No. 00-1302
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN ROE #2, ET AL..,

PLAINTIFFS-APPELLANTS,

VS.

ALAN OGDEN, IN HIS OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE COLORADO STATE BOARD OF LAW EXAMINERS, ET. AL.,

DEFENDANTS-APPELLEES

On Appeal from the U.S. District Court for the
District of Colorado, The Honorable Richard P. Matsch,
District Court Case No. 99-M-967

APPELLANTS' BRIEF

David D. Powell, Jr.
Stephen G. Masciocchi
Susannah Pollvogt
HOLLAND & HART LLP
P.O. Box 8749
555 17th Street, Suite 3200
Denver, Colorado 80201-8749
(303) 295-8000

In cooperation with the American Civil Liberties Union Foundation of Colorado
Mark Silverstein
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, Colorado 80218
(303) 777-5482

STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES
FEDERAL CASES

FEDERAL STATUTES AND COURT RULES

MISCELLANEOUS

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals.

Plaintiffs-Appellants John Roe #2 and the Ralph Timothy Potter Chapter of the American Civil Liberties Union at the University of Denver College of Law (collectively the "Students") respectfully submit Appellants' Brief.

STATEMENT OF JURISDICTION

This action arises under the laws of the United States, including Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* and 42 U.S.C. § 1983. Therefore, the district court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The district court had jurisdiction to grant declaratory relief pursuant to the Declaratory Relief Act, 28 U.S.C. §§ 2201 and 2202.

On July 7, 2000, the district court entered its Memorandum Opinion and Order granting defendants' motion to dismiss, and on the same date, the court entered a separate written judgment. The judgment constitutes a final order disposing of all claims with respect to all parties. See FED.R.CIV.P. 58.

This Court's jurisdiction arises under 28 U.S.C. § 1291. The Students timely filed their notice of appeal on July 31, 2000, within 30 days after the judgment and order from which they appeal. See FED.R.APP.P. 4(a).

ISSUES PRESENTED FOR REVIEW

The principal issues on appeal are as follows.

1. To have standing to challenge a regulation, a plaintiff must allege an actual or imminent injury. Imminent injury exists if a plaintiff has concrete plans, at a specific future time, to take action that will subject him to the regulation. Here, plaintiffs are University of Denver law students who have concrete plans to apply for and take the Colorado bar exam at a specific future time. Do they have standing to challenge the legality of questions on the Colorado bar application?

2. Younger abstention applies when the exercise of federal jurisdiction would interfere with a pending state court proceeding. Here, there was no pending state court proceeding; nevertheless, the district court abstained because a state court proceeding would be available to the plaintiffs in the future. Did the district court properly apply the Younger abstention doctrine?

These two issues reflect the primary bases on which the district court dismissed this lawsuit. In this brief, the Students also address several related issues with respect to the district court's application of the standing, ripeness, and Younger abstention doctrines.

STATEMENT OF THE CASE

A. Nature Of The Case

The Colorado bar application contains three questions relating to a bar applicant's past history of diagnosis or treatment for mental illness or for drug or alcohol use. In this lawsuit, the Students assert that these questions violