No.

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE , ALLISON GIRVIN, MARK ANDERSON, MARK KOLMAN, PETITIONERS

v.

Hon. REBECCA WHITE BERCH, Chief Justice, Arizona Supreme Court, Hon. W. SCOTT BALES, Vice Chief Justice; Hon. JOHN PELANDER; Hon. ROBERT M. BRUTINEL,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The question presented is whether Arizona's professional licensing rule — that denies reciprocal licensing to attorneys from ten disfavored states solely and admittedly because these states do not provide reciprocal licensing to Arizona licensed attorneys — abridges the Privileges and Immunities Clauses, the Commerce Clause, or the First Amendment?

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The Ninth Circuit's published Opinion affirming Summary Judgment for the Respondents is set forth in WL 6871577 (9th Cir. 2014), and in the Appendix 1a. The nonpublished order denying rehearing and rehearing *en banc* is set forth in the Appendix at 87a The District Court's published Opinion granting Summary Judgment for the Respondents and denying Summary Judgment to Petitioners is reported at *NAAMJP v. Berch*, 973 F. Supp. 2d 1082, 1097 (D. Ariz. 2013), and in the Appendix 19a.

JURISDICTION

This Court has jurisdiction for this petition under 28 U.S.C. § 1254.

The Ninth Circuit's decision was filed on December 8, 2014. A petition for rehearing and rehearing *en banc* was timely filed on December 22, 2014. It was denied on January 15, 2015.

RELEVANT PROVISIONS INVOLVED

See 115a-118a.

STATEMENT

This case is about the dysfunctional and antiquated Balkanized licensing rules for sister-state attorneys triggered by fifty-one self-governing sovereigns under this Honorable Court's direction. It is about segregation versus integration, justice for the favored home town team versus equal justice for all. It's not about the Red States or the Blue States: It's about the United States. Petitioner challenges under

the Privileges and Immunities Clause, Commerce Clause, and the First Amendment the Arizona Supreme Court's underinclusive Rule 34(f)(1)(A), its reciprocal licensing wall that categorically disqualifies otherwise qualified attorneys from ten disfavored states solely and admittedly because these states do not provide reciprocal admission on motion to Arizona lawyers.

Petitioners submit this Court has already answered this *reciprocal* bar admission on motion question by its decision in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) under the Privileges and Immunities Clause. And, also more generally answered this reciprocal restraint of trade question under the Commerce Clause in its unanimous decision in *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988*);* Accord *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 US 366 (1976). This Court invalidated these reciprocal licensing restraints.

Initially, in order to qualify for reciprocal licensing in Arizona (and in other states), the applicant has to submit documental proof of graduation from an ABA accredited law school, evidence of admission by bar examination, original certificates of good standing from every jurisdiction admitted, an original record of disciplinary history from every jurisdiction admitted, certified driving history from every state in which the attorney has ever held a license, finger prints, copies of pleading and final judgments from every legal or administrative action in which the attorney has been a party including civil and criminal, an official Multistate Professional Responsibility score report of 85 or higher, photographs, birth certificates, a passport information page, driver's license, proof of U.S. citizenship, if not a citizen a copy of all immigration

documents, if a veteran copies of discharge or separation papers. The attorney also has to answer in writing comprehensive questions about where he or she has lived, went to school, and worked for his or her entire life going back to birth, provide references, and pay a $1,800 application fee. The applicant must also attend a one day course on Arizona law as another precondition. Petitioners do not challenge these burdens. Petitioners' narrow challenge is to the wavier of a content-based bar exam for attorneys from forty favored jurisdictions and the denial of a waiver on Arizona's content-based licensing test for attorneys from ten disfavored states.

Specifically, Petitioners challenge Arizona Rule 34(f)(1)(A), which provides the applicant:

> "A. either (i) have been admitted by bar examination to practice law in another jurisdiction allowing for admission of Arizona lawyers on a basis equivalent to this rule or (ii) have been admitted by bar examination to practice law in one or more states, territories, or the District of Columbia, and have been admitted to and engaged in the active practice of law in another jurisdiction allowing admission of Arizona lawyers on a basis equivalent to this rule for five of the seven years immediately preceding the date upon which the application is filed."

Rule 34 does not employ language using the terms "reciprocity" or "reciprocal licensing." Petitioners aver Rule 34 on its face and as applied is speaker, content, and viewpoint discrimination because it singles out and suppresses fully protected expression

of the Petitioners and otherwise qualified attorneys from ten disfavored states on matters of public concern in Arizona. Petitioners aver content-based suppression of free expression is not content neutral, and restrictions enacted for the purpose of restraining free speech on the basis of speech are presumptively unconstitutional.

The American Bar Association has in this 21st Century twice commissioned encyclopedic studies on lawyer licensing across interstate lines as a result of revolutionary technological advances. These ABA Commissions were staffed by highly respected neutral lawyers from all over the United States. They conducted open, transparent, and uninhibited public hearings in many states, receiving testimony and input from virtually every state bar and arm of the organized bar. Their findings and conclusions were then sent out for further public comment before they were adopted by the ABA's 500 member House of Delegates. See ABA *Multijurisdictional Practice Commission* (2002).[1] The ABA *Commission on Ethics 20-20* (2012)[2] followed the same format of compiling a massive public record. It recommended that all states should adopt admission on motion for all ABA accredited law school graduates with three years of experience. The attorney still has to undergo the State's background check. The ABA concluded that the failure of states to have admission on motion (i.e. waving the bar exam requirement) injures the public and profession. (*See* 87a for the 20-20 Commission findings of fact and conclusions). It further

[1] http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.html

[2] http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html

concluded that women as a class are disproportionately injured by the failure of states to have admission on motion provisions (97a), and that the "you get reciprocity if we get reciprocity" (tit-for-tat) restrictions "only serve to sustain outdated and parochial purposes at a time when the relevance of borders to the competent practice of law has and will continue to erode." (100a)

The ABA Commission on Ethics reported over 40,000 experienced lawyers have been admitted on motion in the last five years without any evidence of injury to the public or profession; 65,000 in the last ten years. Petitioners aver the ABA has essentially concluded that *one bar exam is more than enough for experienced attorneys with three years of experience.* Petitioners aver this makes perfect sense because if laymen are qualified to represent themselves as long as they are not mentally ill, it follows they are qualified to select their own counsel. It is implausible to presume laymen are qualified to represent themselves, but experienced attorneys are not qualified to represent laymen. This Honorable Court has held professional norms articulated by the American Bar Association are "(s)tandards to which we have referred as 'guides to determining what is reasonable.'" *Wiggins v. Smith*, 539 US 510, 524 (2003). This Honorable Court also grants reciprocal admission on motion for licensed attorneys in good standing with three years of experience. *See* Supreme Court Rule 5. The decisions below suppress this undisputed evidence that was submitted and argued in Petitioners' Motion for Summary Judgment and on appeal.

Presently, 40 states have reciprocal licensing for experienced attorneys. Twenty-five of these states provide tit-for-tat reciprocal licensing. Fifteen states

provide reciprocal licensing to everyone. Ten states do not provide reciprocal licensing to anyone. In the Ninth Circuit, there are four states that have tit-for-tat reciprocity rules similar to Arizona including Alaska, Oregon, Utah, and Idaho. Additionally, four of the ten holdout states that entirely deny reciprocal licensing are in the Ninth Circuit (California, Nevada, Montana, and Hawaii). State judges, of course, are elected by popular vote and dependent on local attorneys for campaign contributions. Local attorneys who are active and self-interested market participants in the market they regulate dominate Arizona's licensing system for sister-state attorneys.

Additionally, because of increasing technological advances 15 states, including Arizona, have adopted the Uniform Bar Exam (UBE), which allows novice attorneys from these 15 states to transfer their bar exam results and obtain reciprocal licensing without any experience in these 15 states. The National Conference of Bar Examiners develops and scores the 200 multiple choice question test (MBE) that virtually all states employ. The Uniform Bar Exam Commission (UBEC) takes this national test one step further toward national uniformity It also works hand in hand with the National Conference of Bar Examiners.[3] The Uniform Bar Exam (UBE) does not test state specific law. It follows the same 200 multiple choice question, essay and performance test format that virtually all states employ. The UBE licensing exam is uniform, but the subjective essay and performance answers are graded by local state licensing officials. The scores are then transferable, which permits novice attorneys to obtain reciprocal licensing.

[3] http://www.ncbex.org/about-ncbe-exams/ube/

Arizona Chief Justice and respondent REBECCA WHITE BERCH is the pioneer and Chair of the Uniform Bar Exam Commission. She and her UBEC colleagues are nationally recognized experts on bar admission. Justice BERCH argues, "A bar exam is a test of minimum competence to practice law[4]," which means that once a lawyer is licensed under the UBE platform that he or she is eligible for reciprocal licensing in all UBE states. Her UBEC colleague, Maryland licensing official Bedford T. Bentley, Jr., has also spent his career focusing on lawyer licensing. He argues in support of other states adopting the UBE, "The bar examination cannot and does not test many of the skills identified by the [ABA] MacCrate Report as fundamental to the successful practice of law." [5] Nine out of the ten skills identified as fundamental are not tested on the bar exam. It is also well known by testing experts that "Study after study has shown that it is almost impossible to get judges to agree on scores for essay answers."[6] The direct learning curve correlation between skill and experience has become popularly known as the 10,000 hour rule. After years of experience practicing law a lawyer or judge's skill

4 Rebecca White Berch, "The Case for the Uniform Bar Exam, "The Bar Examiner, Feb 2009 p. 12 ("A bar exam is a test of minimum competence to practice law.")

5 Bedford T. Bentley, Jr. "Rethinking the Purpose of the Bar Examination," The Bar Examiner, February 2009 p. 17

6 Dr. Geoff Norman, "So What Does Guessing the Right Answer Out of Four Have to Do With Competence Anyway?" The Bar Examiner, p. 21 (Nov 2008)

become automatic, much like speaking, associating, and arguing in one's native tongue. The decisions below suppress this undisputed evidence that was submitted and argued in Petitioners' Motion for Summary Judgment and on appeal.

Psychometricians have developed standards for testing and measurement. The hallmarks are *validity* and *reliability*. For example, if a test for AIDS does not accurately prove the presence or absence of the virus the test is not *valid*. Too many false positives or false negatives undermine *validity*. *Reliability*, as in any scientific measurement, is concerned with repeatability. Does the test produce the same results every time? The ABA and UBE have concluded bar exams for experienced attorneys are neither *valid* nor *reliable*. They are not *valid* because nine out of ten fundamental lawyering skills are not measured. They are not *reliable* because it is almost impossible to get graders to agree on subjective test scores. They are also not *reliable* because a licensed attorney in good standing by definition has already proven that he or she is not a threat to the public. The issue in this case, of course, is not whether bar exams are constitutional. The issue is whether Rule 34's waiving Respondent's content-based licensing test for otherwise qualified attorneys coming from favored states, but not other otherwise qualified attorneys coming from disfavored states is constitutional?

Petitioner NAAMJP is a non-profit corporation whose stated mission is to improve the legal profession by promoting the adoption of the American Bar Association's (ABA) recommendation for reciprocal bar admission without restrictions. Petitioner, as the corporation Citizens United developed extensive knowledge about Hilary Clinton, has amassed a wealth

of public information in support of reciprocal licensing. The Conference of Chief Justices has advocated the adoption of the ABA's recommendation for reciprocal admission. The Obama Administration, the Department of Defense and the Department of Justice have recommended that states streamline occupational licensing restrictions across state lines.[7] Microsoft has also studied diversity in the legal profession and has concluded the legal profession is far behind other professions in promoting racial diversity.[8] Supreme Court Justice SONIA SOTOMAYOR recently criticized the judiciary for a lack of diversity in every area of the legal profession at American University's Washington College of Law.[9] Petitioners allege these reciprocal licensing rules which burden the rights to expressive association and petition, much like a poll tax on the right to vote and the sixteenth and seventeenth century content-based licensing of printing presses, undermines diversity because they implicate the Petitioner's rights to bar admission not only in Arizona, but also in the federal context in United States District Courts for these non-reciprocity and non-UBE states. The decisions below suppress this evidence that

[7] http://www.defense.gov/home/pdf/Occupational_Licensing_and_Military_Spouses_Report_vFINAL.PDF

[8] Raising the Bar: Exploring the diversity gap within the legal profession, http://blogs.microsoft.com/on-the-issues/2013/12/10/raising-the-bar-exploring-the-diversity-gap-within-the-legal-profession/

[9] ABA Journal November 21, 2013 http://www.abajournal.com/news/article/sotomayor_says_judiciary_is_missing_a_huge_amount_of_diversity/?utm_source=maestro&utm_medium=email&utm_campaign=daily_email

demonstrates the Petitioners are not a clear and present danger.

Petitioner ALLISON GIRVIN is an attorney in good standing licensed by the California Supreme Court. She graduated from Villanova University School of Law, and she was an undergraduate at St. Joseph's University and the captain of its Division 1 tennis team. She successfully practiced law in California for a number of years. Petitioner moved to Arizona, married, and had a child. Petitioner was otherwise qualified for reciprocal licensing in Arizona, except that she is categorically denied reciprocity because California is one of the ten states that deny reciprocal licensing to Arizona lawyers. The self-admitted sole reason for the Rule 34(f) firewall is Arizona's disagreement with other states' licensing rules for Arizona attorneys.

Petitioner GIRVIN in order to continue her career as a lawyer, took two months off from work, studied, and sat for the Arizona content-based bar exam. With notice that she had filed a lawsuit, Arizona licensing officials graded her essay and performance tests, and failed her by one point. Petitioner was one of three failed by one point. Arizona licensing officials have unbridled discretion. The results of failing applicants are secret and not disclosed to the public. (AZ Rule 35(b)(4)(117-18a) Petitioner was denied the right to see her answers, the right to learn the breakdown of her MBE, essay, and performance scores. There is no meaningful right to appeal as the scores are "considered final and not reviewable absent extraordinary circumstances". *See* AZ Rule 35(d) (118a) There is nothing to appeal but a number. With the fox guarding the hen house, an attorney who fails the Arizona bar exam is ineligible for admission on motion for an additional five years. (Rule 34(f)(4)

Petitioner MARK ANDERSON graduated from the University of the Montana School of Law. Petitioner is a resident of Montana. He is an attorney admitted and in good standing in Montana with over eighteen years of experience. Petitioner wants to take every step necessary including taking Arizona's mandatory one day class on Arizona law, like the otherwise qualified attorneys from 40 jurisdictions, and obtain admission in Arizona. Montana is one of the ten states that do not provide reciprocal admission to anyone, so Petitioner is categorically disqualified. However, Montana has adopted the Uniform Bar Exam (UBE). Thus, novice lawyers from Montana are qualified for Arizona reciprocal licensing but Petitioner and experienced lawyers from Montana are not.

The net effect of Rule 34 is that lawyers from ten disfavored states are 100% banned from filing petition for the redress of grievances *as counsel of record* in Arizona courts. Their free speech and their client's freedom of expression are suppressed and their freedom to engage in expressive association and petition in Arizona's public forums and marketplace of ideas is abridged.

Petitioner avers Rule 34(f) does not advance a substantial state interest because 40 states have already adopted reciprocal admission. Petitioner avers even assuming Arizona has a substantial state interest in determining their competence and fitness to practice law, Rule 34(f) is not directly or closely related to advancing that state interest because the requirement that he re-take a content-based entry level test that he has already passed does not tell Arizona anything the state does not already know because the UBE does not test state specific law. Petitioner avers the best evidence of his competence, fitness to practice law, and

that he is not a threat to the public is his good standing as a Montana Supreme Court licensed lawyer for eighteen years. Petitioner further avers any substantial state interest Arizona has is further undermined by the studies in favor of the UBE that show that nine out of ten fundamental lawyering skills are not tested on an entry level content-based bar exam, and that it is almost impossible to get graders to agree on subjective answer test scores. Petitioner further avers Respondent has less restrictive alternative means available to accomplish its interest in protecting its lawyers' right to reciprocal licensing in other states, such as lobbying those states, or filing a petition on their behalf. Respondent has also not demonstrated why simply opening up its courthouse door will not result in other state's opening up their courthouse door. Eighty percent of the States are already on board with reciprocal waiving of bar exams.

The published decision white washes the fact that Rule 34(f) is underinclusive. Respondent does not suppress free expression for attorneys from ten disfavored states in Rule 38(a) *pro hac vice* admission, Rule 38(c) admission without examination for full-time law school faculty members, Rule 38(f) admission for attorneys working for approved legal services organizations to practice in Arizona, and Rule 38(h) admission for in-house corporate counsel. (67a) Petitioners aver this constitutes subject matter and viewpoint discrimination because Respondent is permitting some lawyers to fight free style and it compels other lawyers to follow Marquis of Queensberry rules.

Respondent in its cross-motion for summary judgment did not submit any studies, substantive evidence, legislative or judicial findings, declaration, or

even anecdotal evidence in support of its professional licensing firewall. It did not even attempt to refute the ABA and UBE Commission recommendations for reciprocal licensing (that respondent BERCH pioneered), and the Petitioners submitted in support of their Motion for Summary Judgment.

The Arizona District Courts sustained Rule 34 primarily under the rational basis standard of review (54a, 68-69a). It denied Petitioners' motion for summary judgment. The Ninth Circuit affirmed. It concluded that Rule 34 did not constitute speaker, content, or viewpoint discrimination; that it was not a prior restraint; it did not abridge the First Amendment rights to expressive association or to petition for the redress of grievances. It held that none of the Petitioners established *relaxed* First Amendment standing, and even if they had *relaxed* standing, Rule 34(f) is a reasonable time, place, and manner restriction. Petitioners here allege the Ninth Circuit erred because they clearly have standing to challenge licensing rules that in effect disbar them, and Rule 34 does not qualify as a reasonable time, place, and manner restriction because it is not content, speaker, and viewpoint neutral, which is the essential prerequisite for intermediate level review. Petitioners further submit in practice and in effect the panel applied rubber stamp rational basis review.

The Ninth Circuit further, on the other hand, held Petitioners had established Article III standing. But Rule 34(f) did not violate the Article IV § 2 Privileges and Immunities Clause, the Fourteen Amendment Privileges and Immunities Clause (right to travel), or the Commerce Clause because there was no discrimination on the basis of citizenship and residence, and, as in the First Amendment context, the

Petitioners could always obtain an Arizona license by taking Arizona's content based licensing exam that would be graded in secret based on content. Petitioners submit the Ninth Circuit's decision affirming Arizona's separate but equal era licensing rules manifests censorship and suppression of locally unpopular ideas.

REASONS FOR GRANTING THE PETITION

I. THE PUBLISHED DECISION FAILS TO ADHERE TO *SUPREME COURT OF VIRGINIA v. FRIEDMAN* AND *NEW ENERGY Co of INDIANA v. LIMBACH*

This is a case challenging an Arizona reciprocal licensing rule, a rule admittedly adopted to protect Arizona lawyers from competition, heard in Arizona federal courtrooms, decided by an Arizona Magistrate Judge, and later by a panel chaired by long-time former Arizona state judge, heard with a platoon of University of Arizona law students packing the courtroom, argued by an out-of-state Italian-American and an out-of-state Jewish lawyer. Who is going to win? Is the Arizona bar and judiciary going to rule against the Arizona bar and judiciary in an Arizona courtroom?

"When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest." *North Carolina State Board of Dental Examiners v. FEC*, docket 13-534, slip opinion p. 14 filed February 25, 2015. This Court should grant review because the need for active supervision is manifest. This reciprocal licensing competition between 25 states injures all Americans, makes a perfect mockery out of our Constitution, and only this Honorable Court can put

an end to this First Amendment antagonism that implicates the viability of the United States as a single entity.

The Ninth Circuit held Petitioners had Article III standing to present their claims under the Privileges and Immunities Clauses and Commerce Clauses. However, the panel's decision, essentially applying rational basis review (9a), has decided an important question of federal law in a way that conflicts with this Court's decisions in the *reciprocal* licensing cases *Supreme Court of Virginia v. Friedman*, *supra*, *New Energy Co. of Indiana v. Limbach*, *supra*, and *Great Atlantic & Pacific Tea Co. v. Cottrell*, *supra*.

In the seminal case *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Supreme Court held,

> The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may — and often do — represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. *Id.* at 281-82.

Piper applied strict scrutiny, least restrictive alternative review. *Piper* recognizes that many of the states that have erected fences have done so primarily to protect their lawyers from professional competition,

and that this is not a substantial state interest under the Privileges and Immunities Clause or the Commerce Clause. *Id.* at 285 n. 18. The decision misapplies the law by holding that Petitioners opportunity to practice law in Arizona is not a fundamental or constitutional right subject to strict scrutiny.

More particularly, the published decision rejects this Court's holdings in *Supreme Court of Virginia v. Friedman*, that bar admission on motion is a constitutionally protected Privilege and Immunity, and that states cannot discriminate against otherwise qualified out-of-state attorneys in bar admission on motion. Virginia argued Ms. Friedman could take the bar examination, and thus the Clause was not offended. This Court rejected this contention stating, "The issue instead is whether the State has burdened the right to practice law, a privilege protected by the Privileges and Immunities Clause, by discriminating among otherwise equally qualified applicants solely on the basis of citizenship or residency. We conclude it has." *Id.* at 67. The norm under the Privileges and Immunities Clause is comity, i.e. equal treatment. This Court stated, "we see no reason to assume that nonresident attorneys who, like Friedman, seek admission to the Virginia bar on motion will lack adequate incentives to remain abreast of changes in the law or to fulfill their civic duties." *Id.* at 69. *Friedman* holds the State has the burden of proof under the strict scrutiny standard.

Ms. Friedman as an American citizen and lawyer was allowed to live outside of Virginia and obtain reciprocal licensing in Virginia. Here, petitioner MARK ANDERSON lives in Montana. He seeks admission on motion in Arizona. The facts here and in *Friedman* are virtually identical. Rule 34(f) categorically disqualifies ANDERSON and lawyers (citizen applicants) in ten

disfavored states. There is discrimination against otherwise qualified citizens. If a state cannot disqualify otherwise qualified applicants from 49 states as in *Friedman*, it obviously cannot single out and disqualify applicants from ten disfavored states.

The Ninth Circuit further erred because the purpose of the Privileges and Immunities Clause and the Dormant Commerce Clause is to guard against economic protectionism. Arizona has admitted the justification for Rule 34(f) is to protect its own lawyers' economic interests. Economic turf protection is not a substantial state interest under either clause. *Piper*, 470 U.S. at 285 n. 18 Rule 34 does not protect Arizona citizens: It protects Arizona lawyers.

The Ninth Circuit panel using a belt and suspenders approach to hold up its political decision sidesteps *Friedman*. First it holds there is no discrimination on the basis of residence or citizenship despite the facts here as applied to Petitioner ANDERSON and in *Friedman* are virtually identical. And second:

> "Even if Arizona's AOM did infringe on a right protected by the Privileges and Immunities Clause, the Rule is closely related to advancing a substantial state interest. *See Friedman*, 467 U.S. at 65" (10a)

This Ninth Circuit conclusion that the opportunity to take Arizona's bar exam is rational (8a) and closely related was flatly rejected in *Friedman*, and it squarely contradicts this Court's decision in *Friedman* that discrimination in bar admission on motion against otherwise qualified applicants on the

basis of citizenship or residence is not a substantial state interest and that it is not narrowly tailored.

As noted above, Respondent did not submit any study or findings showing Rule 34(f) advances a substantial state interest or evidence proving Rule 34(f) is directly and closely related to advancing that state interest. Under the time, place, and manner intermediate level scrutiny, Respondent has the burden of proof. Respondent, however, did not submit any study or anecdotal evidence rebutting ABA and UBEC commission studies in favor of reciprocal licensing, which Respondent BERCH has pioneered. The panel's suppression of this undisputed ABA and UBE evidence demonstrates censorship is afoot.

Rule 34(f) obviously does not advance a substantial state interest because 40 states have already adopted reciprocal admission. Even assuming Arizona has a substantial state interest in determining Petitioners' competence and fitness to practice law, Rule 34(f) is not directly or closely related to advancing that state interest because the requirement that Petitioners re-take an entry level test they have already passed does not tell Arizona anything the state does not already know because the UBE does not test state specific law. The admitted aim and purpose of Rule 34(f) is to provide economic protection, which is not a legitimate state interest, let alone a substantial state interest that is narrowly tailored. Rule 34 on its face and as applied does not benefit Arizona consumers. It benefits Arizona lawyers by providing them a monopoly on the constitutional right to petition. Respondent has less restrictive alternative means available to accomplish its interest in protecting its lawyers' right to reciprocal licensing in other states, such as lobbying those states, or filing a petition on

their behalf. Respondent has also not demonstrated why simply opening up its courthouse door will not result in other state's opening up their courthouse door.

Likewise, the panel's conclusion that Rule 34(f)'s reciprocal restraint of trade does not violate the Dormant Commerce Clause because it regulates "even-handedly," (14a) while singling out attorneys from ten states for discriminatory treatment is absurd. The panel's decision fails to adhere to Justice SCALIA's Opinion for a unanimous Court in *New Energy Co. of Indiana v. Limbach*, *supra*, 486 U.S. 269 (1988). There, this Court expressly held that a categorical exclusion is not needed to find a Dormant Commerce Clause violation based on a reciprocity provision of state law: "It is true that in *Cottrell* and *Sporhase* the effect of a State's refusal to accept the offered reciprocity was total elimination of all transport of the subject product into or out of the offering State; whereas in the present case the only effect of refusal is that the out-of-state product is placed at a substantial commercial disadvantage through discriminatory tax treatment. That makes no difference for purposes of Commerce Clause analysis." 486 U.S. at 275.

Justice SCALIA then discussed *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), and *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977), and held that "[t]he present law likewise imposes an economic disadvantage [not total exclusion] upon out-of-state sellers[,] and the promise to remove that if reciprocity is accepted no more justifies disparity of treatment than it would justify categorical exclusion." *Ibid.* Because the panel's holding "Attorneys barred in non-reciprocal states still have the option to take the Arizona UBE to gain admission to the Arizona bar" (16a) is directly in conflict with this

Court's holding in *New Energy*, (and *Friedman*) this Court should grant review.

Former Chief Justice REHNQUIST in his dissent in *Friedman* points out, "The Court's ruling penalizes Virginia, which has at least gone part way towards accommodating the present mobility of our population, but of course leaves untouched the rules of those [twenty-eight] States which allow no reciprocal admission on motion." *Id.* at 71. When *Friedman* was decided, we didn't have smart phones where people can communicate face to face thousands of miles apart. Google, Facebook, Yahoo, YELP, You Tube, and PACER did not exist. This Court by not granting review in this case will penalize the Petitioners and American citizens all over the United States as the Ninth Circuit has refused to follow *Friedman* and *Limbach*. Not granting review provides judicial immunity to the tit-for-tat restraint of trade reciprocity rules of twenty-five states that similarly have not adhered to *Friedman* and *Limbach*. Not granting review rejects the ABA and Obama administration, Department of Defense and Department of the Treasury, studies that have concluded that it is time to bring the practice of law out of the *Plessy v. Ferguson*, 163 US 537 (1896) separate but equal era, and into the 21st Century integrated world we live.

II. THE PUBLISHED DECISON DECIDES AN IMPORTANT QUESTION OF LAW IN A WAY THAT NULLIFIES THE FIRST AMENDMENT

This Court in *Citizens United v. Federal Election Commission*, *Citizens United* __ U.S. __, 130 S.Ct. 876, (2010) invalidated a Federal Election Commission rule as a *prior restraint*, and held

corporations have First Amendment rights. This Court in *US v. Alvarez*, __ U.S. __, 132 S. Ct. 2537, 2543 (2012), overturned the conviction of a pathological liar and invalidated the *Stolen Valor Act* as a *content based* restriction under the First Amendment. This Court in *United States v. Stevens*, 559 U. S. __, 130 S.Ct. 1577 (2010), overturned the conviction and invalidated a statute that prohibited the sale of dog-fighting videos and other depictions of animal cruelty, holding that the statute was facially *overbroad* under the First Amendment. This Court in *Snyder v. Phelps*, 562 U.S. 109, 131 S.Ct. 1207 (2011), overturned a jury verdict under the First Amendment in a tort case arising from a group picketing and carrying hate-based signs on a *matter of public concern* near an American soldier's funeral.

This Court *McCutcheon v. Federal Election Com'n* , 572 U.S. __, 134 S. Ct. 1434, 1449-1453 (2014), invalidated a federal statute that imposed aggregate campaign limits under the First Amendment expressive association clause as not narrowly tailored. This Court concluded the whole point of the First Amendment is to protect individual speech that the majority might prefer to restrict, or that the legislature or judges might not view as useful to the democratic process. *Id.* at 1449-1453 (2014)

This Court in *Holder v. Humanitarian Law Project*, 561 U.S.1, 130 S. Ct. 2705 (2010), in a challenge to a federal statute making it a crime to aid foreign terrorist organizations, *including advice on the law*, the government claimed the only thing at issue was *conduct* and not *speech*. *Holder* makes clear *that verbal or written communications*, *even those that function as vehicles for delivering professional legal* services, to aid foreign terrorist organizations are "*content-based*

speech" for purposes of the First Amendment that requires strict scrutiny review. 561 U.S. at 27-28, 130 S.Ct. 2705. *See* Chief Justice ROBERTS majority conclusion: "The Government is wrong that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O'Brien* provides the correct standard of review. *O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech." 130 S.Ct. at 2723. Moreover, the *Humanitarian* Court unanimously applied strict scrutiny review and rejected the intermediate standard.

Petitioners in this case are American citizens and licensed lawyers in good standing. They have core protected rights to free speech, expressive, association, and to petition the government for the redress of grievances that are on the highest rung of the hierarchy of First Amendment values. Petitioners are not: corporations, pathological liars, purveyors of dog-fighting videos, funeral protesters, flag burners, draft card burners, campaign contributors; they are not seeking to provide legal advice to foreign terrorist organizations. Petitioners request this Honorable Court enforce their First Amendment rights as it did in the above noted decisions.

The First Amendment provides an injunction against the government abridging the People's freedoms to speech, expressive association, and to petition for the redress of grievances. Rule 34 on its face and as applied, however, provides an injunction against the Petitioners and otherwise qualified attorneys from ten disfavored states that vacates the First Amendment injunction. The government may not prohibit the suppression of ideas simply because society finds the idea itself offensive or disagreeable. *Texas v.*

Johnson, 491 US 397, 409 (1989) “"[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Ibid.*

This Rule 34 injunction encumbers speaker and speech, constrains content and viewpoint, and inhibits messenger and message in the public forum and marketplace of ideas in direct defiance of the First Amendment. Rule 34 is the polar opposite of wide-open, robust, and uninhibited. The First Amendment protects “*litigation [as] a means for achieving the lawful objectives of equality by all government*.” (Emphasis added) *NAACP v. Button*, 371 U.S. 415, 429 (1963). It is thus a form of political expression. *Ibid.* We afford speech to the public "by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634, (1995)

Attorneys from 40 favored states are not subject to Arizona’s Rule 34 injunction. The published decision which serves as a national role model throughout America side-steps the text of the First Amendment and this Court’s precedent interpreting it, simply and repeatedly, by failing to address it in an astonishing variety of contests including: “relaxed” standing, content, viewpoint, and speaker discrimination, the rights to expressive association, petition, and the prior restraint doctrine.

Suppressing this Court’s exacting scrutiny precedent, the decision holds Rule 34 is subject to intermediate level, time, place, and manner review. This holding is misplaced because the essential prerequisite for intermediate scrutiny is content neutrality. The law has to apply evenly to everyone equally. See *Humanitarian Law*, unanimously rejecting intermediate level scrutiny in the context of

providing legal aid for foreign terrorist organizations. Rule 34 on its face and as applied is obvious impermissible content-based discrimination under *Humanitarian Law* and this Court’s precedent, which of course the decision does not address. "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *US v. Alvarez*, *supra*, __ U.S. __, 132 S. Ct. 2537, 2543 (2012). (internal cites omitted) As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality." *Id.* at 2544 In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as "startling and dangerous" a "free-floating test for First Amendment coverage ... [based on] an ad hoc balancing of relative social costs and benefits.” *Ibid.* “The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.” *Id.* 2548 *US v. Alvarez* holds that even knowing lies are a content-based restriction. This Court overturned the *Stolen Valor Act,* 18 U.S. § 704 as a content-based and overbroad restriction on free expression.

Likewise, in *Carey v. Brown*, 447 U.S. 455 (1980), the legislature generally banned residential picketing but created an exemption for labor picketing. The legislature disapproved of the medium not the picketer’s content-based message. The Court held,

> "[W]hile a municipality may constitutionally impose reasonable time, place, and manner

> regulations on the use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities; what a municipality may not do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression. *Id.* at 471-72 STEWART concurring.

Here, as in *Carey v. Brown*, Respondent gives a license to petition and associate with their clients to attorneys from 40 states (including D.C.), (it does not care what the subject is about or what the speech says) but it withholds that license permit to Petitioners and otherwise qualified applicants from ten states. As in *Carey v. Brown*, Rule 34 disapproves of the speaker and not necessarily the speech. *Carey v. Brown* demonstrates both that Rule 34 constitutes content discrimination, and the decision holding Rule 34 is a time, place, and manner restriction is clearly erroneous.

Even in the context of unprotected expression (fighting words, threats, etc.) Rule 34 on its face and as applied is obvious impermissible content discrimination in light *R.A.V. v. Minnesota*, 505 U.S. 377 (1992), which of course the decision does not address. Minnesota enacted a statute that criminalized cross-burning and other threatening conduct "on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." *Id.* at 379. *R.A.V.* deals with bigoted speech and viewpoint discrimination. This Court invalidated the statute reasoning: "Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the "fighting words" doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits

otherwise permitted speech solely on the basis of the subjects the speech addresses. *Id.* at 381 Respondent "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392.

Here, Respondent's Rule 34 injunction on its face effectively drives the Petitioners and their viewpoint from Arizona's markets. Respondent licenses one side of the debate to fight freestyle while imposing on Petitioners the obligation to follow Marquis of Queensberry rules. Petitioners' First Amendment fully protected expression is enjoined solely and admittedly because other states suppress its attorneys fully protected expression. The panel's decision shows "official suppression of ideas is afoot." *Id.* at 390.

The published decision further censors Petitioners' claim that Rule 34 constitutes impermissible *speaker* discrimination by the judiciary. In *Citizens United v. Federal Election Commission*, *supra*, the Court held:

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and

> speaker, and the ideas that flow from each. 130 S.Ct. at 890
>
> …
>
> *Any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. Id.* at 890 (Emphasis added)

The basic premise underlying the Court's ruling in *Citizens United* is the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity. *Id.* at 930 (Justice STEVENS in dissent). Courts, too, are bound by the First Amendment. *Id.* at 891. In *Citizens United*, this Court held the challenged Federal Election Commission Rules were a prior restraint and on their face chilled the corporation's speech. *Id.* at 895-96 ("These onerous restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.") Rule 34 as applied to Petitioners functions as a content-based prior restraint. The panel's decision likewise subjects the Petitioners to Arizona's licensing police much like the licensing of printing presses in the 16th and 17th Centuries. The panel fails to explain why Petitioners have to take Arizona's content-based bar exam that is graded on the basis of content, and lawyers from 40 favored states receive a waiver, when Arizona's bar exam does not test Arizona law.

Because Petitioners are challenging the sacred cow, the decision suppresses this Court's expressive association precedent by failing to recognize the right to expressive association includes the mutually reinforcing right to petition for rights: "[T]he Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). "Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to impose penalties or withhold benefits from individuals because of their membership in a disfavored group." *Ibid.* This Court in *Roberts* applied the strict scrutiny standard of review. Here, as in *Roberts*, Rule 34 imposes penalties and withholds benefits because of Petitioners' membership in a disfavored class of otherwise qualified attorneys. The panel — dodges *Roberts* by ignoring it and its strict scrutiny standard of review — by holding that the right to take the bar exam again does not burden the right to expressive association because the Arizona fox guarding the hen house is a vegetarian; he will not eat the chicken or its eggs.

The published decision commits the same sleight of hand in its Petition Clause analysis. Rule 34 plainly burdens the Petition Clause in the same way that literacy tests burden the right to vote. Otherwise qualified attorneys from disfavored states are disbarred in Arizona unless they pass a content-based literacy test and prove they are not a threat to the public but favored states' lawyers get to fight freestyle. There is little qualitative difference from being invidiously

denied a seat on a train (Homer Plessy) in the 19th Century or seat on a bus (Rosa Parks) in the 20th Century because of skin color, than an otherwise qualified lawyer being denied a seat at the Arizona bar in the 21st Century because he or she comes from a disfavored state.

The Ninth Circuit published decision flies over the First Amendment text, *Carey v. Brown, R.A.V. v. Minnesota, Citizens United, Humanitarian Law Project*, and *Roberts* without analysis. It holds, "Plaintiffs' arguments on First Amendment free speech grounds mistake the appropriate First Amendment framework for analyzing the AOM Rule. We consider bar admission restrictions to be time, place, and manner restrictions on speech." (11a-12a) (citing, of course, Ninth Circuit law), which cites *In Ward v. Rock Against Racism*, 491 US 781 (1989).

In *Rock Against Racism*, a city's regulation that requires bandshell performers to use sound-amplification equipment and a sound technician provided by the city was challenged. Certiorari was granted to clarify the legal standard applicable to governmental regulation of the time, place, or manner protected speech. Here, the decision by applying time, place, and manner intermediate review admits Rule 34 concerns speech regulation, and not speech and non-speech regulation (conduct). This Court stated the intermediate level of review as follows:

> Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 791.

The decision misapplies the intermediate standard of review because the Rule 34 injunction is not content neutral. Even if it were content neutral, it fails intermediate because it is not narrowly tailored to serve a significant government interest, less restrictive alternative test. This alleged time, place, and manner review also trumps this Court's reciprocal licensing precedent in *Friedman* and *Limbach*, *Humanitarian Law*, *Carey*, and *Alvarez*.

Additionally, the decision labels its standard of review as time, place, and manner but that is lip service. It is applying rational basis in effect. As noted above, Respondent has the burden of proof and persuasion under intermediate level scrutiny. Respondent did not offer any legislative or judicial findings, declaration, statistical or substantive evidence, in support of its firewall. It submitted no evidence undermining the ABA or UBE studies. The decision appealed makes a mockery of the First Amendment.

III. THE PANEL'S HOLDING THAT THE PETITIONERS DO NOT HAVE FIRST AMENDMENT STANDING TO CHALLENGE AN ATTORNEY LICENSING RESTRICTION IS CENSORSHIP

This Court's supervisory responsibility over the rule of law warrants *certiorari* review is amply demonstrated by the panel's finding that not one of the Petitioners established First Amendment "relaxed"

(sic) standing in an attorney licensing challenge. Compare *City of Lakewood v. Plain Dealer Publishing Co.*, 486 US 750 (1988), concerning standing and licensing restrictions, this Court stated:

> "Recognizing the explicit protection accorded speech and the press in the text of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license.[5] E. g., *Freedman v. Maryland*, 380 U. S. 51, 56 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license") (emphasis added); … *Lovell v. Griffin*, 303 U. S. 444, 452-453 (1938) ("As the ordinance [providing for unbridled licensing discretion] is void on its face, it was not necessary for appellant to seek a permit under it"). *Lakewood*, 486 US at 755-56

Censorship is plainly afoot, as according to the panel sitting in Phoenix, corporations in cases like *Citizens United* and *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014) may have First Amendment rights, but not one Petitioner, has established First Amendment standing in a licensing challenge. This Ninth Circuit holding is a perversion of the rule of law.

Unless this Court grants review, the Ninth in aim and practical effect, insulates all attorney licensing rules in the Ninth Circuit from further challenge under *res judicata* and collateral estoppel principles. This means that eight (out of the nine states in the Ninth Circuit) that have abjured *Friedman*, *Limbach*, the First Amendment, and the ABA's recommendation for reciprocal licensing are immune from challenge. This locally popular precedent subjects the Petitioners and their counsel to Court imposed sanctions for filing a frivolous claim should they challenge any attorney professional speech restriction in the Ninth Circuit: not unlike African-Americans who were denied the right to vote if they could not pass a literacy test designed and graded by their white brothers, and then were denied the right to challenge the test and the test results. Like Alabama Chief Justice Roy Moore and his colleagues, this published decision sends a strong message of disunion, and that this Supreme Court's precedent can be ignored with impunity. Other lower courts have already begun citing the Ninth Circuit's decision with approval.

This Court's supervisory responsibility over the administration of justice process is not limited to Arizona. Twenty-five states have tit-for-tat reciprocal licensing rules. These 25 states, in general, have United States District Courts that by Local Rules vicariously adopt forum state bar admission rules (where the state judges are subject to being voted out of office for unpopular decisions and local attorneys participating in the market they regulate dominate the licensing boards.) Likewise, United States District Courts are generally admitting brand new lawyers from sister-states adopting the UBE, and excluding experienced attorneys based on tit-for-tat licensing

rules. Not granting review means that corporations have more First Amendment rights than members of the bar. Not granting review authorizes the Ninth Circuit to nullify the Constitutional and the First Amendment.

CONCLUSION

There are few lawyers in the United States who will not stand up and cheer if this Honorable Court grants review. As the ABA, UBE, the Microsoft study on the lack of diversity in the law, and the Obama Administration recommendation to streamline occupational licensing across state lines have almost in one voice made clear, the failure to have reciprocal admission on motion injures the public and the legal profession. It is invariably this Court's duty to say what is the law. Petitioners thus respectfully request that this Court grant *certiorari*.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appeal from the United States District Court for the District of Arizona Bridget S. Bade, Magistrate Judge, Presiding

Argued and Submitted October 6, 2014—Phoenix, Arizona

Filed December 8, 2014

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE , ALLISON GIRVIN, MARK ANDERSON, MARK KOLMAN,
Plaintiffs-Appellants,
v.
Hon. REBECCA WHITE BERCH, Chief Justice, Arizona Supreme Court, Hon. W. SCOTT BALES, Vice Chief Justice; Hon. JOHN PELANDER; Hon. ROBERT M. BRUTINEL,
Defendants-Appellees.

No. 13-17082
D.C. No 2:12-cv-01724-BSB

OPINION

Before: Dorothy W. Nelson, Barry G. Silverman, and Milan D. Smith, Jr., Circuit Judges
Opinion by Judge Milan D. Smith, Jr.

COUNSEL

Joseph R. Giannini (argued), Los Angeles, California, for Plaintiffs-Appellants.

Eryn M. McCarthy (argued), Assistant Attorney General, Phoenix, Arizona, for Defendants-Appellees.

Alan B. Morrison (argued), Public Citizen Litigation Group, Washington, D.C., for Amicus Curiae Public Citizen, Inc.

OPINION

M. SMITH, Circuit Judge:

Plaintiffs-Appellants (Plaintiffs) National Association for the Advancement of Multijurisdictional Practice (NAAMJP), Allison S. Girvin, and Mark Anderson filed suit against justices of the Arizona Supreme Court challenging Arizona Supreme Court Rule 34(f) (the AOM Rule), which describes how experienced attorneys can be admitted on motion to the State Bar of Arizona (Arizona Bar). The AOM Rule permits admission on motion to the Arizona Bar for attorneys who are admitted to practice law in states that permit Arizona attorneys to be admitted to the bars of those states on a basis equivalent to Arizona's AOM Rule, but requires attorneys admitted to practice law in states that do not have such reciprocal admission rules to take the uniform bar exam (UBE) in order to gain admission to the Arizona Bar. Anderson, Girvin, and NAAMJP allege that the AOM Rule is unconstitutional under the First Amendment, the Dormant Commerce Clause, and the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment.

We hold that the AOM Rule is constitutional, and that the district court did not err in dismissing Plaintiffs' claims on summary judgment, or in denying leave to amend Plaintiffs' complaint to permit the

joinder of John Doe.

FACTUAL AND PROCEDURAL BACKGROUND

NAAMJP is a non-profit corporation whose stated mission is to improve the legal profession by promoting the adoption of the American Bar Association's (ABA) recommendation for reciprocal bar admission. The ABA encourages states to permit experienced attorneys to be admitted to their bars on motion, provided those attorneys are admitted to the bar in another state.

Allison Girvin is a member of the State Bar of California, who received a score of 272 on the UBE, one point below the passing score required by Arizona. Girvin appealed her UBE score, but she has not received a breakdown of the score from the Arizona Supreme Court. She has not applied for admission to the Arizona Bar under the AOM Rule. Girvin currently lives in Arizona and states that she wishes to practice law in Arizona.

Mark Anderson is a member of the State Bar of Montana, who asserts that Arizona's AOM Rule has restricted him from moving to Arizona to practice law. Anderson has not taken the UBE. Like Girvin, Anderson has not applied for admission to the Arizona Bar pursuant to the AOM Rule.

The Rules of the Arizona Supreme Court provide three methods of admission to the Arizona Bar: (1) admission by taking and passing the UBE, (2) admission pursuant to the AOM Rule, and (3) admission by transfer of a UBE score from another jurisdiction. Ariz. R. Sup. Ct. 34(a)–(h). Anderson, Girvin, and NAAMJP challenge the second of these methods, which provides for admission on motion for attorneys who "have been admitted by bar examination to practice law

in another jurisdiction allowing for admission of Arizona lawyers on a basis equivalent to this rule." Ariz. R. Sup. Ct. 34(f)(1)(A). This effectively means that Arizona permits admission on motion to its bar for attorneys admitted in states having reciprocal admission rules for Arizona-barred attorneys, but requires that attorneys admitted to practice law in states that do not have reciprocal admission rules take the UBE.

On July 1, 2013, the Arizona Supreme Court expanded Rule 34(f)(1) to permit admission to the Arizona Bar on motion for some attorneys admitted in non-reciprocal jurisdictions. Specifically, after July 1, 2013, attorneys admitted to practice law by bar examination in a nonreciprocal jurisdiction, but who are subsequently admitted to practice law on motion in a jurisdiction that has reciprocity with Arizona, and have actively practiced for five of the last seven years in that jurisdiction, are eligible for admission in Arizona under the AOM Rule.

Anderson, Girvin, and NAAMJP brought suit in the District of Arizona challenging the constitutionality of the AOM Rule on First Amendment, Fourteenth Amendment, Dormant Commerce Clause, and Privileges and Immunities Clause grounds. NAAMJP's counsel, Joseph Giannini, has brought challenges to bar admission requirements in several courts. *See Blye v. Kozinski*, 466 Fed. App'x. 650 (9th Cir. 2012); *Paciulan v. George*, 229 F.3d 1226 (9th Cir. 2000); *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990); *Giannini v. Comm. of Bar Exam'rs*, 847 F.2d 1434 (9th Cir. 1988); *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Gonzales*, 211 F. App'x 91 (3d Cir. 2006). Mr. Giannini is currently subject to a pre-filing order issued in the Northern District of California requiring him "to pay monetary sanctions for signing a frivolous complaint,

having an improper purpose, and making scandalous allegations against various judges and defendants." *Paciulan v. George*, 38 F. Supp. 2d 1128, 1132 (N.D. Cal. 1999) *aff'd*, 229 F.3d 1226 (9th Cir. 2000).

On August 6, 2013, Plaintiffs filed a motion to join a John Doe plaintiff. John Doe, an attorney admitted to the State Bar of Florida by examination, and to the Texas and Tennessee bars on motion, argues that the amendments to Arizona's AOM Rule are unconstitutional. Although Texas and Tennessee share reciprocity with Arizona, John Doe is ineligible for admission on motion in Arizona because he has not actively practiced in either Texas or Tennessee for five of the last seven years. He alleges he is afraid to disclose his identity for fear of retaliation.

The district court granted summary judgment to Defendants-Appellees (Defendants). Although the district court did not conclusively determine whether Anderson, Girvin, and NAAMJP had standing, it granted Defendants summary judgment on the merits on all of Plaintiffs' claims. The district court also declined to allow John Doe to join this action because his challenges did not arise out of the same transactions or occurrences as those of the remaining Plaintiffs. Anderson, Girvin, and NAAMJP timely filed this appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1331. We review a grant of summary judgment *de novo*. We determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law and whether there are any genuine

issues of material fact. *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 954 (9th Cir. 2013).

DISCUSSION

I. Standing

We first address whether Anderson, Girvin, and NAAMJP have standing to challenge the AOM Rule. Plaintiffs assert that they are injured by Arizona's AOM Rule. Defendants respond that this case does not present a justiciable case or controversy under Article III of the Constitution because Anderson, Girvin, and NAAMJP lack the requisite injury, and because their claims do not qualify for the relaxed standing analysis utilized in First Amendment cases.

A. Article III Standing

To establish Article III standing, Girvin, Anderson or NAAMJP must show that they suffered a concrete injury, that there is a causal connection between the injury and Defendants' conduct, and that the injury will likely be redressed by a favorable decision from this court. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).

Girvin alleges an injury that meets Article III requirements. She took and failed the UBE. She is currently working in Scottsdale, Arizona, but is unable to practice as an Arizona attorney. Although she has not applied to be admitted to the Arizona Bar pursuant to the AOM Rule, such an application would be futile because she is a member of the State Bar of California, which does not have reciprocity with Arizona. *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002) ("We have consistently held that standing does not require exercises in futility.").

Since Girvin establishes Article III standing, an analysis of Anderson and NAAMJP's standing is unnecessary. *See California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 789 (9th Cir. 2014) ("We need not address the standing of each plaintiff if we conclude that any plaintiff has standing.") (citing *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009)).

B. First Amendment Standing

Because an analysis of Girvin and Anderson's First Amendment standing requires us to delve into the merits of their claims, it is sufficient to note at this point of our opinion that the AOM Rule does not chill speech, nor does it infringe on attorneys' rights to be present in court and express themselves. Even if attorneys are ineligible to be admitted in Arizona on motion, they may still gain admission by passing the UBE. The presence of alternative means to gain admission limits the amount of speech that might otherwise be restricted by the AOM Rule, and suggests that Anderson does not have First Amendment standing.

NAAMJP does not have First Amendment standing. NAAMJP argues that it possesses First Amendment standing based on *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). NAAMJP's argument seems to be that since *Citizens United* recognizes that corporate organizations have certain First Amendment rights, NAAMJP does as well. However, even if NAAMJP enjoys First Amendment rights pursuant to *Citizens United*, NAAMJP is not claiming that *its* political speech is restricted. Rather, NAAMJP claims that the AOM

Rule restricts the speech of its members, something its members cannot prove.

II. Fourteenth Amendment Equal Protection Clause

Since Girvin has established Article III standing, and we must consider the merits of Girvin and Anderson's claims in order to fully evaluate their First Amendment standing, we now proceed with a consideration of the merits of Plaintiffs' claims. Plaintiffs argue, first, that the AOM Rule discriminates against attorneys admitted to the bar in states that do not have reciprocity with Arizona, and therefore, that the Rule violates the Equal Protection Clause of the Fourteenth Amendment.

Since the AOM Rule does not disadvantage a suspect class or infringe on a fundamental right, the Rule is subject to rational basis review. *See Lupert v. Cal. State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985) ("State and federal courts generally have subjected state bar admission restrictions to mere rational basis analysis."). "To survive rational basis review, [the AOM Rule] must be 'rationally related to a legitimate state interest.'" *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1065 (9th Cir. 2014) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

The AOM Rule serves two legitimate state purposes. First, the AOM Rule helps Arizona regulate its bar: "The Supreme Court is extremely deferential to legislative classifications in actions challenging regulation of licensed professions." *Lupert*, 761 F.2d at 1328. Moreover, by honoring reciprocal bar requirements, the state of Arizona helps to ensure that its attorneys are treated equally in other states. States

that share reciprocity with Arizona will likely continue to admit Arizona-barred attorneys on motion because members of the bar in those states are eligible for reciprocal privileges in Arizona.

The AOM Rule serves these purposes without being unduly restrictive. Attorneys seeking admission in Arizona have alternative means to obtain Arizona Bar membership, namely by passing the UBE. Thus, we conclude that the AOM Rule does not violate Plaintiffs' rights under the Fourteenth Amendment's Equal Protection Clause.

III. Privileges and Immunities Clause, Article IV, Section 2

Plaintiffs next argue that the AOM Rule deprives them of a privilege protected by Article IV, Section 2 of the U.S. Constitution; namely, the right to practice law. In *Supreme Court of New Hampshire v. Piper*, the Supreme Court held that the practice of law is a fundamental right under the Privileges and Immunities Clause because it is "important to the national economy" and because it "has a noncommercial role and duty." 470 U.S. 274, 281 (1985).

We conclude that Arizona's AOM Rule does not contravene Article IV, Section 2's Privileges and Immunities Clause because it does not favor Arizona's in-state citizens over out-of-state citizens. The purpose of the Privilege and Immunities Clause is to prevent "a state from discriminating against citizens of other states in favor of its own." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939). The AOM Rule is neutral: the State of Arizona imposes the same bar admission requirements on its own citizens as it does on citizens of other states. If a citizen of Arizona is admitted to the bar in a state that does not share reciprocity with

Arizona, then the attorney is not eligible to be admitted to the Arizona Bar on motion, irrespective of the attorney's residency or citizenship status.

The cases cited byPlaintiffs stand only for the proposition that bar admission rules that impose *residency requirements* on bar applicants violate the Privileges and Immunities Clause. *See Piper*, 470 U.S. at 275 (resident of Vermont challenging New Hampshire's limit of bar admission to New Hampshire residents); *Sup Ct. of Va. v. Friedman*, 487 U.S. 59, 61 (1988) (resident of Illinois challenging Virginia's limit of bar admission to Virginia residents). The AOM Rule, on the other hand, relies solely on state of bar admission, and applies equally to residents and non-residents of Arizona.

Even if Arizona's AOM Rule did infringe on a right protected by the Privileges and Immunities Clause, the Rule is closely related to advancing a substantial state interest. *See Friedman*, 467 U.S. at 65. As noted *supra*, the state of Arizona has a considerable interest in regulating its state bar and in ensuring that attorneys licensed in Arizona will be treated equally in states having reciprocity with Arizona. Accordingly, the AOM Rule does not violate the Privileges and Immunities Clause, Article IV, Section 2.

IV. Privileges and Immunities Clause, Fourteenth Amendment

Plaintiffs also argue that the AOM Rule deprives them of a fundamental right protected by the Privileges and Immunities Clause of the Fourteenth Amendment. The Supreme Court, however, has made clear that the Privileges and Immunities Clause of the Fourteenth Amendment only protects those rights accruing from

citizenship of the United States, *Slaughter-House Cases*, 83 U.S. 36, 77 (1872), and the right to practice law is not one of those rights. *See Paciulan v. George*, 229 F.3d 1226, 1229 (9th Cir. 2000) ("The courts and legal commentators have interpreted the [*Slaughter-House*] decision as rendering the Clause essentially nugatory.").

Plaintiffs seem to argue that the AOM Rule burdens their right to travel to Arizona from non-reciprocal states. The Fourteenth Amendment Privileges and Immunities Clause does recognize that travelers becoming permanent residents of a new state have "the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). In this case that right is not infringed because the AOM Rule treats non-state residents the same way as it treats residents of Arizona. In *Saenz*, by contrast, California discriminated on the basis of residency by limiting welfare benefits during a recipient's first year of California residency to the amount that the recipient would have received in the state of his prior residence. *Id.* at 492.

V. First Amendment Right to Free Speech

Plaintiffs present several arguments concerning the First Amendment right to free speech, including a claim that the AOM Rule chills speech by excluding lawyers from practicing in the state, that the AOM Rule is a prior restraint on speech, and that the AOM Rule constitutes content and viewpoint discrimination.

Plaintiffs' arguments on First Amendment free speech grounds mistake the appropriate First Amendment framework for analyzing the AOM Rule. We consider bar admission restrictions to be time, place, and manner restrictions on speech. *See Mothershed v. Justices of Sup. Ct.*, 410 F.3d 602, 611

(9th Cir. 2005) ("In order to further its substantial interest in regulating the legal profession, the State of Arizona may institute reasonable time, place, and manner restrictions on Arizonans' First Amendment right to consult with an attorney."). As such, the AOM Rule must be "narrowly tailored to a substantial governmental interest" and "leave open ample alternative channels for communication of the information." *Id.* "A time, place, and manner restriction is narrowly tailored as long as the substantial governmental interest it serves 'would be achieved less effectively absent the regulation and the regulation achieves its ends without . . . significantly restricting a substantial quantity of speech that does not create the same evils.'" *Id.* at 612 (quoting *Galvin v. Hay*, 374 F.3d 739, 753 (9th Cir. 2004)).

We hold that the AOM Rule is a reasonable time, place, and manner restriction. Arizona is regulating the practice of law, and such regulation is a substantial government interest. *See id.* at 611. Arizona also grants attorneys the option to pass the UBE to gain admission to its bar, which reduces the quantity of speech that the AOM Rule might otherwise restrict. *See id.* at 612.

Girvin and Anderson thus lack standing under the relaxed standing analysis in First Amendment cases, which permits plaintiffs to challenge a statute whose very existence chills expression, even if the plaintiffs have not suffered a concrete injury. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

VI. First Amendment Right to Association and Right to Petition

Plaintiffs next argue that Arizona's AOM Rule abridges their freedom to associate with non-reciprocal states, and forces attorneys to associate with reciprocal

states.[1] This is an attenuated reading of the First Amendment right to associate, which only encompasses the "'right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). Arizona attorneys and non-Arizona attorneys are free to associate with attorneys who are members of the bars of other states, whether these other states enjoy reciprocity with Arizona or not. Moreover, the AOM Rule provides bar applicants alternative means for gaining membership in the Arizona Bar. The presence of these alternative means significantly decreases any obstacles to the freedom to associate that might otherwise result from the AOM Rule.

A parallel response addresses Plaintiffs' claims on First Amendment Petition Clause grounds. "[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes." *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2494 (2011). The AOM Rule ultimately does not deny Appellants meaningful access to the courts. As long as attorneys are admitted under the AOM Rule, or pass the UBE, they may still practice in Arizona courts. *See Paciulan v. George*, 229 F.3d 1226, 1230 (9th Cir. 2000).

VII. Dormant Commerce Clause

The Commerce Clause of the U.S. Constitution, Article I, Section 8, prohibits states from discriminating against interstate commerce, and bars state regulations that, although facially nondiscriminatory, unduly burden interstate commerce. *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148

(9th Cir. 2012).

"Although the Constitution does not in terms limit the power of States to regulate commerce, [the Supreme Court has] long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). When the Court thus construes the Commerce Clause, the Clause is often referred to as the Dormant Commence Clause. Anderson, Girvin, and NAAMJP argue that the AOM Rule violates the Dormant Commerce Clause because it disqualifies attorneys from bar admission based on the states where they were licensed, which in turn prevents those attorneys from moving to and practicing in Arizona. As with their other claims, Plaintiffs' claims on Dormant Commerce Clause grounds are without merit.

Like the Privileges and Immunities Clause, Article IV, Section 2, the Dormant Commerce clause is intended to limit economic protectionism by states, i.e., "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988). "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C &A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994). Where a state statute or regulation burdens interstate commerce, we weigh the burden against the police power of the state. *See Conservation Force, Inc. v. Manning*, 301 F.3d 985, 993 n.7 (9th Cir. 2002). When the statute or regulation "even-handedly . . . effectuate[s] a legitimate local public interest, and its

effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

As noted in our analysis of Plaintiffs' Privileges and Immunities Clause arguments, the AOM Rule does not discriminate against out-of-state interests and favor in-state interests. Arizona requires the same of its citizens as it does citizens of other states. The AOM Rule also arguably promotes some commerce because it encourages other state jurisdictions to reciprocallyrecognize the professional license held by Arizona attorneys who can then relocate to other states, and practice there. Even if the AOM Rule were discriminatory, however, a state can legitimately regulate the practice of law for public protection purposes. *Cf. Mothershed v. Justices of Sup. Ct.*, 410 F.3d 602, 611 (9th Cir. 2005)(finding that a state has a substantial interest in regulating bar requirements). Any negative impact on interstate commerce stemming from the AOM Rule is further mitigated by the existence of alternative means of admission to the Arizona Bar. If an attorney is not eligible for admission to the bar under the AOM Rule, she can still take the UBE and be admitted to practice in Arizona. In *Scariano v. Justices of Supreme Court of Indiana*, the Seventh Circuit considered a Dormant Commerce Clause challenge to Indiana's rule that an out-ofstate practitioner can only be admitted to practice before its bar on motion if they practice "predominantly" in Indiana for a period of five years. 38 F.3d 920, 923 (7th Cir. 1994). The Seventh Circuit concluded that this requirement did not burden commerce because "any discriminatory effects are mitigated by offering the bar exam as an alternative means of admission." *Id.* at 925–

26. We are persuaded by the Seventh Circuit's reasoning, and applythe same rationale to Plaintiffs' Dormant Commerce Clause challenge to Arizona's AOM Rule.

The Supreme Court cases relied on by amicus curiae Public Citizen are inapposite. These cases find violations of the Dormant Commerce Clause where a state completely barred commerce based on a lack of reciprocity, and did not provide alternative means for out-of-state businesses to sell commodities in the state. *See Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982) ("[T]he reciprocity provision operates as an explicit barrier to commerce between the two States."); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 377 (1976). In the one case cited by amicus curiae in which a state did not completely bar commerce, "the out-of-state product [was] placed at a substantial commercial disadvantage through discriminatory tax treatment." *Limbach*, 486 U.S. at 275. The cited cases differ from the present case because attorneys from non-reciprocal states are not categorically denied admission to the Arizona Bar, nor are they placed at a significant economic disadvantage by the AOM Rule. Attorneys barred in non-reciprocal states still have the option to take the Arizona UBE to gain admission to the Arizona Bar.

VIII. Intervention of John Doe Plaintiff

During the pending litigation in district court, Plaintiffs filed a motion to amend their complaint under Federal Rule of Civil Procedure 15(a) to join a John Doe plaintiff. The district court denied the motion. We review the denial of a motion for leave to amend under the deferential abuse of discretion standard and will not revisit the district court's decision denying Plaintiff's

motion. *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999).

We conclude that the district court did not err in finding that John Doe, an attorney admitted to the bar in Florida and admitted to practice on motion in Texas and Tennessee, was challenging a separate provision of law that did not arise out of the same transaction or occurrences claimed by Plaintiffs in their complaint. Fed. R. Civ. P. 20(a)(1)(A) ("Persons may join in one action as plaintiffs if: . . . they assert [a] right to relief . . . with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences.").

IX. Conclusion

The district court correctly granted summary judgment to the justices of the Arizona Supreme Court. Although Plaintiffs can establish Article III standing based on injuries suffered by Girvin, Plaintiffs fail to establish that the AOM Rule is unconstitutional on First Amendment, Fourteenth Amendment, or Privileges and Immunities Clause Grounds. We affirm the decision of the district court. All outstanding motions filed by Plaintiffs-Appellants and Defendants-Appellees are denied. Each party shall bear its own costs on appeal.

AFFIRMED.

Footnotes

***** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

[1] We summarily dismissed the same line of reasoning in

a memorandum disposition in 2010. In *Gordon v. State Bar of California*, a California bar applicant challenged on freedom of association grounds California's requirement that he attend an ABA-accredited law school. 369 F. App'x 833, 835 (9th Cir. 2010). We concluded that "[t]he district court properly dismissed Gordon's First Amendment claim because attending an ABA-accredited school is not the only path for qualifying for the California state bar examination and Gordon is not deprived of his right not to associate with an ABA-accredited school." *Id.*

9/9/13

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE , ALLISON GIRVIN, MARK ANDERSON, MARK KOLMAN,
Plaintiffs
v.
Hon. REBECCA WHITE BERCH, Chief Justice, Arizona Supreme Court, Hon. W. SCOTT BALES, Vice Chief Justice; Hon. JOHN PELANDER; Hon. ROBERT M. BRUTINEL,
Defendants

No. CV-12-1724-PHX-BSB

ORDER

In this matter, Plaintiffs, the National Association for the Advancement of Multijurisdiction Practice (the NAAMJP), Allison Girvin (Girvin), Mark Anderson (Anderson), and Mark Kolman (Kolman), challenge Arizona Supreme Court Rule 34(f), which provides for admission on motion to the Arizona Bar (the AOM Rule). (Doc. 36.) Plaintiffs allege that Arizona's AOM Rule is unconstitutional because it allows admission on motion for attorneys admitted in states having reciprocal admission rules for Arizona attorneys (reciprocity states), but requires attorneys admitted to practice law in states that do not have reciprocal admission rules (non-reciprocity states) to take the uniform bar examination (UBE) to gain admission to the Arizona Bar. (*Id.*) Plaintiffs seek

declaratory and injunctive relief; specifically Plaintiffs request an order declaring Arizona's AOM Rule unconstitutional and enjoining its enforcement. (*Id.* at ¶ 97.)

The parties have filed several dispositive motions. Plaintiffs have filed a motion for summary judgment (Doc. 28), and Defendants have filed a motion to dismiss[1] (Doc. 52) and a cross motion for summary judgment.[2] (Doc. 54.) After the dispositive motions were fully briefed, the NAAMJP and Kolman filed a motion to admit Kolman to the Arizona Bar. (Doc. 90.) Plaintiffs also filed a motion to amend the Second Amended Complaint to add a party. (Doc. 95.) As set forth below, the Court grants summary judgment in Defendants' favor on Plaintiffs' claims and denies Defendants' motion to dismiss as moot. The Court also denies Plaintiffs' motion for summary judgment,[3] denies Plaintiffs' motion to admit Kolman to the Arizona Bar, and denies Plaintiffs' motion to amend.

I. Background

A. Plaintiff NAAMJP and the Individual Plaintiffs

The NAAMJP is a non-profit corporation that describes its mission as improving the legal profession by promoting the adoption of the American Bar Association's (ABA) recommendation for reciprocal bar admission. (Doc. 36 at 4-5; Russell Decl. ¶¶ 1and 3.)[4] Plaintiffs' counsel Joseph Giannini, who is also a director of the NAAMJP (Doc. 54-1 ¶ 32; Doc. 70-1 ¶ 32), has filed numerous challenges to state and federal bar admission requirements on a variety of grounds, including the Supremacy Clause, the Commerce Clause, Title VII, the Fifth Amendment right to property and right to travel, and the Full Faith and Credit Clause.

See Paciulan v. George, 229 F.3d 1226, 1228 (9th Cir. 2000) (citing *McKenzie v. Rehnquist*, 1999 WL 1215630 (D.C. Cir. Nov. 22, 1999)); *Morissette v. Yu*, 1994 WL 123871 (9th Cir. Apr. 11, 1994); *Giannini v. Real*, 911 F.2d 354 (9th Cir.1990); *Giannini v. Comm. of Bar Exam'rs*, 847 F.2d 1434 (9th Cir. 1988)).

Plaintiff Kolman has been a licensed Maryland attorney since 1971. (Doc. 36 at 6; Kolman Decl. ¶ 1.) Kolman has also been admitted by waiver to practice in the District of Columbia, which has reciprocity with Arizona.[5] (Doc. 69 at 9 n.3) Kolman is a partner with Dickstein Shapiro LLP in Washington, D.C. (Kolman Decl. ¶ 4.) He moved to Arizona in 2008. (*Id.* at ¶ 11.) Kolman attests that he has obtained a certificate of completion of the Arizona Law for Admission on Motion Course and passed the Multi-State Professional Responsibility Examination (MPRE). (*Id.* at ¶ 13.) He also attests that he has provided the Arizona Committee on Character and Fitness the documentation required for admission on motion. (*Id.*) Kolman applied for, and was denied, admission on motion to the Arizona Bar because his state of licensing, Maryland, does not have reciprocity with Arizona. (*Id.* at ¶ 14.) On February 24, 2011, Kolman filed a petition for review with the Arizona Supreme Court. (*Id.* at ¶ 15.) The court denied his petition on April 19, 2011. (*Id.*)

Plaintiff Girvin is a licensed California attorney. (*Id.* at 8; Girvin Decl. ¶ 2.) She moved to Arizona in 2012. (Doc. 36 at 8.) Girvin received a score of 272 on the UBE administered in Arizona (Arizona UBE) in July 2012;[6] her score was one point below a passing score of 273. (Girvin Decl. ¶¶ 13, 15.) Girvin alleges that she failed the examination "after counsel for defendants communicated [defense counsel] had the connections, power, and ruthless intent to retaliate for filing this lawsuit." (Doc. 36 at 8; Girvin Decl. ¶¶ 16-17.) Girvin

scored 134.6 on the MBE, a portion of the bar examination consisting of 200 multiple choice questions. (Girvin Decl. at ¶¶ 15, 19.) Girvin attests that the Arizona Supreme Court and the National Conference of Bar Examiners have refused to disclose a breakdown of her MBE score, or her state and national rank on the MBE test. (*Id.* at ¶ 20.) Girvin scored 137.4 on the MEE, the essay portion of the UBE. (*Id.* at ¶ 15.) She attests that the Arizona Supreme Court has refused to provide a breakdown of her scores on the MEE. (*Id.* at ¶ 21.)

Plaintiff Anderson is a licensed Montana attorney. (Doc. 36 at 9; Anderson Decl. ¶ 1.) Anderson attests that Arizona's rules regarding admission on motion have deterred him from moving to Arizona to practice law. (Anderson Decl. ¶¶ 1-2.) He alleges that he will move to Arizona "if Arizona abrogates its tit-for-tat bar admission Rule . . . ." (Doc. 36 at 9.)

B. Admission to the Arizona Bar and Rule 34

The Rules of the Arizona Supreme Court provide three methods of admission to the practice of law in Arizona: (1) admission by Arizona UBE (Ariz. R. Sup. Ct. 34(a)); (2) admission on motion (Ariz. R. Sup. Ct. 34(f)); and (3) admission by transfer of UBE score from another jurisdiction (Ariz. R. Sup. Ct. 34(h)).

The Arizona Supreme Court Committees on Examinations and Character and Fitness make initial determinations regarding admission to the bar based on educational and fitness findings. (DSOF ¶¶ 1,4, Ex. A.)[7] A person aggrieved by a decision of either Committee may file a petition for review with the Arizona Supreme Court pursuant to Ariz. R. Sup. Ct. 36(g)(1). The Arizona Supreme Court has exclusive jurisdiction to make the ultimate decision regarding who may practice

law in Arizona and under what conditions. (DSOF ¶ 2; Ex. A.); *see also* Ariz. R. Sup. Ct. 31.

Plaintiffs challenge the Arizona Supreme Court's rule governing admission on motion, Rule 34(f)(1). When Plaintiffs filed this matter, Rule 34(f) provided that:

> 1. An applicant who meets the requirements of (A) through (H) of this paragraph (f)(1) may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:
>
> A. have been admitted by bar examination to practice law in another jurisdiction allowing for admission of licensed Arizona lawyers on a basis equivalent to this rule;
>
> * * *
>
> C. have been primarily engaged in the active practice of law in one or more states, territories, or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed.

Ariz. R. Sup. Ct. 34(f)(A) and (C).

Effective July 1, 2013, the Arizona Supreme Court expanded Rule 34(f)(1) to allow attorneys to apply for admission on motion to the Arizona Bar if they have been "admitted by bar examination to practice law in one or more states, territories, or the District of Columbia, and have been admitted to and engaged in the active practice of law for at least five years in another jurisdiction or jurisdictions allowing for admission of licensed Arizona lawyers on a basis equivalent to this rule." Ariz. R. Sup. Ct. 34(f) (2013).

Under this amendment, attorneys who were admitted by bar examination in a nonreciprocal jurisdiction, and then became admitted by motion and

practiced in a jurisdiction that Arizona deems reciprocal, such as the District of Columbia, may also apply for admission on motion. Although this amendment to Rule 34(f) likely increases the number of attorneys eligible for admission on motion, it does not render the pending action moot because it does not abrogate the reciprocity requirement at the heart of Plaintiffs' challenge to that rule.

II. Judicial Notice

Before considering the pending motions, the Court considers Plaintiffs' request that the Court take judicial notice that the State of Montana adopted the UBE in July 2013. (Docs. 87 and 88.) Defendants oppose this request and argue that Montana's adoption of the UBE is not material to the issues before the Court. (Doc. 89.) Defendants also argue that Plaintiffs' request for judicial notice improperly includes additional arguments related to issues that the parties have fully briefed.

Under Federal Rule of Evidence 201, a trial court may take judicial notice of facts "if requested by the party and supplied with the necessary information." Fed. R. Evid. 201(d). A fact is appropriate for judicial notice if it is "not subject to reasonable dispute because it is (1) generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined by from sources whose accuracy cannot reasonably be questioned." *Id.* at 201(b). Facts contained in public records are considered appropriate subjects of judicial notice. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1025 (9th Cir. 2006).

The Court confirmed that the Montana Supreme Court adopted the UBE on July 3, 2013 by consulting

the National Conference of Bar Examiners website, www.ncbex.org and the Montana Bar Association's website, www.montanabar.org. Although the Court will take judicial notice that the Supreme Court of Montana adopted the UBE in July 2013, that fact is not relevant to the issues in this case. Because the Court did not permit additional briefing on the pending dispositive motions, the Court will not consider Plaintiffs' other arguments asserted in its request for judicial notice.

III. Standards of Review

A. Summary Judgment Motions

Federal Rule of Civil Procedure 56 authorizes the Court to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a);[8] *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party bears the initial burden of identifying the portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323.

If the moving party meets its initial burden, the opposing party must establish the existence of a genuine dispute as to any material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986). The opposing party must demonstrate the existence of a factual dispute that is both material, meaning it affects the outcome of the claim under the governing law, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1031 (9th Cir. 2010), and genuine, meaning "'the evidence is such that a reasonable jury could return a

verdict for the nonmoving party.'" *Freecycle Sunnyvale v. Freecycle Network*, 626 F.3d 509, 514 (9th Cir. 2010) (quoting *Anderson*, 477 U.S. at 248). The opposing party "must show more than the mere existence of a scintilla of evidence." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Anderson*, 477 U.S. at 252). However, the evidence of the non-movant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255.

B. Rule 12 Motions to Dismiss

Under Rule 12(b)(1), a defendant may move to dismiss a complaint for lack of subject matter jurisdiction. "[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. When a claim is challenged under this rule, the court construes the complaint liberally in the plaintiff's favor. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 & 570 (2007). The court presumes that all well-pleaded allegations are true, resolves all reasonable doubts and inferences in the plaintiff's favor, and views the complaint in the light most favorable to the plaintiff. *Id.* at 555.

IV. Summary of the Claims and Defenses

Plaintiffs' Complaint and First Amended Complaint named the Arizona Supreme Court and four

Arizona Supreme Court Justices as Defendants. (Docs. 1 and 14). In the Second Amended Complaint, however, Plaintiffs omitted the Arizona Supreme Court as a Defendant, and instead named as Defendants only four Arizona Supreme Court Justices, in their official capacities. (Doc. 36 at 10.)

Plaintiffs bring this suit pursuant to 42 U.S.C. § 1983 and assert violations of the First Amendment, the Privileges and Immunities Clause, the Dormant Commerce Clause, and the Fourteenth Amendment's Equal Protection and Due Process Clauses. (Doc. 36.) Plaintiffs seek summary judgment on all the claims in their Second Amended Complaint, but their motion addresses only their assertion of standing, their First Amendment Claims, excluding Girvin's retaliation claim, and their right to travel claim under the Privileges and Immunities Clause. (Doc. 28.)

In their motion to dismiss and their motion for summary judgment, Defendants assert nearly identical arguments that Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction, or summary judgment entered in Defendants' favor, because Plaintiffs claims are barred by: (1) the Eleventh Amendment; (2) the *Rooker-Feldman* doctrine; (3) judicial and legislative immunity; and (4) Article III's justiciability doctrines. (Docs. 52 and 54.) Defendants also argue that Plaintiffs claims are barred because they failed to exhaust state remedies by seeking a rule change through Ariz. R. Sup. Ct. 28. Defendants further argue that they are entitled to summary judgment, or dismissal for failure to state a claim, because Plaintiffs' claims lack merit. This argument is directed to Plaintiffs' claims under the First Amendment, the Dormant Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection and Due Process Clauses of the Fourteenth

Amendment. (Docs. 52 and 54.)

V. Analysis of Potential Bars to Plaintiffs' Claims

A. Eleventh Amendment Immunity

Defendants first argue that this Court lacks subject matter jurisdiction over Plaintiffs' claims because the State of Arizona and the Arizona Supreme Court are not amenable to suit in federal court under the Eleventh Amendment. (Doc. 54 at 4.) The Eleventh Amendment bars suit against a state unless Congress has abrogated the state's sovereign immunity or the state has waived it. *Holley v. Cal. Dep't of Corrs.*, 599 F.3d 1108, 1111 (9th Cir. 2010). This protection extends to the agencies and departments of a state. *Id.* "The Arizona Supreme Court . . . is an 'arm of the state' for Eleventh Amendment purposes." *Lucas v. Ariz. Sup. Ct. Fiduciary Certification Program*, 2011 WL 5289774, at *1 (9th Cir. Nov. 3, 2011); *see also Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir.1987) ("[A] suit against the Superior Court is a suit against the State, barred by the eleventh amendment."). Thus, unless an exception applies, the Eleventh Amendment would bar Plaintiffs from suing the Arizona Supreme Court or the State of Arizona.

Defendants acknowledge that Plaintiffs have not named the State of Arizona or the Arizona Supreme Court as Defendants in the Second Amended Complaint. Rather, the Defendants are four Arizona Supreme Court Justices, acting in their official capacities. (Doc. 36 at 10.) Defendants, however, assert that because Plaintiffs seek relief against "Arizona," the "State," and the "Arizona Supreme Court," and do not seek any relief against the named Justices, their claims are actually against the Arizona Supreme Court or the State of Arizona and are barred by the Eleventh

Amendment. (Doc. 54 at 5.)

Relying on *Mothershed v. Justices of the Sup. Ct.*, 410 F.3d 602 (9th Cir. 2005), Defendants further argue that Plaintiffs' claims against the Justices are really claims against the Arizona Supreme Court because that court promulgated the challenged AOM Rule at the direction of the State as a sovereign. In *Mothershed*, the plaintiff alleged that certain Arizona rules governing *pro hac vice* admission and admission requirements for out-of-state attorneys violated the Sherman Act and the First Amendment. *Id.* at 605. Although the defendants in *Mothershed* were state bar officials and state supreme court justices, the Ninth Circuit did not address whether a suit against these individuals would be barred under the Eleventh Amendment as a suit against the state.

Instead, the Ninth Circuit found that the individual defendants were state actors for purposes of *Parker* immunity to antitrust liability.[9] *Id.* at 608-09. The Ninth Circuit stated that "although [plaintiff's] claim is nominally against certain state bar officials and the Supreme Court Justices in their individual capacities, it is the Supreme Court of Arizona that is the real party in interest because the state bar rules that [plaintiff] is challenging are promulgated by the court in its supervisory role over the practice of law in Arizona." *Id.* at 609. Thus, the court concluded that the plaintiff's antitrust claims were barred. *Id.*

The court, however, did not find that the Eleventh Amendment, or any other form of immunity, barred the plaintiff's First Amendment claims against the defendants, even though it had found that these defendants were acting at the direction of the state as a sovereign. Indeed, the court considered the merits of the plaintiff's First Amendment claims. *Id.* at 610-612 (finding claims failed as a matter of law because the

challenged rules were reasonable time, place, and manner restrictions on Arizonan's First Amendment right to obtain and consult with a lawyer). Thus, *Mothershed* does not establish that the Eleventh Amendment bars Plaintiffs' claims.

Furthermore, Plaintiffs argue that the *Ex Parte Young* exception to Eleventh Amendment immunity applies and allows their claims. (Doc. 69 at 7.) The *Ex Parte Young* exception allows government officials to be sued in their official capacity for violating federal law. *Ex Parte Young*, 209 U.S. 123, 160 (1908); *see also Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris (Harris)*, ___ F.3d ___, 2013 WL 4615131 (9th Cir. Aug. 30, 2013); *Salt River Project Agr. Imp. and Power Dist. v. Lee (SRP II)*, 672 F.3d 1176, 1181 (9th Cir. 2012). The *Ex Parte Young* exception only permits suits for prospective injunctive relief. *Demery v. Kupperman*, 735 F.2d 1139, 1146 (9th Cir. 1984). Additionally, the *Ex Parte Young* exception "requires a 'special relation' between the state officer sued and the challenged statute, such that the officer has 'some connection with the enforcement of the act [.]'" *Paisley v. Darwin*, 2011 WL 3875992, at *3 (D. Ariz. Sept. 2, 2011) (quoting *Confederated Tribes & Bands of Yakama Indian Nation v. Locke*, 176 F.3d 467, 469 (9th Cir.1999)).

Here, Plaintiffs seek only prospective injunctive relief, they allege violations of federal law, and they are suing the government actors who allegedly violated federal law in his or her official capacity. (*See* Doc. 36 at 10.) In an analogous case, the Ninth Circuit held that a plaintiff could sue tribal officials, including Justices of the Navajo Nation Supreme Court. *SRP II*, 672 F.3d at 1181. In so holding, the Court stated, "[t]his lawsuit for prospective injunctive relief may proceed against the officials under a routine application of *Ex Parte*

Young." *Id.* at 1177; *see also Harris*, 2013 WL 4615131, at *3 (under the *Ex. Parte Young* exception, the California Attorney General was not immune under the Eleventh Amendment because she had the duty to prosecute any violations of the allegedly unconstitutional statute). Accordingly, the Eleventh Amendment does not bar Plaintiffs' claims in this suit. *See Giannini v. Real*, 711 F. Supp. 992, 996 (C.D. Cal. 1989) (finding that although the Eleventh Amendment barred damage claims against the State of California, plaintiff's § 1983 claims for injunctive relief against state officials were not barred by the Eleventh Amendment).

B. The *Rooker-Feldman* Doctrine

Defendants next argue that the *Rooker-Feldman* doctrine bars Kolman's and Girvin's claims. (Doc. 54 at 5-7.) Although 28 U.S.C. § 1331 usually vests federal courts with jurisdiction over federal constitutional claims, the *Rooker-Feldman* doctrine is an exception that applies to preclude jurisdiction. This exception arises out of a negative inference from 28 U.S.C. § 1257, the statute that grants jurisdiction to review a state court judgment only to the United States Supreme Court, and not the federal district courts. *See D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Under the *Rooker-Feldman* doctrine, the federal district courts lack subject matter jurisdiction over a suit that is a "de facto appeal from a state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004); *Rooker*, 263 U.S. 413; *Hale v. Harney*, 786 F.2d 688, 691 (5th Cir. 1986). This doctrine applies even when the challenge to the state court decision involves federal constitutional issues.

Feldman, 460 U.S. at 484–86.

The Supreme Court, however, has emphasized the *Rooker-Feldman* doctrine's limited scope explaining that "the *Rooker-Feldman* doctrine . . . is confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283-84 (2005). The Court noted that in both *Rooker* and *Feldman*, the cases that gave rise to the doctrine, the plaintiffs were directly challenging a state court judgment. *Exxon*, 544 U.S. at 284-85 (noting that the plaintiffs in *Rooker* alleged that the "adverse state-court judgment was rendered in contravention of the Constitution" and so should be declared "null and void," and that the plaintiffs in *Feldman*, in part, directly challenged a state court's denial of their petitions seeking waiver of a rule that required bar applicants to have graduated from an ABA-approved law school). In both cases, the plaintiffs "called upon the District Court to overturn an injurious state-court judgment." *Id.* at 291-92.

1. Plaintiffs' "As Applied" Challenges to the AOM Rule

The Second Amended Complaint alleges that, on its face and as applied to Plaintiffs, the AOM Rule violates the First Amendment (Count I). (Doc. 36 at 32-39.) The Second Amended Complaint also generally asserts that Rule 34(f)(1)(A) and (C) violate the Plaintiffs' rights under the Privileges and Immunities Clause (Count II), the Dormant Commerce Clause (Count III), and the Equal Protection Clause (Count

IV). (*Id.* at 39-45.) The Second Amended Complaint further alleges that Girvin's rights under the Due Process Clause of the Fourteenth Amendment were violated when she was assigned a failing grade on the UBE. (Count V). (*Id.* at 46-48.) Finally, the Second Amended Complaint seeks an order admitting Plaintiffs to the Arizona Bar. (*Id.* at 49.)

Defendants argue that although Kolman and Girvin characterize their claims as facial attacks on the constitutionality of Arizona's AOM Rule, their claims are "inextricably intertwined" with the final decisions of the Arizona Supreme Court denying them admission to the Arizona Bar and, therefore, they are asking this Court to review a state court decision and it lacks jurisdiction to do so. (Doc. 54 at 6) (citing *Craig v. State Bar of Cal.*, 141 F.3d 1353, 1354 (9th Cir. 1998).) In the *Rooker-Feldman* context, the phrase "inextricably intertwined" describes the conclusion that a claim asserts an injury whose source is a state court judgment and, therefore, such a claim is barred by *Rooker-Feldman*. *McCormick v. Braverman*, 451 F.3d 382, 393 (6th Cir. 2006). "The crucial point is whether the district court is being asked to review the state court decision." *Fayyumi v. City of Hickory Hills*, 18 F. Supp. 2d 909, 913 (N.D. Ill. 1998) (citing *Feldman* 460 U.S. at 483-84 n.16). The Ninth Circuit has explained that "inextricably intertwined" simply means a plaintiff cannot assert legal error of a state court judgment in a district court. *Kougasian*, 359 F.3d at 1142–43.

Kolman applied for admission on motion and the Committee on Character and Fitness denied his admission. The Arizona Supreme Court denied his petition for review. To the extent that Kolman asserts violations of his constitutional rights based on the Arizona Supreme Court's 2011 denial of his application for admission to practice law in Arizona pursuant to

Arizona's AOM Rule, he is directly attacking a state court judgment and, under *Rooker-Feldman*, the Court lacks jurisdiction to consider his claims that Arizona's AOM Rule is unconstitutional "as-applied" to him. *See Feldman*, 460 U.S. at 487-88; *Lawrence v. Welch*, 531 F.3d 364, 369 (6th Cir. 2009) (affirming district court's ruling that the *Rooker-Feldman* doctrine precluded subject matter jurisdiction over claims for injunctive relief requiring defendants to issue plaintiff a license to practice law). Accordingly, Defendants are entitled to summary judgment on Kolman's "as-applied" challenges to Arizona's AOM Rule. *See Levanti v. Tippen*, 585 F. Supp. 499, 503 (S.D. Cal. 1984) (district court lacks jurisdiction to review denial of admission which amounts to an "as-applied" challenge).

Furthermore, Kolman's motion for an order directing the Arizona Supreme Court to immediately admit him to the Arizona Bar under amended Rule 34(f) would require this Court to overturn the Arizona Supreme Court's prior denial of his application for admission on motion and thus *Rooker-Feldman* bars review of that motion.[10] *See Exxon*, 544 U.S. at 291-92. Accordingly, the Court will deny Kolman's motion for an order directing the Arizona Supreme Court to admit him to the Arizona Bar for lack of subject matter jurisdiction.[11] (Doc. 90).

Girvin failed the July 2012 UBE administered in Arizona, but did not petition the Arizona Supreme Court for review of the Committee on Examination's determination of her grade. (DSOF ¶ 28; Doc. 70, Ex. 1 at 6, admitting DSOF ¶ 28.) Girvin alleges that she was denied procedural due process because the results of the Arizona UBE "are secret, [t]he grading policy is secret," and "there is no meaningful opportunity for judicial review" of those results. (Doc. 36 at 47.) Defendants assert that because Girvin did not seek

review in the Arizona Supreme Court, the Committee on Examinations' initial determination that she should be denied admission to the Arizona Bar constitutes a final decision of the Arizona Supreme Court, and federal court review of that decision is barred by the *Rooker-Feldman* doctrine. (Doc. 54 at 6.) The *Rooker-Feldman* doctrine does not apply unless the federal plaintiff seeks to "overturn an injurious state-court judgment." *Exxon*, 544 U.S. at 292.

Defendants do not cite any authority that supports their argument that the Committee on Examination's recommendation that Girvin be denied admission to the Arizona Bar constitutes a "state-court judgment" for purposes of the *Rooker-Feldman* doctrine. Instead, Defendants cite *Craig v. State Bar of Cal.*, 141 F.3d 1353 (9th Cir. 1998), to support their argument that Girvin is challenging a decision of the Arizona Supreme Court. In that case, however, the plaintiff sought review of the Committee of Bar Examiners decision in the California Supreme Court and the court denied review. *See Craig*, 141 F.3d at 1353. Thus, in *Craig*, the plaintiff was challenging a decision of the California Supreme Court regarding his bar admission and his claim was barred by the *Rooker-Feldman* doctrine. *Id.* at 1354. Here, because Girvin did not seek review in the Arizona courts, she is not seeking review of a state court judgment. Although Girvin's procedural due process claim may not be subject to review for some other reason, it is not precluded by the *Rooker-Feldman* doctrine.

2. Plaintiffs' Facial Challenges to the AOM Rule

The *Rooker-Feldman* doctrine, however, does not bar Plaintiffs' general challenges to Arizona's AOM

Rule. *See Feldman*, 460 U.S. at 1317. Plaintiffs seek an order declaring Ariz. R. Sup. Ct. 34(f) unconstitutional on its face. (Doc. 36 at 49.) This request is not individual to Kolman, Anderson, or Girvin, and it is not based on any Arizona Supreme Court decision denying an individual application for admission on motion to the Arizona Bar. Therefore, this Court has jurisdiction to consider a facial attack on the Arizona AOM Rule. *See Levanti*, 585 F. Supp. at 503 (finding that the district court had jurisdiction over plaintiff's claim that the grading scheme employed by the bar examiners unconstitutionally discriminates against non-residents); *Doe v. Florida Bar*, 630 F.3d 1336, 1341-42 (11th Cir. 2011) (noting that, in contrast to an as-applied challenge, "[a] facial challenge . . . seeks to invalidate a statute or regulation itself" and considering merits of facial challenge to Florida Bar's rules governing recertification process); *Craig*, 141 F.3d at 1354-55 (affirming district court's dismissal of complaint for lack of subject matter jurisdiction because plaintiff's allegations regarding the state bar's refusal to modify the oath to conform with his religious beliefs was personal to him and his "sweeping prayer" for "relief as the Court deems just and proper" did not convert his "distinctly individual claims into a general challenge to the oath requirement.").

C. Judicial Immunity

Defendants also assert that this suit is barred because as Arizona Supreme Court Justices they have judicial immunity. (Doc. 54 at 7.) Generally, judges who are sued in their personal capacities for decisions made in their judicial capacities are entitled to absolute judicial immunity. *Forrester v. White*, 484 U.S. 219, 225–26 (1988). Judicial immunity applies "'however

erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" *Cleavinger v. Saxner*, 474 U.S. 193, 199–200 (1985) (quoting *Bradley v. Fisher*, 80 U.S. 335, 347 (1871)). "Grave procedural errors or acts in excess of judicial authority do not deprive a judge of this immunity." *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988). Moreover, "judicial immunity is not overcome by allegations or bad faith or malice . . . ." *Mireles v. Waco*, 502 U.S. 9, 11 (1991).

Here, Plaintiffs are suing the Defendants in their official capacities, thus a judicial immunity defense is unavailable. In *Kentucky v. Graham*, the Supreme Court explained that personal immunity does not bar official capacity suits:

> When it comes to defenses to liability, an official in a personal-capacity actionmay, depending on his position, be able to assert personal immunity defenses[.] In an official-capacity action, these defenses are unavailable. The only immunitiesthat can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.

473 U.S. 159, 167–68 (1985) (internal citations and footnote omitted); *see also Pulliam v. Allen*, 466 U.S. 522, 541–542 (1984) ("We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.").

Accordingly, judicial immunity does not bar this action.

D. Legislative Immunity

Defendants also assert that "if Plaintiffs had" made allegations related to the adoption of the challenged AOM Rule, they would have absolute legislative immunity. (Doc. 54 at 7.) The Second Amended Complaint, however, does not include allegations related to the adoption of the AOM Rule at issue and thus does not implicate the legislative immunity doctrine. The Court declines to speculate whether legislative immunity might have barred other claims that Plaintiffs could have brought.

E. Article III Justiciability Doctrines

Defendants next argue that this case does not present a justiciable case or controversy, as Article III requires. They argue that the NAAMJP, Girvin, Kolman, and Anderson lack standing to challenge Arizona's AOM Rule because they lack the requisite injury. (Doc. 54 at 8-11.) Plaintiffs assert that they having standing because they are injured by Arizona's "tit-for-tat bar admission rules." (Doc. 70, Ex. 1 at 2.)

1. The NAAMJP's Standing

Defendants assert that the NAAMJP does not have standing to bring this action because it cannot be the "object of the challenged AOM Rule and accordingly lacks the injury required by Article III." (Doc. 54 at 8.) The standing doctrine ensures that a plaintiff's claims arise in a "concrete factual context" appropriate to judicial resolution. *Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Standing ensures that the proper party has brought suit. To establish standing, a plaintiff must show that he has suffered a concrete injury, that there is a causal

connection between his injury and the defendant's conduct, and that the injury will likely be redressed by a favorable decision. *United States v. Hays*, 515 U.S. 737, 742-43 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan*, 504 U.S. at 561; *see also Warth v. Seldin*, 422 U.S. 490, 518 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.").

a. Third-Party Standing

The NAAMJP argues that it has third-party standing to assert claims for attorneys who are not before the Court and "who wish to remain anonymous." (Doc. 36 at 5.) Plaintiffs allege that the unnamed attorneys, who are members of the NAAMJP, are "stigmatized, slandered, and humiliated by the Rule 34(f) blanket presumption that they are not competent in their profession." (Doc. 36 at 5.) These allegations do not confer standing on the NAAMJP.

A litigant may bring a case on behalf of a third party in limited circumstances when: "'(1) the litigant has suffered an injury in fact, giving him a sufficiently concrete interest in the outcome of the issue; (2) the litigant has a close relation to the third party; and (3) there exists some hindrance to the third party's ability to protect his own interest.'" *Nat'l Ass'n for Advancement of Multijurisdiction Practice v. Gonzales*, 2006 WL 3779792, at *3-4 (3d Cir. Dec. 21, 2006) (quoting *Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 189 n. 4 (3d Cir. 2006)). The NAAMJP has not met these requirements.

Even assuming that the NAAMJP has shown some injury and that there is a sufficient relationship between the NAAMJP and its unnamed attorney members, the NAAMJP fails to show how these attorneys are unable to protect their own interests. Accordingly, the NAAMJP does not have third-party standing. *See Gonzales*, 2006 WL 3779792, at *3 (finding that unnamed attorneys that allegedly suffered injuries due to district courts' local rules on admission *pro hac vice* did not confer standing on the NAAMJP).

b. First Amendment Standing

The NAAMJP also asserts that it has standing to challenge Arizona's AOM Rule because it is a corporation with a federal right to petition for redress of grievances and "state restrictions on that federal right are subject to First Amendment scrutiny." (Doc. 36 at 5.) The NAAMJP essentially argues that because the NAAMJP has First Amendment rights, it has standing to challenge Arizona's AOM Rule. In support of that assertion, the NAAMJP relies on *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010). The NAAMJP's reliance on *Citizens United* is misplaced.

In *Citizens United*, the Supreme Court considered a non-profit corporation's constitutional challenges to certain provisions of the Bipartisan Campaign Reform Act of 2002. The Court held "that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." *Id.* at 337. Thus, *Citizens United* would support the NAAMJP's position if it were asserting that it has standing to assert that its political speech was restricted because of its corporate identity. This case, however, does not involve the NAAMJP's political

speech or any infringement on its First Amendment rights. Therefore, the NAAMJP does not have standing to assert the constitutional claims alleged in the Second Amended Complaint because it has not suffered the requisite injury.

2. Girvin's and Anderson's Standing

Defendants also argue that Girvin and Anderson cannot assert the claims in the Second Amended Complaint because they do not satisfy Article III's "case or controversy" requirements. (Doc. 54 at 9.) The exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Federal plaintiffs "'must allege some threatened or actual injury resulting from the putatively illegal action.'" *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). Abstract or hypothetical injury is not sufficient. Plaintiffs must allege that they "have sustained or [are] immediately in danger of sustaining some direct injury" as a result of the challenged statute or official conduct. *Mass. v. Mellon*, 262 U.S. 447, 488 (1923). The injury or threat of injury must be both "real and immediate," and not "conjectural" or "hypothetical." *E.g.*, *Golden v. Zwickler*, 394 U.S. 103, 109–110 (1969).

Defendants argue that Girvin and Anderson have not demonstrated that as a result of Arizona's AOM Rule they have suffered an injury that may be legally redressed. Girvin does not allege that she applied for admission on motion to the Arizona Bar or that the AOM Rule has prevented her from seeking to practice law in Arizona. (Doc. 36 at 38.) Accordingly, Girvin has not presented this Court with a justiciable

claim related to Arizona's AOM Rule, and this Court lacks jurisdiction over her constitutional challenges to that rule. *See Arthur v. Sup. Ct. of Iowa*, 709 F. Supp. 157, 162 (S.D. Iowa 1989) (dismissing plaintiffs' claims for lack of standing because they had not applied for admission to the Iowa Bar under the challenged rule); *Nat'l Ass'n of Multijurisdiction Practice*, 2006 WL 3779792, at *3 (finding that NAAMJP's attorney members had not suffered any injury because there was no showing that they had applied to practice in the federal district courts or that they would seek to practice there but-for the local rules).

Anderson also has not applied to practice in Arizona, but he alleges that he has not moved to Arizona and applied to practice law because of the AOM Rule. (Anderson Decl. ¶¶ 1-2.) In *Paciulan*, 38 F. Supp. 2d at 1135-36, the court considered the plaintiffs' constitutional challenges to California's rules on *pro hac vice* admission, even though plaintiffs had not alleged that they had applied for *pro hac vice* status in a particular state court proceeding and that they were denied such status. *Id.* at 1135. The court noted that several Ninth Circuit decisions "note that standing may be found in circumstances like [those before the court] where further application would be futile." *Id.* (citing *Desert Outdoor Adv., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996) ("Desert and OMG also have standing to challenge the permit requirement, even though they did not apply for permits, because applying for a permit would have been futile.")). The court did not resolve the issue of standing, but rather "assum[ed] for purposes of argument that plaintiffs ha[d] standing, [and concluded that] plaintiffs ha[d] nevertheless failed to state a claim." *Paciulan*, 38 F. Supp. 2d at 1136. Here, even assuming that Anderson has standing to challenge Arizona's AOM Rule, as

discussed below, Defendants are entitled to summary judgment on his claims.

F. Exhaustion

Defendants further argue that Kolman, Girvin, and Anderson have not exhausted their claims because they have "not petitioned the Arizona Supreme Court for changes to the AOM Rule in order to initiate discussion about admission on motion in the appropriate state forum." (Doc. 54 at 11.) Defendants argue that because the AOM Rule is a matter of substantial state interest, Plaintiffs should seek changes through state channels. In support of this assertion, Defendants cite *In re Griffiths*, 413 U.S. 717, 723 1973). The *Griffiths* decision recognized that a state has "a constitutionally permissible substantial interest in determining whether a [state bar] applicant possesses 'the character and general fitness requisite for an attorney or counsel-at-law.'" *Id.* (quoting *Law Students Research Council v. Wadmond*, 401 U.S. 154, 159 (1971)). That decision, however, did not address exhaustion of challenges to a state bar's rules related to admission processes. Here, the Court need not determine whether Plaintiffs were required to exhaust their claims by seeking an amendment to the AOM Rule because their claims are subject to summary judgment, as discussed below.

G. Conclusion Regarding Potential Bars to Plaintiffs' Claims

As set forth above, the Court has considered Defendants' arguments that Plaintiffs' claims are barred or that the Court lacks jurisdiction over these claims The Court finds that (1) the Eleventh Amendment does not bar Plaintiffs' claims because the

Ex Parte Young exception applies to allow Plaintiffs' claims, (2) under the *Rooker-Feldman* doctrine, this Court lacks jurisdiction over Kolman's "as applied" challenges to Arizona's AOM Rule and his motion for admission to the Arizona Bar because those claims seek review of a state court judgment, (3) the *Rooker-Feldman* doctrine does not bar Girvin's procedural due process claim based on her failing bar score because that claim does not challenge a state court judgment, (4) the *Rooker-Feldman* doctrine does not bar Plaintiffs' general challenges to the AOM Rule because the Court has jurisdiction to consider facial attacks on the rule, (5) the Defendants are not entitled to judicial immunity, which is a form of personal capacity immunity, because they have been sued in their official capacities, (6) the Court will not speculate on whether legislative immunity would apply to bar arguments that Plaintiffs have not asserted, (7) the NAAMJP does not have standing to assert claims on behalf of its attorney members, (8) the Court lacks jurisdiction over Girvin's constitutional challenges to the AOM Rule, except her retaliation claim, because she has not alleged that she suffered an injury as a result of the AOM Rule, and (9) the Court will not determine whether Plaintiffs were required to exhaust their claims by seeking a rule change prior to filing suit.

In the absence of any disputed facts, Defendants are entitled to summary judgment on Kolman's "as applied" challenges, Girvin's challenges to the AOM Rule, except her retaliation claim, and the NAAMJP's claims.[13] Because Plaintiffs' other claims are not barred by immunity or lack of jurisdiction, in the following sections the Court addresses Girvin's First Amendment retaliation claim, Girvin's, Kolman's and Anderson's arguments that the AOM Rule facially violates the First Amendment, Anderson's claims under the

Privileges and Immunities Clauses, and Plaintiffs' Dormant Commerce Clause, equal protection, and due process claims. .

VI. Analysis of Plaintiffs' Claims

A. Girvin's First Amendment Retaliation Claim

In Count I of the Second Amended Complaint, Girvin alleges that "defendants' agents" failed her by one point on the July 12, 2012 Arizona UBE to retaliate against her for "exercising her constitutional right to petition."[14] (Doc. 36 at 38-39.) Girvin alleges that "the defendants' agents have expressly stated an intention to retaliate, and they have set out to ruin plaintiff's career for exercising her constitutional right to petition." (*Id.*) Girvin contends that her scores are of passing quality and that she demonstrated more than a minimum level of competence in her answers. (*Id.* at 39.) She contends that Arizona's test results are "secret, final, and not reviewable." (*Id.*)

In her declaration, Girvin avers that she "believe[s] this failing score is the result of retaliation against [her] by agents of the defendants." (Girvin Decl ¶ 16.) She further declares that "defendants' agents have expressly stated in blunt and unambiguous terms an intention to retaliate, asserting they would ruin [her] attorney's career if he did not dismiss the lawsuit." (*Id.* ¶ 17.) Defendants argue that these statements are not admissible because they are "speculation, opinion, and hearsay." (Doc. 54 at 12.)

The Ninth Circuit has held that a free speech retaliation claim is cognizable under section 1983. *See e.g., Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) ("Deliberate retaliation by state

actors against an individual's exercise of [the right to petition the government for redress of grievances] is actionable under section 1983."); *see also Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283–84 (1977). Although it is not expressly mentioned in the Constitution, retaliation is actionable because retaliatory actions may chill an individual's exercise of constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). A plaintiff may demonstrate a First Amendment retaliation claim by showing that defendants intended to interfere with the plaintiff's exercise of his First Amendment rights, and the defendants' acts "would chill or silence a person of ordinary firmness from future First Amendment activities." *See Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300-01 (9th Cir. 1999); *see also Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755 (9th Cir. 2006).

Here, to establish Defendants' liability under § 1983, Girvin must show that Defendants personally participated in the alleged deprivation of her First Amendment rights. *See Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) ("In order for a person acting under color of state law to be liable under § 1983 there must be a showing of personal participation in the alleged rights deprivation.") A plaintiff must link the named defendants to the violation at issue. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1020–21 (9th Cir. 2010). Liability may not be imposed under the theory of respondeat superior, *Iqbal*, 556 U.S. at 676; *Ewing v. City of Stockton*, 588 F.3d 1218, 1235 (9th Cir. 2009), and administrators may only be held liable if they "participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Additionally,

retaliation is not established simply by showing adverse activity by a defendant after protected speech; rather, plaintiff must show a nexus between the protected speech and the adverse action. *See Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000).

Here, Girvin alleges that her failing score on the July 2012 Arizona UBE was motivated by the desire of "Defendants' *agents*" to retaliate against her for filing this lawsuit against Defendants. Girvin's claims are directed at unidentified "agents" of Defendants who are not parties to this action. She alleges that "defendants' agents" retaliated against her for filing this action and "have expressly stated an intention to retaliate, and they have set out to ruin plaintiff's career" or to ruin her attorney's career. (Doc. 39 at 38-39.) The Second Amended Complaint lacks specific factual allegations connecting each individually named Defendant to the alleged retaliatory conduct. The allegations do not specify what role each Defendant played in the described conduct and how each Defendant caused, or failed to correct, the alleged harm. In short, Girvin fails to show an affirmative link between the alleged injury and the conduct of the named Defendants. *See Rizzo v. Goode*, 423 U.S. 362, 371-72 (1976). "[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. 662. Each defendant may only be liable for misconduct directly attributed to him or her because there is no vicarious or respondeat superior liability under § 1983. *Iqbal*, 556 U.S. at 677-79; *see also Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 629 (7th Cir. 2009).

Because § 1983 does not provide for respondeat superior or vicarious liability, Girvin's retaliation claim against "defendants' agents" fails as a matter of law. *See Mann v. Brenner*, 2010 WL 1220963, at *2 (3d Cir.

Mar. 30, 2010) (dismissing a First Amendment retaliation claim and noting that vague and conclusory allegations that plaintiff was assessed an unreasonable fine in retaliation for using the legal process failed to state a claim); *Davis v. Ramen*, 2008 WL 39700869, at *6 (E.D. Cal. Aug. 22, 2008) (dismissing First Amendment retaliation claim based on plaintiff's failure to "link each named defendant with affirmative act or omission that demonstrates a violation of plaintiff's federal rights.").

Moreover, Girvin has not presented evidence to create a factual dispute over whether "defendants' agents" assigned a failing score to her on the July 2012 Arizona UBE in retaliation for her participation in this lawsuit. Defendants, however, have presented evidence that the Committee on Examination consists of twelve members and its duties include administering and grading the Arizona Bar exam. (DSOF ¶ 12.) Although members of the Committee on Examination (Examiners) may be responsible for grading a specific examination question, not every Examiner is assigned a question to grade. (*Id.*) When an Examiner is assigned a question to grade, he is responsible for overseeing the grading process and directing grading activities, including recording and reporting scores. (DSOF ¶ 12.) Graders help the Examiners with these duties. Graders read the exam answers, analyze the answers, and assign a grade to the answers. The Graders report that grade to the Examiner. (*Id.*) Defendants have provided the Court with declarations from the Graders and Examiners who scored the Arizona UBE administered on July 24 and July 25, 2012. (DSOF Exs. B and C; Doc. 62.) Plaintiffs object to these declarations as immaterial. (Doc. 70, Ex. 1 at 3.) Plaintiffs' objection is unfounded. The Examiner and Grader declarations are relevant to the grading of the July 2012 Arizona UBE,

which is at issue in Girvin's retaliation claim.

The exams are graded anonymously. (DSOF ¶ 14.) Bar applicants are assigned a random identification (ID), which is the only identifier on the answers viewed by the Examiner and the Grader. (*Id.*) Communications regarding answers, grades, and applicants are conducted using the applicant's ID, not the applicant's name or other specific identifying information. (*Id.*) There were eight written questions on the July 2012 Arizona UBE. (DSOF ¶ 17.) Eight Examiners and thirteen Graders participated in the grading process. (*Id.*) The only people involved in grading the exams and issuing grades were the Examiners assigned to a particular question, and the Graders assigned to assist the Examiners. (*Id.* at ¶ 20.) None of the Examiners or Graders who participated in the grading process for the July 2012 Arizona Bar exam had any knowledge of the name of the person whose exam they graded at any point during or after the grading process. (*Id.* at ¶¶ 21, 22.)

Girvin does not present any facts, or even allege any facts, to raise a genuine issue that the Defendants directed any of the Examiners or Graders to assign a particular, or a failing, grade to Girvin's Arizona UBE. (Doc. 36 at 38-39; Doc. 70, Ex. 1 ¶¶ 14-15, 2023.) Although Girvin speculates that someone other than the Graders and Examiners, such as an unidentified "licensing official," must have been involved in grading her July 2012 Arizona UBE (Doc. 70, Ex. 1 ¶¶ 14-15, 19, 20-23), her unsupported allegations are not sufficient to create a genuine issue of disputed fact.

Girvin further alleges that failing Arizona's UBE by one point is uncommon and thus her failure by that margin is evidence of retaliation. (Doc. 70, Ex. 1 ¶ 24.) Contrary to Girvin's assertion, her failure by one point does not support a finding of retaliation. Five applicants

for the July 2012 bar exam scored one point below passing. (DSOF ¶ 24.) There is no evidence that any of those applicants had filed a lawsuit against the Arizona Supreme Court or any Arizona Supreme Court Justice before failing the UBE. Girvin's assertion that few applicants fail the Arizona UBE by one point does not create a genuine issue of disputed material fact regarding retaliation against her for participating in this lawsuit.[15] In summary, Girvin's retaliation claim fails as a matter law because she has not linked any of the Defendants with the alleged retaliation. Moreover, she fails to create a genuine issue of material fact regarding retaliation against her for participating in this lawsuit. Therefore, Defendants are entitled to summary judgment on Girvin's First Amendment retaliation claim.

B. First Amendment Free Speech, Association, and Petition Claims

Plaintiffs argue that Arizona's AOM Rule impermissibly infringes on their First Amendment rights to free speech, association, and to petition in a public forum. (Doc. 36 at 32-38.) As previously discussed in Section V.B, Plaintiffs' "as applied" claims are barred and the Court's review is limited to Plaintiffs' facial challenge to Arizona's AOM Rule. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Rust v. Sullivan*, 500 U.S. 173, 183 (1991). Plaintiffs have not met this strict standard.

1. Content/View Point Discrimination and Breadth of Rule 34(f)

Plaintiffs contend that Arizona's AOM Rule discriminates on the basis of content and viewpoint because it "denies one group of citizens the right to address selected audiences on controversial issues of public policy . . . ." (Doc. 36 at 32) (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 546 (1980)). Plaintiffs assert that Arizona's AOM Rule discriminates on the basis of content and viewpoint because "it permits attorneys from reciprocity states to obtain a license and petition the courts and speak; whereas it categorically prohibits attorneys from non-reciprocity states the same precious freedoms." (Doc. 36 at 32.) Plaintiffs further argue that Arizona's AOM Rule is overly broad because it "chills more speech than necessary by categorically excluding lawyers from non-reciprocity states." (Doc. 36 at 34.)

Contrary to Plaintiffs' assertion, Arizona's AOM Rule does not "categorically prohibit" attorneys admitted to practice in non-reciprocity states from admission to practice law in Arizona. Rather, these attorneys may obtain a license to practice law in Arizona by taking the Arizona UBE or by transferring a UBE score from another jurisdiction. *See* Ariz. R. Sup. Ct. 34(a). Admission on motion is not the only method of admission to the Arizona Bar. Furthermore, the AOM Rule does not improperly "make differential licensing distinctions based on a speaker's identity as a member of a favored or disfavored bar." (Doc. 36 at 34.) Although Arizona's AOM Rule distinguishes between attorneys who were admitted to practice in states that Arizona deems reciprocal and attorneys who were not admitted to practice in such states, that distinction does not violate the First Amendment.

The Ninth Circuit recognizes that "states traditionally have enjoyed the sole discretion to determine qualifications for bar membership," and has

upheld regulations on bar membership against First Amendment challenges. *See Paciulan*, 38 F. Supp. 2d at 1137 (N.D. Cal. 1999) (state rule permitting *pro hac vice* admission for non-residents, but not for residents licensed to practice law in other states, did not constitute impermissible speaker discrimination in violation of the First Amendment); *see also United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("the States have broad power to regulate the practice of law"). The Supreme Court has explained that the "interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

In addition, "to further its substantial interest in regulating the legal profession, the State of Arizona may institute reasonable time, place, and manner restrictions on Arizonans' First Amendment right to consult with an attorney." *Mothershed*, 410 F.3d at 611 (upholding Arizona's rule on *pro hac vice* admissions against First Amendment challenge). Arizona may also institute reasonable time, place, and manner restrictions on the practice of law in Arizona. *See Paciulan*, 38 F. Supp. 2d at 1137 (the practice of law is protected speech under the First Amendment). Time, place, and manner regulations are reasonable "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 858 (9th Cir. 2004) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 79 (1989) (internal quotation marks omitted)).

"The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. Speech restrictions are content-neutral when they can be justified without reference to the content of the regulated speech." *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1043 (9th Cir. 2002) (internal quotation marks and citation omitted). Rule 34(f) is content-neutral because it establishes eligibility requirements for admission on motion without regard to the area of law the bar applicant intends to practice. In other words, that rule does not limit admission on motion to attorneys based on the attorney's area of practice or the attorney's actual or prospective clients. *See Mothershed*, 410 F.3d at 612 (finding Arizona's *pro hac vice* rules "content-neutral because they impose a generally applicable prohibition on the retention of out-of-state counsel without regard to the subject matter of the representation.").

A time, place, and manner regulation is narrowly tailored if the substantial governmental interest it serves "would be achieved less effectively absent the regulation and the regulation achieves its ends without . . . significantly restricting a substantial quantity of speech that does not create the same evils." *Galvin v. Hay*, 374 F.3d 739, 753 (9th Cir. 2004) (internal quotation marks omitted; alteration in original). The State of Arizona has a substantial interest in regulating the practice of law within the state. *See Bates*, 433 U.S. at 361 ("the regulation of the activities of the bar is at the core of the State's power to protect the public"). Rule 34(f) furthers that interest by "secur[ing] for [Arizona] attorneys who decide to relocate, the advantage of favorable terms of admission to another state's bar by offering that same advantage to attorneys of such other states that reciprocate." *See*

Schumacher v. Nix, 965 F.2d 1262, 1271-72 (3d Cir. 1992) (finding that bar admission rule prohibiting graduates from unaccredited law schools from sitting for Pennsylvania's bar examination, except such graduates who were members in good standing of a bar of a 'reciprocal state' and who had practiced law in that state for five years, was rationally related to the state's interest in securing mutual treatment for its attorneys seeking admission to the bar of another state). Finally, the Arizona rules offer several additional avenues through which attorneys may gain admission to the Arizona Bar. *See* Ariz. Sup. Ct. R. 34(a). Because Arizona's AOM Rule is a reasonable time, place, and manner regulation, Plaintiffs' claims that the rule violates the First Amendment because it discriminates on the basis of content and viewpoint, and because it is overly broad, fail as a matter of law. Defendants are entitled to summary judgment on this claim.

2. Prior Restraint on Speech

Plaintiffs further contend that Arizona's AOM Rule is a "prior restraint" on speech that "categorically excludes" attorneys from non-reciprocity states from Arizona courtrooms before they have a chance to appear. (Doc. 36 at 36.) "[P]rior restraint analysis is triggered by the existence of official discretion to deny the use of a given forum for First Amendment protected activity." *Jersey's All-Am. Sports Bar, Inc. v. Wash. State Liquor Control Bd.*, 55 F. Supp. 2d 1131, 1137 (W.D. Wash. 1999). Thus, a prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials. *Near v. State of Minn. ex rel Olson*, 283 U.S. 697, 713 (1931). For example, a prior restraint exists when a permit or license requirement places unchecked

discretion in the hands of a government official. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (citations omitted).

In support of their claim that Arizona's AOM Rule is an improper prior restraint on speech, Plaintiffs rely on several cases, including *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). These cases do not support a finding that Arizona's AOM Rule is an improper prior restraint on speech.[16] (Doc. 36 at 35; Doc. 69 at 29-31.) In *Legal Services*, the Court considered limitations on a non-profit corporation's distribution of Congressionally-appropriated funds to grantee organizations that provide free legal assistance to indigent clients, including clients seeking welfare benefits. *Id.* at 537. Congress prohibited the plaintiff corporation from funding any organization representing clients seeking to amend or challenge existing welfare law. *Id* at 538. The Court found that this funding restriction violated the First Amendment because it was "aimed at the suppression of ideas inimical to the Government's own interests." *Id.* at 549. The Court in *Legal Services* did not analyze the funding restriction at issue as a prior restraint on speech.

Moreover, even if Arizona's AOM Rule could be considered a restriction on an attorney's ability to express himself in the form of litigation, the AOM Rule contains objective standards that are amenable to judicial review and does not permit licensing decisions at the "whim" of the Arizona Supreme Court. *See* Ariz. R. Sup. Ct. 34(f); *Thomas v. Chicago Park Dist.*, 534 U.S. at 323 (restriction on free expression must "contain adequate standards to guide the official's discretion and render it subject to effective judicial review.") Furthermore, although the Supreme Court has held that litigation and the right to hire counsel may be entitled to First Amendment protection, *see Ill. State Bar Ass'n*, 389 U.S. at 221-22, the First Amendment is not an absolute bar to government regulation on free expression and association. *See NAACP v. Button*, 371 U.S. 415, 453 (1963).

Plaintiffs have not shown that Arizona's AOM Rule creates an improper prior restraint on speech as a matter of law and have not shown that there is a genuine dispute of material fact on that issue.[17] Accordingly, Defendants are entitled to summary judgment on Plaintiffs' claim that Arizona's AOM Rule is an improper prior restraint on speech in violation of the First Amendment. *See In re Gadda*, 2006 WL 322515, at *2 (9th Cir. Dec. 7, 2006) (finding that court's order precluding attorney from reapplying for admission to bar of the district court until he satisfied a key membership requirement — establishing that he was a member of the California Bar — was not an unconstitutional restraint on free speech); *Gallo v. U.S. Dist. Ct. for the Dist. of Ariz.*, 349 F.3d 1169, 1184 (9th Cir. 2003) (finding that a requirement that an applicant for admission to a district court's bar must be a member in good standing of the bar of the state's highest court was "well within the District Court's rule making power and . . . [did] not violate any constitutional right.") (internal citations omitted).

3. Freedom of Association

Plaintiffs further argue that Arizona's AOM Rule constitutes "compelled association that abridges the First Amendment right of Freedom of Association . . . ." (Doc. 36 at 36.) Plaintiffs argue that because Arizona's AOM Rule denies admission on motion to attorneys from non-reciprocal states, the rule abridges attorneys' freedom to associate with non-reciprocal states. Plaintiffs also assert that Arizona's AOM Rule

improperly compels attorneys to associate with reciprocal states. (Doc. 36 at 37.)

The First Amendment includes "a right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (citing cases). Plaintiffs have not cited authority to support their argument that limiting admission on motion to reciprocating states violates the First Amendment right of freedom of association. Indeed, under Ninth Circuit precedent, Arizona's AOM Rule does not violate the First Amendment right to association because Arizona provides other paths for gaining admission to the Arizona Bar. *See Gordon v. State Bar of Cal.*, 2010 WL 750115 at *1 (9th Cir. Mar. 5, 2010) (rejecting claim that California's requirement that a bar applicant must have attended an ABA-accredited school violated her First Amendment freedoms of association and non-association "because attending an ABA-accredited school [was] not the only path for qualifying for the California state bar examination . . . .") (citing *Besig v. Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1276 (9th Cir. 1982) (rejecting plaintiffs' First Amendment claim brought under non-association theory when membership in club may have been more favorable but was not mandatory to access desired facilities)).[18] Because there are no disputed issues of fact related to Plaintiffs' claim based on a violation of the First Amendment right of association, and Defendants are entitled to judgment as a matter of law, the Court grants summary judgment in Defendants' favor on this claim.

4. Right to Petition

Finally, Plaintiffs assert that Arizona's AOM

Rule violates the First Amendment right to petition "because it arbitrarily and irrationally assumes that the Plaintiffs, and all experienced lawyers from non-reciprocity states will file sham petitions for an anti-competitive purpose, and only file sham petitions for an anti-competitive purpose unless they take another entry level bar exam." (Doc. 36 at 38; Doc. 69 at 32 (citing *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (discussing the Supreme Court's prior decision in *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), in which the Court held that immunity from antitrust liability did not apply to "sham" activities).)

Plaintiffs' arguments are derived from cases discussing the Sherman Act, not the First Amendment. Furthermore, Plaintiffs do not provide any support for their allegations that the Arizona Supreme Court adopted Arizona's AOM Rule because it believed that attorneys from non-reciprocal states would violate rules of ethical and professional conduct. Plaintiffs do not explain how their allegations support a claim that Arizona's AOM Rule violates their right to petition.

The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." *U.S. Const. amend. I.* The right to petition extends to all departments of the government, including the executive department, the legislature, agencies, and the courts. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The Arizona AOM Rule limits admission on motion to attorneys licensed in states Arizona deems reciprocal. The AOM Rule, however, does not deny Plaintiffs "meaningful access to the courts" because they "may still bring their claims in [Arizona] courts as litigants; they simply may not bring claims as lawyers without first satisfying [Arizona's] rules for admission

to the state bar." *See Paciulan*, 38 F. Supp. 2d at 1138 (rejecting plaintiffs' claim that California's rule on admission *pro hac vice* violated their right of access to the court). In addition, Rule 34(a) provides several avenues for an attorney to gain admission to the Arizona Bar.

"[P]laintiffs have not alleged a denial of their First Amendment rights simply because they may not practice law in [Arizona] due to a failure to fulfill the requirements for admission to the State Bar." *See id.* Accordingly, Plaintiffs' First Amendment right-to-petition claim fails and the Court grants summary judgment in Defendants' favor on this claim.

C. Privileges and Immunities Clauses Claims

In Count II of the Second Amended Complaint, Plaintiffs assert a violation of the Privileges and Immunities Clauses of both Article IV, § 2 and of the Fourteenth Amendment. (Doc. 36 at 39.) Plaintiffs argue that Arizona's AOM Rule punishes nonresident attorneys from non-reciprocity states by forcing them to take the Arizona UBE although they have already passed another state's bar examination. Plaintiffs assert that Arizona's AOM Rule prevents attorneys from non-reciprocal states from pursuing professional pursuits and instituting legal actions in Arizona. (*Id.* at 41-42.)

As an initial matter, because Kolman and Girvin are Arizona residents, they have no claim under the Privileges and Immunities Clauses. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873) (the Privileges and Immunities Clauses provide "no security for the citizen of the state in which [the privileges] were claimed."); *United Bldg. and Const. Trades Council of Camden Cnty. and Vicinity v. Mayor and*

Council of the City of Camden, 465 U.S. 208, 217 (1984) (residents of New Jersey did not have a claim under the Privileges and Immunities Clauses based on ordinance by a New Jersey city requiring that at least 40% of employees and contractors working on city construction projects be city residents). Thus, the Court considers only Anderson's Privileges and Immunities Clauses claims because he is a Montana resident.

1. Article IV, § 2

Under the Privileges and Immunities Clause of Article IV, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[19] U.S. Const. art. IV, § 2. This clause seeks to prevent "a state from discriminating against citizens of other states in favor of its own." *Hague v. C.I.O.*, 307 U.S. 496, 511 (1939) (holding that to establish a claim under the Privileges and Immunities Clause, plaintiffs must allege discrimination on the basis of out-of-state residency). Article IV, § 2 protects an individual's right to "pursue a livelihood in a State other than his own." *Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 386 (1978). The Supreme Court has held that the practice of law is considered a "privilege" for purposes of the Privileges and Immunities Clause of Article IV, § 2. *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 276-78 (1985).

Here, Arizona's AOM Rule does not depend on a bar applicant's residency and is not a residency classification. *See* Ariz. R. Sup. Ct. 34(f). Rather, its application turns on whether the state or states in which an attorney has "been admitted by bar examination," or in which an attorney has "been admitted to and engaged in the active practice of law for at least five years," allow reciprocity for licensed

Arizona attorneys. Ariz. R. Sup. Ct. 34(f)(1)(A). This rule applies equally to Arizona residents and non-residents who seek admission to the Arizona Bar on motion.

In the cases that Plaintiffs cite in support of their claim, the courts held that the Privileges and Immunities Clause prohibits discrimination against out-of-state applicants for bar admission who met all of the necessary qualifications for bar membership except for residence in the state. *See Sup. Ct, of Va. v. Friedman*, 487 U.S. 59 (1988); *Piper*, 470 U.S. 274. These cases are distinguishable because the Court was analyzing rules with residency requirements. In *Piper*, the challenged rule included a residency requirement for admission to the bar. 470 U.S. at 277 n.1 (finding that New Hampshire Supreme Court Rule excluding non-residents from the bar violated the Privileges and Immunities Clause of Article IV, § 2). In *Friedman*, the Court found that Virginia's residency requirement for admission to the state's bar without examination violated the Privileges and Immunities Clause.[20] *Id.* at 65-66. Here, contrary to Plaintiffs' allegation (Doc. 36 at 8-9), Arizona's AOM Rule does not require Arizona residency as a prerequisite to admission on motion to the Arizona Bar. *See* Ariz. R. Sup. Ct. 34(f)(1)(A)-(H). The rule applies equally to residents and non-residents who wish to apply for admission on motion. Thus, the rule does not implicate Article IV, § 2.

Relying on *Hillside Dairy v. Lyons*, 539 U.S. 59 (2003), Plaintiffs further argue that discrimination on the basis of out-of-state residency is not a necessary element for a violation of the Privileges and Immunities Clause. (Doc. 69 at 9-10), As Defendants argue, Plaintiffs misinterpret *Hillside Dairy*. (Doc. 72 at 9.) In *Hillside Dairy*, the Court did not hold that discrimination on the basis of out-of-state residency is

no longer required to establish a Privileges and Immunities Clause claim. Rather, the Court found that a claim for a violation under the Privileges and Immunities Clause cannot be dismissed merely because the challenged law does not discriminate against out-of-state residents on its face. *Id.* at 67.

Here, Arizona's AOM Rule does not discriminate against out-of-state citizens on its face or as applied. Indeed, in a similar challenge to a reciprocity provision in an admission on motion rule, the Fourth Circuit concluded that the reciprocity provision did not violate Article IV, § 2 noting that the challenged state rule imposed the same obligations on its citizens that it imposed on citizens of other states. *See Hawkins v. Moss*, 503 F.2d 1171, 1180 (4th Cir. 1974) (upholding South Carolina Supreme Court rule allowing an attorney licensed in another state to be admitted on motion to the South Carolina Bar, provided the other state granted reciprocal rights to attorneys admitted to practice in South Carolina). Thus, the Court concludes that Arizona's AOM does not implicate the Privileges and Immunities Clause of Article IV, § 2 and Defendants are entitled to summary judgment on this claim.

2. Fourteenth Amendment Privileges and Immunities Clause

Plaintiffs also assert that Arizona's AOM Rule interferes with their right to interstate travel to pursue their profession in violation of the Privileges and Immunities Clause of the Fourteenth Amendment. (Doc. 36 at 39, 41; Doc. 69 at 18.) This Clause has traditionally protected only those rights accruing from United States citizenship. *See e.g. Slaughter-House Cases*, 83 U.S. at 77 (1872).

The Supreme Court did not specifically identify these privileges and immunities in the *Slaughter-House Cases*, but included among them "some which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.* "The courts and legal commentators have interpreted the decision as rendering the Clause essentially nugatory." *Paciulan*, 229 F.3d at 1229 (citing Robert H. Bork, *The Tempting of America 180* (1990) ("[T]he privileges and immunities clause . . . has remained the cadaver that it was left by the *Slaughter–House Cases*."); Laurence H. Tribe, American Constitutional Law 556 (2d ed. 1988) ("The S*laughter–House* definition of national rights renders the fourteenth amendment's privileges or immunities clause technically superfluous[.]"); Kevin Christopher Newsom, *Setting Incorporationism Straight*: *A Reinterpretation of the Slaughter–House Cases*, 109 Yale L.J. 643, 646 (2000) ("In contemporary constitutional discourse, *Slaughter–House* stands for one simple truth: that the Privileges or Immunities Clause is utterly incapable of performing any real work in the protection of individual rights against state interference, and that any argument premised on the Clause is therefore a constitutional non-starter.")).

In *Saenz v. Roe*, however, the Supreme Court applied the Privileges and Immunities Clause in a right-to-travel context to hold that travelers deciding to become permanent residents of a new state have "the right to be treated like other citizens of that State." 526 U.S. 489, 500-07 (1999). Plaintiffs rely on *Saenz* in support of their assertion that Arizona's AOM Rule violates that the Privileges and Immunities Clause of the Fourteenth Amendment by restricting travel. (Doc. 36 at 41, Doc. 69 at 12.)

Plaintiffs' reliance on *Saenz* is misplaced because Arizona's AOM Rule treats Plaintiffs like residents of

Arizona who seek admission on motion. In *Saenz*, California imposed a durational residency requirement on welfare benefits by limiting those benefits during a recipient's first year of California residency to the amount that the recipient would have received in the state of his prior residence. *Saenz*, 526 U.S. at 1519. Unlike *Saenz*, Arizona's AOM Rule does not impose a durational residency requirement on admission to the Arizona Bar. Additionally, Arizona's AOM Rule promotes travel by easing admission requirements for some out-of-state attorneys. Therefore, Plaintiffs' Fourteenth Amendment Privileges and Immunities Clause claim fails and the Court enters summary judgment in Defendants' favor on this claim.

D. Dormant Commerce Clause

In Count III of the Second Amended Complaint, Plaintiffs assert that Arizona's AOM Rule violates the Dormant Commerce Clause because it unreasonably burdens interstate commerce by disqualifying "certain experienced attorneys from admission on motion privileges . . . depending on prior state licensing." (Doc. 36 at 42-44.) The Dormant Commerce Clause prohibits "economic protectionism — that is regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

In this case, the burden to show that the challenged rule burdens interstate commerce rests with Plaintiffs. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (party challenging validity of rule bears of burden of showing that it discriminates against interstate commerce). Plaintiffs must show "that the rule favors residents vis-a-vis nonresidents, either on its face or in its practical effects." *Shapiro v. Cooke*, 552

F. Supp. 581, 588 (D.C.N.Y. 1982). When a state regulation promotes a legitimate local public interest that has only incidental effects on commerce, the regulation is constitutional unless the burden on commerce is excessive compared to the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970),

As Defendants argue, courts have found that states have a legitimate, substantial interest in regulating the practice of law for public protection purposes. (Doc. 54 at 20 (citing *Hawkins*, 503 F.2d at 1175). The Supreme Court has recognized "the traditional authority of state courts to control who may be admitted to practice before them." *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979).[21] Additionally, courts have recognized that "[i]f a state may constitutionally require all applicants to take the examination, the Commerce Clause is not offended by a rule which permits some, but not all, out-of-state attorneys to be admitted on waiver of the examination." *Shapiro v. Cooke*, 552 F. Supp. 581, 588 (D.C.N.Y. 1982).

Moreover, the existence of alternative means for admission to the bar, such as the Arizona UBE, undermines Plaintiffs' Dormant Commerce Clause claim. *See Scariano v. Justices of Sup. Ct. of State of Ind.*, 38 F.3d 920, 927 (7th Cir. 1994) ("The requirement that an applicant sit for the bar exam can hardly be deemed discriminatory when the vast majority of Indiana attorneys have taken the exam. In the past, this court has found the exam alternative significant under the Commerce Clause.").

Plaintiffs further argue that Arizona's AOM Rule burdens commerce by requiring attorneys licensed in non-reciprocity states take an "entry level bar" examination. (Doc. 36 at 43.) In support of this argument, Plaintiffs cite *Wiesmueller v. Kosobucki*, 571 F.3d 699 (7th Cir. 2009). In *Wiesmueller*, the court

found that the Wisconsin Supreme Court rule allowing graduates of the two state law schools to be admitted to practice law in Wisconsin without taking the bar examination was subject to scrutiny under the Commerce Clause. *Id.* at 707. The court found that "[i]t is enough that an aspiring lawyer's decision about where to study, and therefore, where to live as a student, can be influenced by the diploma privilege to bring this case at least within the outer bounds of the commerce clause; because the movement of persons across state lines, for whatever purpose, is a form of interstate commerce." *Id.* at 705. The Seventh Circuit remanded the case to the district court to determine whether the diploma privilege violated the Commerce Clause.

Unlike the rule at issue in *Wiesmueller*, Arizona's AOM Rule applies equally to residents of Arizona and non-residents and does not burden interstate commerce. Rather, Arizona's AOM Rule is a "means of making available reciprocal admissions to the Arizona Bar" and it promotes interstate commerce by easing the admission requirements for some out-of-state attorneys. *See Golfarb v. Sup. Ct. of Va.*, 766 F.2d. 859, 863 (4th Cir. 1985) (rejecting commerce clause challenge to Virginia rule admitting only those out-of-state attorneys to the bar without examination who intended to practice full time in Virginia). Thus, Arizona's AOM Rule encourages cross-state or multi-state practice and does not place an undue burden on interstate commerce. *See Shapiro*, 552 F. Supp. at 588 (noting that New York's admission-on-motion rule "encourages and enhances" interstate commerce by waiving the bar examination for qualified out-of-state attorneys).

Arizona's AOM Rule also effectuates a legitimate local public interest of encouraging other

states to admit Arizona attorneys on similar terms of reciprocal admission and therefore overcomes any minimal burden on interstate commerce that might exist. *See* (DSOF ¶ 7); *Schumacher*, 965 F.2d at 1270 (finding that promoting reciprocal bar admission on motion a legitimate interest). Therefore, Plaintiffs' Dormant Commerce Clause claim fails and the Court grants Defendants summary judgment on this claim.[22]

E. Equal Protection Claim under the Fourteenth Amendment

Count IV of the Second Amended Complaint alleges that Arizona's "hop-scotch licensing classifications violate the Equal Protection Clause." (Doc. 36 at 44-45; Doc. 70 at 8.) In support of this claim, Plaintiffs point to the Arizona Supreme Court's exceptions to the standard examination and admission process, including (1) Rule 38(a) *pro hac vice* admission, (2) Rule 38(b) "certificate of registration" for foreign legal consultants, (3) Rule 38(c) admission without examination for full-time law school faculty members, (4) Rule 38(f) admission for attorneys working for approved legal services organizations to practice in Arizona, and (5) Rule 38(h) admission for in-house corporate counsel. (Doc. 36 at 44-45; Doc. 70 at 8.) Plaintiffs assert that these rules on admission are illogical because, although Plaintiffs are ineligible for admission on motion, they theoretically could be qualified to practice law in Arizona under Rules 38(c), 38(f), 38(g), and 38(h). (Doc. 36 at 45.) Plaintiffs appear to argue that because Arizona provides a variety of avenues for attorney admission to the Arizona Bar, its AOM Rule does not serve a legitimate interest. (*Id.*; Doc. 70 at 7-9.)

When evaluating claims under the Equal

Protection Clause, the court must first determine the appropriate level of scrutiny to apply to the challenged rule. When a law disadvantages a suspect class or impinges on a "fundamental right," the court applies the strict scrutiny test. In the absence of such circumstances, the court analyzes the rule under a rational basis test. *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985). Plaintiffs correctly state that rules that infringe on fundamental rights are subject to strict scrutiny (Doc. 36 at 44), but they have not shown infringement on a fundamental right or discrimination against a suspect class that would trigger that standard of review in this case. *See Giannini*, 911 F.2d at 358 (9th Cir. 1990) (finding that "the challenged bar examination neither impairs a fundamental right nor discriminates against a suspect class").

In *Piper*, the Supreme Court held that the right to practice law is a "fundamental right" for purposes of the Privileges and Immunities Clause. 470 U.S. at 1276-78. The holding in *Piper*, however, is limited to the Privileges and Immunities Clause and does not apply in the context of an Equal Protection Clause claim. *See Lupert*, 761 F.2d at 1327 n.2; *Giannini*, 911 F.2d at 359 (there is no fundamental right to practice law or to take a bar examination under the Fourteenth Amendment Equal Protection Clause). Additionally, Plaintiffs do not define any "suspect class" to which they belong and lawyers are not members of a "suspect class." *See Giannini*, 911 F.2d at 359 ("lawyers are not a suspect class"); *Maynard v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 701 F. Supp. 738, 742 (C.D. Cal. 1988) (finding that there is no legal support for the contention that federal legal practitioners should be deemed a suspect class). Accordingly, the proper standard of review is the rational basis test. *See Schware v. Bd. of Exam'rs*, 353 U.S. 232, 238-39 (1957). The Supreme Court has been

especially deferential to legislative classifications in the context of challenges to the state regulation of licensed professions. *See, e.g., Watson v. Maryland*, 218 U.S. 173 (1910); *Ohralik v. State Bar Ass'n*, 436 U.S. 447 (1978). Here, as Defendants assert, Arizona's AOM Rule is rationally related to Arizona's legitimate interest in regulating its bar and seeking to ensure that attorneys licensed in Arizona will be treated equally in states having reciprocity with Arizona. (DSOF ¶ 7); *see Schumacher*, 965 F.2d at 1270 (finding that promoting reciprocal bar admission on motion is a legitimate interest for purposes of the Equal Protection Clause); *Shapiro*, 552 F.2d at 588 n.13; *Hawkins v. Moss*, 503 F.2d at 1178 ("Reciprocal statutes or regulations, it has been uniformly held, are designed to meet a legitimate state goal and are related to a legitimate state interest. For this reason, they have been found invulnerable to constitutional attack on equal protection grounds.").

Plaintiffs do not explain how Arizona's exceptions to the standard examination and admission procedures provided in Rule 38, support their claim that Arizona's AOM Rule violates the Equal Protection Clause. (Doc. 36 at 45.) Thus, there are no disputed facts regarding this claim and Defendants are entitled to judgment as a matter of law. Therefore, the Court enters summary judgment in Defendants' favor on Plaintiffs' claim under the Equal Protection Clause.

F. Fourteenth Amendment Due Process

In Count V of the Second Amended Complaint, Plaintiffs allege substantive and procedural due process violations. (Doc. 36 at 45.) Plaintiffs' allegations in support of their due process claims are difficult to decipher. For example, Plaintiffs allege that "[t]he testing process for sister-state attorneys is a taboo

subject, shrouded in secrecy, wrapped in a riddle, [and] surrounded by a conundrum in large part because of a gentleman's club agreement." (Doc. 36 at 46.) Even viewed in the light most favorable to Plaintiffs, these allegations do not state a claim for relief. *See* Rule 12(b)(6). The Court nonetheless addresses Plaintiffs' claims.

1. Substantive Due Process

Plaintiffs argue that Defendants' reliance on Arizona's UBE to test already licensed attorneys violates the Due Process Clause because the UBE does not conform to standardized testing requirements. (Doc. 36 at 37 n.31; Doc. 70 at 9.) In support of this argument, Plaintiffs refer to *The Standards for Educational and Psychological Testing* (1999), published by the American Educational Research Association, American Psychological Association, and the National Council on Measurement in Education. Defendants respond that this is a policy argument that does not support a due process claim.

Each state is free to prescribe the qualifications for admission to practice for those lawyers who appear in its courts. *Leis*, 439 U.S. at 442. Plaintiffs do not explain why or how the *Standards for Educational and Psychological Testing* are applicable to the Arizona UBE or how Arizona's alleged failure to comply with those standards gives rise to a due process claim. Further, the Ninth Circuit has held that a "state need not use a professionally validated examination." *Giannini*, 911 F.2d at 354, 358. Accordingly, Plaintiffs have not shown a substantive due process violation.

Moreover, Plaintiffs do not allege that Defendants participated in drafting Arizona's UBE and are thus responsible for any failure to conform to

certain testing standards. Because a government official is only liable for his own conduct, and Plaintiffs have not presented any evidence that Defendants acted or failed to act unconstitutionally, Defendants are entitled to summary judgment on this claim. *See Simmons*, 609 F.3d at 1020-21 (granting summary judgment in favor of defendants on plaintiff's claims that defendants were liable for failing to supervise when there was no evidence that defendants themselves engaged in unconstitutional conduct).

2. Procedural Due Process

Girvin alleges that she was denied procedural due process because she was not provided notice of her "MBE scores or subjective (MEE) scores in each subject." (Doc. 36 at 47.) She further alleges that Arizona's grading policy is secret, the results of Arizona's UBE are secret, and she was not provided a meaningful opportunity for judicial review of her examination results. (Doc. 36 at 47.) The Court "assume[s] that the due process clause requires the state to employ fair procedures in processing applications for admission to the bar, and therefore, that an applicant who has failed the bar examination is entitled to some procedural protections." *See Whitfield v. Ill. Bd. of Law Exam'rs*, 504 F.2d 474, 477-78 (7th Cir. 1974). However, there are no genuine issues of disputed fact regarding Girvin's claim and it fails as a matter of law.

Contrary to her assertion, the rules governing admission to the Arizona Bar provide that an unsuccessful applicant may petition the Arizona Supreme Court for review of a grade assessed on the bar exam. *See* Ariz. R. Sup. Ct. 35(c)(4). Although Girvin did not petition the Arizona Supreme Court for

review, she had a "full and fair opportunity" to do so. (DSOF ¶ 28; Doc. 70, Ex. 1 ¶ 25-31); *see Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481 (1982) (a "full and fair opportunity" means that the "state proceedings need do no more than satisfy the minimal procedural requirements for the Fourteenth Amendment's Due Process Clause."). Additionally, under the rules governing admission to the Arizona Bar, Girvin could retake Arizona's UBE two more times without approval from the Committee on Examination. *See* Ariz. R. Sup. Ct. 35(a)(1).

Considering Girvin's opportunity to challenge her grade before the Arizona Supreme Court and to retake the Arizona UBE, the requested procedures — "notice of her MBE scores" and of her "subjective scores (MEE) in each subject" or further information about the grading process — were not constitutionally required. *See Brewer v. Wegmann*, 691 F.2d 216, 217-18 (5th Cir. 1982) (finding that bar-examination procedure that included destruction of examinations after grading thereby denying applicant an opportunity review his own examination or obtain review of the fairness of the grade did not violate due process because applicant could retake the examination). Several courts have rejected due process challenges to the bar examination processes when applicants are permitted to retake the examination. *See Tyler v. Vickery*, 517 F.2d 1089, 1103-05 (5th Cir. 1975) (holding that due process is not offended by a bar-examination procedure that does not allow failing applicants to obtain review of the determination that he failed, "primarily because an unqualified right to retake the examination at its next regularly scheduled administration satisfies both the purpose of a hearing and affords it protection"); *Singleton v. La. State Bar Ass'n*, 413 F. Supp. 1092, 1098-1100 (E.D. La. 1976) (finding that destruction of

examination papers and the lack of a procedure for review of a failing paper did not offend due process); *Whitfield*, 504 F.2d at 477-78 (7th Cir. 1974) (due process does not require that a bar applicant be permitted to see his examination when he had a right to retake it because "reexamination provides an adequate means of exposing grading errors."). The Court therefore finds that Girvin was provided with procedural due process and grants summary judgment in favor of Defendants on Plaintiff Girvin's procedural due process claim.

G. Sixth Cause of Action — "Violation of 42 U.S.C. § 1983"

Count VI of the Second Amended Complaint incorporates the allegations contained in the preceding counts and asserts a "violation of 42 U.S.C. § 1983." (Doc. 36 at 49.) That statute, however, merely provides a private cause of action and is not itself an independent source of substantive constitutional rights. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979). Accordingly, the Court will grant summary judgment in favor of Defendants on Count VI to the extent that is alleges an independent violation of § 1983.

H. Conclusion Regarding Summary Judgment on Plaintiffs' Claims

As set forth above, the Court finds that Plaintiffs have failed to establish that there are any genuine issues of material fact regarding their claims and that Defendants are entitled to judgment as a matter of law. Therefore, the Court grants summary judgment in Defendants' favor on (1) Girvin's First Amendment retaliation claim, (2) Plaintiffs' claims that the AOM

Rule facially violates their First Amendment rights to free speech, association, and to petition in a public forum, (3) Plaintiffs' Privileges and Immunities Clauses claims, (4) Plaintiffs' Dormant Commerce Clause claims, (5) Plaintiffs' Equal Protection Clause claims, (6) Plaintiffs' due process claims, and (7) Plaintiffs' claim for a violation of 42 U.S.C. § 1983.

I. Declaratory Judgment

Finally, Plaintiffs request declaratory judgment under 28 U.S.C. § 2201. (Doc. 36 at 49.) As set forth above, Plaintiffs have not established a violation of any substantive right. Because a claim for declaratory relief cannot stand on its own, the Court grants Defendants summary judgment on Plaintiffs' claim for declaratory relief. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010) (affirming dismissal of claims for declaratory relief based on dismissal of claims for substantive relief); *Hoeck v. City of Portland*, 57 F.3d 781, 787 (9th Cir. 1995) (having "determined that the City did not violation [plaintiff's] substantive due process rights, [the court] find[s] that [plaintiff's] claim for declaratory relief is likewise without merit.").

VII. Motion to Join "John Doe" Plaintiff

On August 6, 2013, Plaintiffs filed a motion to join a John Doe plaintiff. (Doc. 93.) The motion seeks to join a party and to add claims that Rule 34(f)(1)(A), as amended effective July 1, 2013, is unconstitutional. John Doe purports to be an attorney admitted to the Florida Bar by examination who has practiced law in Florida for over twenty years (Doc. 93, attachment 1 at 2), and who has been admitted on motion to the Texas

and Tennessee Bars. (*Id.*, attachment 1 at 3.) Plaintiffs assert that under Rule 34, as amended, even though Texas and Tennessee have reciprocity with Arizona, John Doe is ineligible for admission on motion under Rule 34 because he has not practiced in either Texas or Tennessee for five of the last seven years.

A. Amendment of Pleadings

Because Plaintiffs have previously amended their complaint, and Defendants do not consent to a further amendment, Plaintiffs need leave of court to amend the Second Amended Complaint. *See* Fed. R. Civ. P. 15(a); *Desert Empire Bank v. Ins. Co.*, 623 F.2d 1371, 1374 (9th Cir. 1980) (noting that Rule 15 standards are implicated by a motion to amend pleadings to add a new party). As indicated in the Court's prior order, Plaintiffs must comply with Local Rule of Civil Procedure Local 15.1. (Doc. 18.) This rule provides, in relevant part, that:

> A party who moves for leave to amend a pleading . . . must attach a copy of the proposed amended pleading as an exhibit to the motion, which must indicate in what respect it differs from the pleading which it amends, by bracketing or striking through the text to be deleted and underlining the text to be added. The proposed amended pleading is not to incorporate by reference any part of the preceding pleading, including exhibits.
>
> LRCiv 15.1(a).

Although Plaintiffs' motion discusses John Doe and the claims he wishes to assert, Plaintiffs have not

attached a proposed third amended complaint as an exhibit to their motion. In view of Plaintiffs' failure to comply with Local Rule 15.1(a), the Court will deny their motion for leave to amend.

Moreover, even if Plaintiffs had complied with Rule 15.1(a), the Court would deny leave to amend the complaint a third time. Rule 15 provides that the court should freely grant leave to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). The court should permit amendment in the absence of undue delay, bad faith or dilatory motive, prejudice to the opposing party, and futility of the amendment. *Foman v. United States*, 371 U.S. 178 (1962). In *Howey v. United States*, 481 F.2d 1187 (9th Cir. 1973), the Ninth Circuit considered these factors, and concluded that they are not of equal weight. Specifically, the court noted that, standing alone, even lengthy delay is an insufficient ground for denial of leave to amend. "Only where prejudice is shown or the movant acts in bad faith are courts protecting the judicial system or other litigants when they deny leave to amend a pleading." *Id.* at 1191; *see also Hanson v. Hunt Oil Co.*, 398 F.2d 578, 581-82 (8th Cir. 1968).

Here, because John Doe's claims are based on July 1, 2013 amendments to Arizona's AOM Rule, and the motion to amend was filed one month after the effective date of that amendment, there is no evidence of undue delay on Plaintiffs' part. However, permitting Plaintiffs leave to file a third amended complaint at this point in the proceedings would prejudice Defendants. This matter has been pending for nearly a year and Plaintiffs have already amended their complaint twice. As discussed in this Order, the parties have filed and exhaustively briefed cross motions for summary judgment and several other motions, without a case management order or any discovery. Therefore, the

parties apparently consider this matter suitable for resolution without discovery. The procedural posture of this case weighs in favor of denying Plaintiffs' motion to amend. *See Matsumoto v. Republic Ins. Co.*, 792 F.2d 869, 872 (9th Cir. 1986) (holding that the district court did not abuse its discretion in denying motion to amend when discovery had already commenced and defendant's motion for summary judgment was pending).

B. Same Transaction or Occurrence

Plaintiffs now seek leave to add an unidentified plaintiff to assert claims related to a July 1, 2013 amendment to Arizona's AOM Rule. Although the AOM Rule, as it existed before the July 1, 2013 amendment, is the subject of the Second Amended Complaint, John Doe's challenges to the AOM Rule as it now exists are unique to his situation. In his declaration in support of the motion for joinder, John Doe states that his "situation differs from the other plaintiffs." (Doc. 93, attachment 1 at 2.) John Doe asserts that "the clerk of admissions for Arizona attorney licensing," told him that he does not qualify for admission on motion under the "new Rule because he [has] not worked in Texas or Tennessee for five of the last seven years." (Doc. 93, attachment 1 at 3.) John Doe does not indicate whether he formally applied for admission to the Arizona Bar on motion.

John Doe's challenges to amended Rule 34(f)(1)(A)(ii) do not arise out of the same transaction or occurrences that are claimed by Plaintiffs in the Second Amended Complaint. *See* Fed. R. Civ. P. 20(a)(1)(A) (providing that "[p]ersons may join in one action as plaintiffs if . . . they assert any right to relief . . . with respect to or arising out of the same transaction,

occurrence, or series of transactions or occurrences;" and there is a common question of law or fact.); *see also Desert Empire*, 623 F.2d at 1374 (noting that Rule 20 standards are implicated by a motion to amend pleadings to add a new party).

Additionally, John Doe's assertion that the amended rule is unconstitutional is contrary to Plaintiff Kolman's current position that he should be admitted to the Arizona Bar under the amended rule. Thus, the proposed claims fail the commonality requirement of Rule 20. *See* Fed. R. Civ. P. 20(a)(1)(A) and (B). To the extent that John Doe seeks to join in the claims asserted in the Second Amended Complaint, amendment would be futile because, as set forth in this Order, those claims fail as a matter of law.

Finally, the addition of a "John Doe" plaintiff on the facts of this case is inconsistent with Rule 10(a), which requires that a complaint name all parties. Fed. R. Civ. P. 10(a); *see also In re Zicam Cold Remedy Mktg. Sales Practices, and Prod. Liab. Litig.*, 2010 WL 2308388, at *2 (D. Ariz. Jun. 9, 2010) (denying leave to amend to add a John Doe defendant based, in part, on Rule 10(a)); *see also S. Methodist Univ. Ass'n v. Wynne & Jaffe*, 599 F.2d 707, 712-13 (5th Cir. 1979) (discussing that courts have allowed plaintiffs to use fictitious names when the issues involve sensitive matters of a "highly personal nature, such as birth control, abortion, homosexuality or the welfare rights of illegitimate children or abandoned families . . . .).

VIII. Conclusion

As set forth above, the Court enters summary judgment in Defendants' favor. Because Defendants' Motion for Summary Judgment (Doc. 54) and Defendants' Motion to Dismiss (Doc. 52) assert nearly

identical arguments, the Court denies the motion to dismiss as moot.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Hearing (Doc. 84) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Requests to Take Judicial Notice (Docs. 87 and 88) are **GRANTED** to the extent that the Court takes judicial notice that the Supreme Court of Montana adopted the UBE in July 2013.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (Doc. 54) is **GRANTED** and that the Clerk of Court shall enter judgment in favor of Defendants and against Plaintiffs and shall terminate this action.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. 28) is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (Doc. 52) is **DENIED** as moot.

IT IS FURTHER ORDERED that the Motion for "Order Admitting [Kolman] Forthwith to the Bar of the Arizona Supreme Court Based on a Recent Change in the Challenged Arizona Supreme Court Rule" (Doc. 90) is **DENIED** for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to Join Party (Doc. 93) is **DENIED.**

Dated this 19th day of September, 2013.

Footnotes

[1] In their motion to dismiss, Defendants argue that the Second Amended Complaint should be dismissed for violating Rule 8, which requires a "short and plain statement" of the claims that is "simple, concise, and direct." (Doc. 52 at 24 (citing Fed. R. Civ.

P. 8(a)(1) and (2)).) The Second Amended Complaint — which is comprised of ninety-seven paragraphs, forty-six footnotes, and forty-nine pages of legal and policy arguments, conclusory allegations, and miscellaneous irrelevant discussions — does notcomply with Rule 8 and the Court could dismiss it on that basis. However, considering the procedural posture of the case, and in the interest of judicial economy, the Courtdeclines to dismiss the Second Amended Complaint for violating Rule 8 and will address the merits of the parties' arguments.

[2] Plaintiffs have requested oral argument on the dispositive motions. (Doc. 84.) Because the parties have exhaustively briefed the pending motions with hundreds of pages of argument in numerous filings (Docs. 28, 52, 53-1, 54, 54-1, 69, 70, 70-1, 71, and 72), the Court finds that oral argument is not necessary to resolve the pending motions and denies Plaintiffs' request. *See Mahon v. Credit Bur. of Placer County, Inc.*, 171 F.3d 1197,1200 (9th Cir. 1999) (explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily, oral argument is not required).

[3] Plaintiffs filed their Complaint on August 13, 2012 (Doc. 1), an Amended Complaint on October 15, 2012 (Doc. 14), and the Second Amended Complaint on December 21, 2012. (Doc. 36.) Plaintiffs filed their motion for summary judgment on December 6, 2012 (Doc. 28), *before* filing their Second Amended Complaint, and therefore that motion was technically mooted by that complaint. Plaintiffs, however, didnot file an additional motion for summary judgment, nor did they seek leave to apply the arguments in their motion for summary judgment to the claims in their Second Amended Complaint. Defendants, nonetheless, filed a response to Plaintiffs' motion for summary judgment,

which they combined with a cross motion for summary judgment. (Doc. 54.)Plaintiffs filed a reply in support of their motion for summary judgment consolidated with their opposition to Defendants' motion for summary judgment and motion todismiss. (Doc. 69.) Plaintiffs also filed a separate opposition to Defendants' motion for summary judgment and motion to dismiss. (Doc. 70.) Although the procedural history is convoluted, the parties' motions for summary judgment have been fully briefed and theCourt has considered the parties' arguments.

[4] Plaintiffs attached to their motion for summary judgment the declarations of Jeffrey Russell, Girvin, Anderson, and Kolman (Doc. 28, Exs. 1-4). AlthoughPlaintiffs did not comply with the Local Rules' requirement that a party file a statement of facts "separate from the motion and memorandum," LRCiv. 56.1, the Court will not deny Plaintiffs' motion on that basis.

[5] A "List of Reciprocal and Non-Reciprocal Jurisdictions with Arizona for Admission on Motion" is located at www.azcourts.gov.

[6] Arizona adopted the Uniform Bar Examination (UBE) and first administered the UBE in July 2012. *See* www.ncbex.org. The UBE consists of the Multistate Essay Examination (MEE), the Multistate Bar Examination (MBE), and two Multistate Performance Test (MPT) tasks. *Id.*

[7] Citations to "DSOF" are to Defendants' Statement of Facts in Support of their Motion for Summary Judgment, located at exhibit 1 to Defendants' Motion forSummary Judgment. (Doc. 54, Ex. 1.) Exhibit A to Defendants' Statement of Facts is the Declaration of Emily Holliday, an employee of the Administrative Office of the Courts, and manager of Attorney Admissions Unit, Certification and Licensing.

(*Id.*)Plaintiffs object that paragraphs one through five of Defendants' statement of facts are immaterial and irrelevant. Because these paragraphs discuss procedures for admission to the Arizona Bar, which are relevant to the issues in this case, Plaintiffs' objections are unfounded. (Doc. 70, Ex. 1 at 4.)

[8] The 2010 amendments to Rule 56 did not alter the standard for granting summary judgment and, therefore, cases applying the prior version of Rule 56 remain applicable. *See* Fed. R. Civ. P. 56 advisory committee's note (2010 amendments).

[9] In *Parker v. Brown*, the Supreme Court held that the Sherman Act does not apply to certain categories of state action. *Id.* at 608 (citing *Parker v. Brown*, 317 U.S.341, 352 (1943)). The Supreme Court later held that one of the exempted categories of state action is the regulation of attorneys by a state supreme court. *Id.* (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 359 (1977)).

[10] In his motion for an order directing the Arizona Supreme Court to admithim to the Arizona Bar (Doc. 90), Kolman argues that he has completed the requirementsfor admission on motion and that he is eligible for admission on motion under Rule 34(f), as amended July 1, 2013, because he has been admitted to practice in the District of Columbia, which has reciprocity with Arizona. Kolman asks this Court to order the Arizona Supreme Court to immediately admit him to the Arizona Bar without requiring him to take further action.

[11] Kolman also seeks immediate admission to the bar of the United States District Court for the District of Arizona. (Doc. 90 at 4.) Kolman must comply with Local Rule of Civil Procedure 83.1 to be admitted to the bar of this Court. *See* LRCiv 83.1(a). The Court denies Kolman's request that it "immediately grant" him

admission to the District Court without requiring him to follow the procedure set forth in Local Rule 83.1.

[12] Defendants also argue that Girvin and Kolman lack standing to raise Privileges and Immunities and Commerce Clause claims because they are residents of Arizona. (Doc. 54 at 10.) The Court addresses Plaintiffs' ability to pursue these claims in Section VI.C. Defendants do not challenge Girvin's standing to assert her retaliationclaim, which the Court addresses in Section VI.A. (Doc. 54 at 9; Doc. 36 at 8.)

[13] The Court could dismiss these claims under Rule 12(b)(1) or (b)(6), orenter summary judgment under Rule 56. Because Defendants assert the same arguments in their motion to dismiss and their motion for summary judgment, and because Plaintiffs have also filed a motion for summary judgment, the Court will apply the summary judgment standard and rule on that basis.

[14] Pursuant to its prior order striking paragraph 73 of the Second Amended Complaint, (Doc. 83), the Court will not consider the allegations in that paragraph.

[15] Under Arizona law, only the Arizona Supreme Court, not the Committee of Bar Examiners, has the authority to grant or deny admission to the bar. Ariz. R. Sup. Ct. 31. An applicant aggrieved by a decision of that Committee, may seek review in the Arizona Supreme Court. Ariz. R. Sup.Ct. 36(g)(1). (Doc. 54 at 16) Defendants arguethat because Girvin did not petition the Arizona Supreme Court for review of the Committee of Bar Examiners' assignment of a failing grade, the court could not have retaliated against her, and therefore no deprivation of a constitutional right has taken place. (Doc. 54 at 16 (citing *Giannini v. State Bar of Cal.*, 206 Fed. Appx. 672 (9th Cir. 2006) (denying First Amendment retaliation claim alleging state bar

assigned him a failing grade for advocating in favor of admission on motion without reciprocity because he did not petition the state supreme court for review).) Because the Court has determined that Girvin's retaliation claim fails on other grounds, the Court does not resolve this issue.

[16] *See* Doc. 69 at 20-25 (citing e.g., *Citizens United*, 558 U.S. at 337 ("theFirst Amendment does not allow political speech restrictions based on a speaker's corporate identity"); *Consol. Edison.*, 447 U.S. at 544 (suppression of inserts discussing controversial public policy issues in public utility's monthly bills infringed on the First Amendment); *Romer v. Evans*, 517 U.S. 620, 627-636 (1996) (amendment to Colorado Constitution that prohibited all state or local government action designed to protect homosexuals from discrimination violated the Equal Protection Clause)).

[17] Although Defendants did not specifically address Plaintiffs' prior-restraintargument, they addressed Plaintiffs' First Amendment claims collectively and moved for summary judgment on all of Plaintiffs' First Amendment claims.

[18] Similarly, in *Paciulan*, the court found that a California rule preventing residents licensed to practice law in other states from gaining *pro hac vice* status in California courts did not violate the First Amendment by preventing them from freely associating with clients and other attorneys. 229 F.3d. at 1230. The court found that under the plaintiffs' "sweeping formulation of the First Amendment, any regulation of bar membership would be deemed unconstitutional." *Id.*

[19] Under this Clause, the term "citizen" and "resident" are used interchangeably. *See Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975).

[20] In *Friedman*, the Court explained that "*Piper*

establishes that a nonresident who takes and passes an examination prescribed by the State, and who is otherwise qualified for the practice of law, has an interest in practicing law that is protected by thePrivileges and Immunities Clause." *Id.* at 65. "The clear import of *Piper* is that the Clause is implicated whenever . . . a State does not permit qualified nonresidents to practice law within its borders on terms of substantially equality with its own residents."*Id.* at 66.

[21] Plaintiffs argue that Defendants erroneously rely on *Leis v. Flynt*, 439 U.S.438 (1978) for the proposition that the practice of law is not a fundamental right because*Leis* was overruled in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), "in which the Court held that the denial of a defendant's right to out-of-state counsel admitted *prohac vice* is reversible error per se." (Doc. 69 at 20.) Plaintiffs misconstrue *Gonzalez-Lopez.*

In *Leis*, the Supreme Court held that an out-of-state attorney seeking to appear *pro-hac* vice did not have an interest protected by the Due Process Clause of the Fourteenth Amendment. 439 U.S. at 442. Contrary to Plaintiffs' assertion, *Gonzalez-Lopez* did not overrule that holding. In *Gonzalez-Lopez*, the Court recognized thatcriminal defendants who have the means to hire their own attorneys have a Sixth Amendment right to counsel of their choice. 548 U.S. at 144. The Court held that the trial court's erroneous deprivation of a criminal defendant's choice of counsel — by denying counsel admission *pro hac vice* — entitled him to reversal of his conviction. *Id.* at 150. In *Gonzalez-Lopez*, the government conceded that the trial court had erroneously denied defendant counsel of his choosing, thus, the Court did not consider the state's *prohac vice* rules or determine whether refusing to

grant *pro hac vice* status violated anyrights of counsel. The Court's holding was based on the Sixth Amendment. It is not applicable to this case and did not overturn the holding in *Leis* that the practice of law isnot a fundamental right for purposes of the Due Process Clause.

[22] Plaintiffs also cite *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976) in support of their Dormant Commerce Clause claim. (Doc. 36 at 43; Doc. 70 at 3.) In *Great Atlantic*, the Court rejected the reciprocity requirement of a Mississippi regulation allowing the sale of milk products from Louisiana in Mississippi if Louisiana accepted milk products from Mississippi on a reciprocal basis. The Court found that the reciprocity requirement did not serve Mississippi's interest in maintaining its health standards because it would allow milk from Louisiana even if its standards were lower than Mississippi's standards. *Id.* at 376. The Court did not hold that all reciprocity requirements violate the Commerce Clause; instead its holding turned on its finding that the reciprocity requirement did not serve a state interest. Here, Arizona's AOM Ruleserves the interest of encouraging other states to admit Arizona attorneys on similar terms. *See* (DSOF ¶ 7.)

1/15/2015

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF MULTIJURISDICTION PRACTICE , ALLISON GIRVIN, MARK ANDERSON, MARK KOLMAN,
Plaintiffs-Appellants,
v.
Hon. REBECCA WHITE BERCH, Chief Justice, Arizona Supreme Court, Hon. W. SCOTT BALES, Vice Chief Justice; Hon. JOHN PELANDER; Hon. ROBERT M. BRUTINEL,
Defendants-Appellees.

No. 13-17082
D.C. No 2:12-cv-01724-BSB

Appeal from the United States District Court for the District of Arizona Bridget S. Bade, Magistrate Judge, Presiding
Argued and Submitted October 6, 2014—Phoenix, Arizona
Filed December 8, 2014

Before: NELSON, SILVERMAN, and M. SMITH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges M. Smith and Silverman vote to deny the petition for rehearing en banc, and Judge Nelson so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of

the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for panel rehearing and the petition for rehearing en banc are denied.

AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
STANDING COMMITTEE ON CLIENT PROTECTION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONALISM
STANDING COMMITTEE ON SPECIALIZATION
NEW YORK STATE BAR ASSOCIATION
REPORT TO THE HOUSE OF DELEGATES
RESOLUTION

RESOLVED, That the American Bar Association amends the ABA *Model Rule for Admission by* Motion, dated August 2012, as follows (additions underlined, deletions struck through

ABA Model Rule on Admission by Motion

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:
   (a) have been admitted to practice law in another state, territory, or the District of Columbia;
   (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;
   (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for three of the seven five years immediately

preceding the date upon which the application is filed;
   (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
   (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
   (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
   (g) designate the Clerk of the jurisdiction's highest court for service of process.

2. For purposes of this rRule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in some state, territory, or the District of Columbia be accepted toward the durational requirement:
   (a) Representation of one or more clients in the private practice of law;
   (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
   (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

(d) Service as a judge in a federal, state, territorial or local court of record; (e) Service as a judicial law clerk; or

(f) Service as in-house counsel provided to the lawyer's employer or its organizational affiliates.

3. For purposes of this rRrule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rRule shall not be eligible for admission on motion.

FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in 30 some state, territory, or the District of Columbia be accepted toward the durational requirement: 31 32 (a) Representation of one or more clients in the private practice of law; 33 (b) Service as a lawyer with a local, state, territorial or federal agency, including military 34 service; 35 (c) Teaching law at a law school approved by the Council of the Section of Legal 36 Education and Admissions to the Bar of the American Bar Association;

37 (d) Service as a judge in a federal, state, territorial or local court of record; 38 (e) Service as a judicial law clerk; or 39 (f) Service as in-house counsel provided to the lawyer's employer or its organizational 40 affiliates. 41

42 3. For purposes of this ~~r~~Rule, the active practice of law shall not include work that, as 43 undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was 44 performed or in the jurisdiction in which the clients receiving the unauthorized services were 45 located. 46

47 4. An applicant who has failed a bar examination administered in this jurisdiction within five 48 years of the date of filing an application under this ~~r~~Rule shall not be eligible for admission 49 on motion. 50 51 FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not 52 adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have 53 adopted admission by motion procedures to eliminate any restrictions that do not appear in the 54 Model Rule on Admission by Motion.

REPORT

The ABA Commission on Ethics 20/20 has examined how globalization and technology are transforming the legal marketplace and fueling cross-border practice. In studying these developments, the Commission has reviewed the existing regulatory framework governing multijurisdictional practice and lawyer mobility and produced several Resolutions and Reports.[1]

The Resolution accompanying this Report proposes an amendment to the ABA Model Rule on Admission by Motion that, if adopted, would allow

lawyers to qualify for admission by motion at an earlier point in their careers than the current Rule allows (i.e., after three, instead of five, years of practice). The Commission is also asking that the ABA adopt a resolution urging jurisdictions that have not adopted the Model Rule to do so and encouraging jurisdictions that already have admission by motion procedures to eliminate additional restrictions, such as reciprocity requirements, that do not appear in the Model Rule.

The Commission's work in this area was informed by the efforts of the ABA Commission on Multijurisdictional Practice ("MJP Commission"), which completed its work a decade ago. In August 2002, the ABA House of Delegates adopted as Association policy all nine of the MJP Commission's recommendations,[2] which reflect a more permissive regulatory framework. This framework allows lawyers, subject to certain limitations, to practice law on a temporary basis in jurisdictions in which they are not otherwise authorized to practice law.[3] The framework also permits lawyers, sometimes with limitations, to establish an ongoing practice in a jurisdiction in which they are not otherwise authorized and without the necessity of sitting for a written bar examination.[4]

The Commission found that this framework has been widely adopted[5] and produced many benefits for clients and their lawyers. It has enabled lawyers to represent their clients more effectively and efficiently, provided clients with more freedom regarding their choice of counsel, and afforded lawyers more personal and professional flexibility.

The Commission concluded that, in light of these successes and the still growing need to engage in cross-border practice, the ABA should once again consider carefully crafted changes to the framework governing multijurisdictional practice. The Resolutions

accompanying this Report address the ABA Model Rule on Admission by Motion.

I. History of the ABA Model Rule on Admission by Motion

In August 2002, the ABA House of Delegates adopted the Model Rule on Admission by Motion. The Model Rule permits a lawyer admitted in one U.S. jurisdiction to gain full admission in another U.S. jurisdiction without having to pass that jurisdiction's bar examination. The lawyer, however, must satisfy several requirements, one of which is to have engaged in the active practice of law for five of the last seven years.[6]

Admission by motion procedures now exist in forty jurisdictions. The Commission's research revealed that more than 65,000 lawyers have used the procedure in the last ten years.[7] Approximately half of these lawyers were admitted in the District of Columbia. The Commission found that there is no evidence that lawyers admitted by motion – either in the District of Columbia or elsewhere – are more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted through more traditional procedures. The Commission sought information in this regard from lawyer disciplinary counsel, and responses revealed that the admission by motion process has produced no discernible risks to clients or the public. To the contrary, it has enabled lawyers to relocate with greater ease and given clients more freedom to select their lawyers.

II. Proposal to Amend the Model Rule on Admission by Motion

In light of the Commission's findings and changes in the practice of law during the last decade, the Commission proposes to reduce the time-in-practice requirement in the Model Rule for Admission by Motion. The current Model Rule requires an applicant for admission by motion to have actively practiced in another jurisdiction for five out of the past seven years, and the Commission is proposing to allow lawyers to qualify for admission by motion after practicing in another jurisdiction for three out of the past five years.

The Commission believes this change responds to client needs and market demands in an increasingly borderless world, where lawyers frequently need to gain admission in other U.S. jurisdictions. For example, lawyers regularly need to move to, or establish a regular practice in, another jurisdiction in order to serve clients who are relocating or who regularly do business in the jurisdiction in which motion admission is sought. The Commission's proposal would address this need, thus benefitting both lawyers and their clients.

The proposal also recognizes that lawyers often need to move to new jurisdictions for a wide range of personal reasons, including the need to find employment. The Commission determined that a reduction of the active practice requirement from five to three years would have particularly salutary effects for less senior lawyers, who are most likely to need to move from one jurisdiction to another. The challenging legal employment marketplace only increases the likelihood that relatively junior lawyers will need to move to a new jurisdiction in search of employment.

The Commission seriously considered several possible arguments against reducing the time-in-practice requirement of the Model Rule. First, the Commission considered the concern that a lawyer who

has practiced for only three years may not be sufficiently competent to practice law in a new jurisdiction. The Commission, however, found no reason to believe that lawyers who have been engaged in the active practice of law for three of the last five years will be any less able to practice law in a new jurisdiction than a law school graduate who recently passed the bar examination in that jurisdiction. In fact, five jurisdictions already have a reduced duration-of-practice requirement of three years,[8] and none of those jurisdictions have reported any resulting problems.

The Commission also found unpersuasive the concern that passage of the bar examination is necessary to demonstrate knowledge of the law of the jurisdiction in which the lawyer is seeking admission. As explained above, more than 65,000 lawyers have obtained admission by motion in the last ten years, and there is no evidence from disciplinary counsel or any other source that these lawyers have been unable to practice competently in the new jurisdiction or have been unable to identify and understand aspects of the new jurisdiction's law that differ from the law of the jurisdiction where those lawyers were originally admitted.

The Commission also concluded that the "local law" concern rests on the incorrect assumption that passage of the bar examination demonstrates competence in local law. In fact, an increasing number of jurisdictions use the Uniform Bar Examination,[9] which typically does not require any knowledge of local law. And in jurisdictions that do test local law, the local law portion of the test is usually sufficiently small that bar passage does not turn on it. Thus, a significant percentage of bar examinations require either limited knowledge of local law or none at all, suggesting that passage of the bar examination does not offer better

evidence of a lawyer's understanding of local law than three years of practice in another jurisdiction. To the contrary, the Commission concluded that three years of practice in another jurisdiction may actually enable a lawyer to identify and understand variations in the law more easily than a recent law school graduate who has never practiced at all but has passed the jurisdiction's bar examination.

Another possible concern that the Commission considered is that lawyers might take and pass the bar examination in a jurisdiction with a relatively high passage rate and then seek admission by motion in a jurisdiction that has more demanding examination requirements. The Commission concluded, however, that the three year waiting period is sufficiently long that lawyers would not have an incentive to circumvent the bar examination requirements of a jurisdiction with a relatively low bar pass rate.

Additionally, the Commission considered whether to retain the existing seven year period within which a lawyer must fulfill the new three year practice requirement. One argument for doing so is that the career tracks of modern lawyers are not always linear and that lawyers, both male and female, frequently need to take time away from the practice of law due to changes in personal circumstances, including changes in substantive employment, military service, returning to school for another degree or, an issue that continues to disproportionately affect women, family care. At the same time, however, the Commission heard concerns that a four year gap in practice would be too substantial to offer adequate assurance to bar admission authorities that a lawyer has the requisite competence to practice law in the new jurisdiction. To reconcile these competing interests, the Commission determined that a lawyer seeking admission by motion should have

to satisfy the three year practice requirement within a five year time period. This approach permits lawyers to take two years off from the active practice of law, while recognizing the concerns that bar admissions authorities would have about an extended period of time away from practice.

Finally, the Commission concluded that Section 2 of the Model Rule on Admission by Motion should state that the time spent practicing pursuant to the proposed new Model Rule on Practice Pending Admission should not count toward the period of time necessary to qualify for admission by motion. (The proposed new Model Rule on Practice Pending Admission would allow lawyers to establish a law practice in another jurisdiction while diligently pursuing admission in that jurisdiction through one of the recognized forms of admission, such as through admission by motion.) The Commission determined that this restriction in Section 2 is a necessary additional client protection as it will prevent lawyers from establishing a practice in a new jurisdiction in fewer than three years and prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.

In sum, the Commission determined that, in most jurisdictions, a lengthy practice requirement unnecessarily hinders the lawyer mobility that clients and legal employers increasingly demand. Although the Commission recognizes that some jurisdictions may have particular needs that warrant a longer or shorter durational requirement, the Commission concluded that the vast majority of jurisdictions would benefit from the proposed approach.

III. Implementation of ABA Model Rule on

Admission by Motion Rule

The Commission concluded that the widespread adoption of admission by motion procedures is a positive development, but also found that a number of jurisdictions have not yet adopted an admission by motion process or have adopted a process that imposes unnecessary restrictions and requirements. Thus, in addition to proposing the amendments described above, the Commission also urges the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate any restrictions, such as reciprocity requirements, that do not appear in the Model Rule.

With regard to the eleven jurisdictions that have not adopted any admission by motion procedure, those jurisdictions require lawyers to take at least some portion of the jurisdiction's bar examination (or a special lawyers' examination) in order to gain admission. The Commission concluded that such a requirement is unnecessary for lawyers who have three years of experience and that these jurisdictions should adopt an admission by motion procedure.

With regard to the forty jurisdictions that have adopted an admission by motion procedure, ten have an admission by motion procedure that is nearly identical to the Model Rule.[10] The other thirty jurisdictions, however, have procedures that impose restrictions beyond those contained in the Model Rule. More than half of these jurisdictions have some type of reciprocity requirement, which makes admission by motion possible only for lawyers from states that also offer admission by motion on a reciprocal basis.[11] Moreover, some jurisdictions define law practice in a manner that is narrower than the Model Rule definition.[12] Other jurisdictions require lawyers to certify that they intend

to practice actively and maintain an office in the state where admission by motion is being sought.[13]

The Commission found no evidence that these more restrictive approaches are related in any way to the competence of the applicants or the protection of the public. Indeed, jurisdictions that have adopted the Model Rule without any additional restrictions have reported no problems. The Commission believes that such varied additional restrictions only serve to sustain outdated and parochial purposes at a time when the relevance of borders to the competent practice of law has and will continue to erode. The Commission believes that the Model Rule on Admission by Motion ensures competent representation and amply protects the integrity of the bar.

Conclusion

Continually evolving technology, client demands and a national (as well as global) legal services marketplace have fueled an increase in cross-border practice as well as a related need for lawyers to relocate to new jurisdictions. The Resolutions accompanying this Report are intended to permit lawyers to respond to these developments to the benefit of their clients, while providing adequate regulatory safeguards. Accordingly, the Commission respectfully requests that the House of Delegates adopt those Resolutions.

Respectfully submitted,
Jamie S. Gorelick and Michael Traynor, Co-Chairs ABA Commission on Ethics 20/20 August 2012

Footnotes

[1] In one Resolution, the Commission is recommending the creation of a Model Rule on Practice Pending Admission that would allow lawyers to establish a

systematic and continuous presence in another jurisdiction while diligently pursuing admission in that jurisdiction. The Commission is also recommending changes to Model Rule 1.6 that would identify the information that lawyers can disclose in order to detect possible conflicts of interest that might arise when lawyers change firms or when two or more firms associate with each other or merge. [2] *See Client Representation in the 21st Century*, Report of the Commission on Multijurisdictional Practice (2002), http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijuri sditional_practice.html .

[3] *See, e.g.,* ABA MODEL RULES OF PROF'L CONDUCT R. [hereinafter MODEL RULE] 5.5(c); ABA MODEL RULE FOR PRO HAC VICE ADMISSION.

[4] *See, e.g.,* MODEL RULE 5.5(d); ABA MODEL RULE FOR ADMISSION BY MOTION.

[5] Since August 2002, forty-four jurisdictions have adopted some form of multijurisdictional practice that is similar to Model Rule 5.5. Chart, *State Implementation of ABA Model Rule 5.5* (2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf. Every jurisdiction now has a rule allowing for pro hac vice admission. Chart, *Comparison of ABA Model Rule For Pro Hac Vice Admission With State Versions and Amendments Since August 2002* (2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf. Seven jurisdictions have adopted a version of the ABA Model Rule for Temporary Practice by Foreign Lawyers. *Summary of State Action on ABA MJP Recommendations 8 & 9* (2010), http://www.americanbar.org/content/dam/aba/migrated

/cpr/mjp/8_and_9_status_chart.authcheckdam.pdf. Forty jurisdictions have adopted a version of the ABA Model Rule on Admission by Motion. Chart, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf. Finally, thirty-one jurisdictions have adopted a version of the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Chart, *Foreign Legal Consultant Rules* (2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for_legal_consultants.authcheckdam.pdf.

6The Model Rule has remained unchanged except for one amendment in 2011. In February 2011, the Section of Legal Education and Admissions to the Bar filed a Resolution with the House of Delegates recommending that the Model Rule be amended to eliminate a provision that prohibited a lawyer's work as in-house counsel or as a judicial law clerk from being counted as part of the necessary practice experience to qualify for admission by motion. The House agreed that the Model Rule had created "an unfair and unnecessary distinction" between in-house counsel and judicial clerks, on the one hand, and the other categories of lawyers listed in paragraph 2 of the Model Rule on the other, and thus adopted the proposed amendment. [7]

7National Conference of Bar Examiners, *Bar Examination and Admission Statistics*, *2011 Statistics*, at 28 (2011), http://www.ncbex.org/assets/media_files/Statistics/2010Stats110111.pdf & *2005 Statistics*, at 35 (2005) http://www.ncbex.org/assets/media_files/Statistics/2005_Statistics.pdf.

[8] Chart, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2010),

http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf.

[9] Nat'l Conference of Bar Exam'rs & Am. Bar Ass'n Section of Legal Education & Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements 2012*, at 23 (2012) (available at http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf).

[10] *See* Comparison Chart, *supra* note 8.

[11] *Id.*

[12] *Id.*

[13] *Id.*

GENERAL INFORMATION FORM

Submitting Entity: ABA Commission on Ethics 20/20

Submitted By: Jamie S. Gorelick and Michael Traynor, Co-Chairs

1. Summary of Resolution(s).

Resolution 105e: Admission by Motion

The ABA Model Rule on Admission by Motion, which was adopted in 2002, allows a lawyer licensed in one U.S. jurisdiction to seek admission in another

U.S. jurisdiction without sitting for that jurisdiction's bar examination. In order to qualify for admission by motion, the Model Rule currently requires a lawyer to have engaged in the active practice of law for 5 of the last 7 years. The Commission proposes to reduce this "time in practice" requirement so that a lawyer can qualify for admission by motion after practicing for 3 of the last 5 years.

The Commission also proposes to amend the Model Rule on Admission by Motion to ensure that the definition of the "active practice of law" does not include time spent practicing pursuant to the proposed Model Rule on Practice Pending Admission (Resolution 105d). The Commission determined that this restriction is necessary to prevent lawyers from qualifying for admission by motion after fewer than three years of active practice in a jurisdiction where the lawyer is actually licensed. The restriction also will prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.

Finally, a number of jurisdictions have not yet

adopted an admission by motion process or have processes with unnecessary restrictions and requirements. The Commission's Resolution encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions that have admission by motion procedures to eliminate restrictions that do not appear in the Model Rule.

2 Approval by Submitting Entity.

3. Has this or a similar resolution been submitted to the House or Board previously?

The Commission approved five of these Resolutions and Reports at its April 12 13, 2012 meeting.
No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption? The adoption of this proposal would result in amendments to the ABA Model Rule on Admission by Motion.

5. What urgency exists which requires action at this meeting of the House?

The ABA is the national leader in developing and interpreting standards of legal ethics and professional regulation and has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. The ABA's last "global" review of the Model Rules and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000

Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). The Commission on Ethics 20/20 was appointed in August 2009 to conduct the next overarching review of these policies.
Technology and globalization are transforming the practice of law in ways the profession could not anticipate in 2002. One aspect of this transformation has been the extent to which lawyers now need to relocate to new jurisdictions during their careers. The proposed amendments to the Model Rule on Admission by Motion respond to this increased need for mobility while providing adequate safeguards for clients and the public.

6. Status of Legislation. (If applicable) N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically amendments to the ABA Model Rule on Admission by Motion. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to implement any policies proposed by the Ethics 20/20 Commission that are adopted by the House of Delegates. The Policy Implementation Committee and Ethics 20/20 Commission have been in communication in anticipation of the implementation effort. The Policy Implementation Committee has been responsible for the successful implementation of the

recommendations of the ABA Ethics 2000 Commission, the Commission on Multijurisdictional Practice and the Commission to Evaluate the Model Code of Judicial Conduct.

8. Cost to the Association. (Both direct and indirect costs) None
9. Disclosure of Interest. (If applicable)
10. Referrals.

From the outset, the Ethics 20/20 Commission concluded that transparency, broad outreach and frequent opportunities for input into its work would be crucial. Over the last three years the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; created webinars and podcasts; made CLE presentations; and received and reviewed hundreds of written and oral comments from the bar and the public. To date, the Commission has made more than 100 presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the ABA Board of Governors, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations.

All materials were posted on the Commission's website. The Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. There are currently 725 people on that list.

The Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities. Included on these Working Groups were representatives of the ABA Standing Committee on Ethics and Professional Responsibility, ABA Standing Committee on Professional Discipline, ABA Standing Committee on Client Protection, ABA Standing Committee on Delivery of Legal Services, ABA Section of International Law, ABA Litigation Section, ABA Section of Legal Education and Admissions to the Bar, ABA Section of Real Property, Trust and Estate Law, ABA Task Force on International Trade in Legal Services, ABA General Practice, Solo and Small Firm Division, ABA Young Lawyers Division, ABA Standing Committee on Specialization, ABA Law Practice Management Section, and the National Organization of Bar Counsel.

11. Contact Name and Address Information. (Prior to the meeting)

Ellyn S. Rosen Regulation Counsel ABA Center for Professional Responsibility 321 North Clark Street, 17th floor Chicago, IL 60654-7598 Phone: 312/988-5311 Fax: 312/988-5491
Ellyn.Rosen@americanbar.org
www.americanbar.org

12. Contact Name and Address Information. (Who will present the report to the

House?)

Jamie S. Gorelick, Co-Chair WilmerHale 1875 Pennsylvania Ave., N.W. Washington, DC 20006 Ph: (202)663-6500 Fax: (202)663-6363
jamie.gorelick@wilmerhale.com
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mtraynor@traynorgroup.com

EXECUTIVE SUMMARY

1. Summary of the Resolution(s)

Resolution 105e: Admission by Motion

The ABA Model Rule on Admission by Motion, which was adopted in 2002, allows a lawyer licensed in one U.S. jurisdiction to seek admission in another

U.S. jurisdiction without sitting for that jurisdiction's bar examination. In order to qualify for admission by motion, the Model Rule currently requires a lawyer to have engaged in the active practice of law for 5 of the last 7 years. The Commission proposes to reduce this "time in practice" requirement so that a lawyer can qualify for admission by motion after practicing for 3 of the last 5 years.

The Commission also proposes to amend the Model Rule on Admission by Motion to ensure that the definition of the "active practice of law" does not include time spent practicing pursuant to the proposed Model Rule on Practice Pending Admission (Resolution 105d). The Commission determined that this restriction is necessary to prevent lawyers from qualifying for admission by motion after fewer than three years of active practice in a jurisdiction where the lawyer is actually licensed. The restriction also will

prevent lawyers from serially relocating to new jurisdictions under the Model Rule on Practice Pending Admission in order to accumulate the necessary practice experience to qualify for admission by motion.

Finally, a number of jurisdictions have not yet adopted an admission by motion process or have processes with unnecessary restrictions and requirements. The Commission's Resolution encourages the eleven jurisdictions that have not adopted the Model Rule to do so and urges jurisdictions with admission by motion procedures to eliminate restrictions that do not appear in the Model Rule.

2. Summary of the Issue that the Resolution Addresses

The ABA's last "global" review of the Model Rules of Professional Conduct and related policies concluded in 2002, with the adoption of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the ABA Commission on Multijurisdictional Practice ("MJP Commission"). As the national leader in developing and interpreting standards of legal ethics and professional regulation, the ABA has the responsibility to ensure that its Model Rules of Professional Conduct and related policies keep pace with social change and the evolution of law practice. To this end, in August 2009, then-ABA President Carolyn B. Lamm created the Commission on Ethics 20/20 to study the ethical and regulatory implications of globalization and technology on the legal profession and propose changes to ABA policies.

The ABA Model Rule on Admission by Motion was adopted in 2002, as part of the package of

resolutions unanimously adopted by the House of Delegates to address increased cross-border practice. At the time of its adoption, the Model Rule required that lawyers could qualify for admission by motion only if they had been engaged in the active practice of law for 5 of the last 7 years.

Much has changed in the last decade, resulting in increased lawyer mobility. For example, lawyers regularly need to move to, or establish a regular practice in, another jurisdiction in order to serve clients who are relocating there or who regularly do business in that jurisdiction. Resolution 105e responds to this need, thus benefitting both lawyers and their clients, by reducing the time in practice requirement in the Model Rule for Admission by Motion to 3 of the last 5 years. The Commission's research revealed that the Model Rule has produced no problems in the jurisdictions that have adopted it and no problems in the jurisdictions that already allow admission by motion after only three years of practice.

3. Please Explain How the Proposed Policy Position will address the issue

A reduction of the time in practice requirement in the ABA Model Rule on Admission by Motion will facilitate the cross-border practice that clients demand in a 21st century legal marketplace.

The Commission's research revealed that there is no reason to believe that lawyers who have spent 3 of the last 5 years engaged in law practice will be any less able to practice law responsibly and competently in a new jurisdiction. The Commission found no evidence

that lawyers admitted by motion are more likely to be subject to discipline, disciplinary complaints, or malpractice suits than lawyers admitted by examination. The Commission also found no evidence that the admission by motion process has produced any risks to clients or the public. To the contrary, it has enabled lawyers to relocate with greater ease and given clients more freedom to select their lawyers. Finally, the Commission found that the five jurisdictions that already have a duration-of-practice requirement of three years have not encountered any problems.

Resolution 105e also adds language to make clear that time spent practicing pursuant to the proposed ABA Model Rule on Practice Pending Admission does not count toward the Model Rule of Admission by Motion's active practice requirement.

Additionally, given the increasing importance of lawyer mobility and the success of the Model Rule on Admission by Motion, the ABA should encourage the adoption of the Model Rule for Admission by Motion in the eleven jurisdictions that have not yet adopted such a process. The ABA also should encourage jurisdictions that have an admission by motion process to eliminate restrictions that do not appear in the Model Rule and that pose unnecessary obstacles to using the process.

The Commission has concluded that these changes will facilitate lawyer mobility in a manner that is consistent with the principles that have guided the Commission's work: protecting the public; preserving the core professional values of the American legal

profession; and maintaining a strong, independent, and self-regulated profession.

4. Summary of Minority Views

The Commission is not aware of any organized or formal minority views or opposition to Resolution 105e as of June 1, 2012.

As of June 1, 2012, the following entities have agreed to co-sponsor Resolution 105e relating to Admission by Motion: The ABA Standing Committee on Client Protection, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Standing Committee on Specialization, and the New York State Bar Association.

From the outset, the Commission on Ethics 20/20 implemented a process that was transparent and open and that allowed for broad outreach and frequent opportunities for feedback. Over the last three years, the Commission routinely released for comment to all ABA entities (including the Conference of Section and Division Delegates), state, local, specialty and international bar associations, courts, regulatory authorities, and the public a wide range of documents, including issues papers, draft proposals, discussion drafts, and draft informational reports. The Commission held eleven open meetings where audience members participated; conducted numerous public hearings and roundtables, domestically and abroad; presented webinars and podcasts; made CLE presentations; received and reviewed more than 350 written and oral comments from the bar, the judiciary, and the public. To date, the Commission has made more than 100

presentations about its work, including presentations to the Conference of Chief Justices, the ABA House of Delegates, the National Conference of Bar Presidents, numerous ABA entities, as well as local, state, and international bar associations. All materials, including all comments received, have been posted on the Commission's website (click here). Moreover, the Commission created and maintained a listserve for interested persons to keep them apprised of the Commission's activities. Currently there are 725 participants on the list.

Further, as noted in the General Information Form accompanying this Resolution, the Commission's process was collaborative. It created seven substantive Working Groups with participants from relevant ABA and outside entities.

The Commission is grateful for and took seriously all submissions. The Commission routinely extended deadlines to ensure that the feedback was as complete as possible and that no one was precluded from providing input. The Commission reviewed this input, as well as the written and oral testimony received at public hearings, and made numerous changes in light of this feedback.

Throughout the last three years, the Commission received many supportive submissions as well as submissions that offered constructive comments or raised legitimate concerns. The Commission made every effort to resolve constructive concerns raised, and in many instances made changes based upon them. The Commission's final proposals were shaped by those who participated in this feedback process.

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

Article I § 8 Powers of congress.

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Article IV § 2. Privileges and immunities, in pertinent part, provides:

[1.] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The First Amendment, in pertinent part provides:

Congress shall make no law ……abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

17A A.R.S. Sup.Ct.Rules, Rule 34 Arizona (f) Admission on Motion.

1. An applicant who meets the requirements of (A) through (H) of this paragraph (f)(1) may, upon motion, be admitted to the practice of law in this jurisdiction.
The applicant shall:

A. either (i) have been admitted by bar examination to practice law in another jurisdiction allowing for admission of Arizona lawyers on a basis equivalent to this rule or (ii) have been admitted by bar examination to practice law in one or more states, territories, or the District of Columbia, and have been admitted to and engaged in the active practice of law in another jurisdiction allowing admission of Arizona lawyers on a basis equivalent to this rule for five of the seven years immediately preceding the date upon which the application is filed:

B. hold a juris doctor degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time of graduation;

C. have been primarily engaged in the active practice of law in one or more states, territories, or the District of Columbia for five of the seven

years immediately preceding the date upon which the application is filed;

D. submit evidence of a passing score on the Multistate Professional Responsibility Examination as it is established in this jurisdiction;

E. establish that the applicant is currently a member in good standing in all jurisdictions where admitted;

F. establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;

G. establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and

H. submit evidence of successful completion of the course on Arizona law described in paragraph (j) of this rule.

17A A.R.S. Sup.Ct.Rules, Rule 35. Examination Requirements

(b) Examination Subjects; Grading

4. Examination grades of an applicant will not be disclosed to the public. The Committee is authorized to
A. release statistical results of the examination;

B. disclose to the law school from which the applicant graduated the applicant's status as pass/fail/withdrew;

C. certify, upon an applicant's request, an applicant's Multistate Bar Examination score to other jurisdictions in which the applicant seeks admission; and

D. disclose an applicant's scores on the uniform bar examination to the National Conference of Bar Examiners.

……

(c) Subsequent Examinations; Role of Committee on Character and Fitness.

1. An applicant failing to pass one uniform bar examination in any jurisdiction may apply for two subsequent uniform bar examinations in Arizona if the applicant meets all requirements listed in Rule 34(b).

……..

(d) Review by the Court. An applicant aggrieved by any decision of the Committee on Examinations may, within twenty (20) days after such decision, file a verified petition for review with this Court; however, the Committee on Examination's decision regarding an applicant's grade score is final and will not be reviewed by the Court absent extraordinary circumstances.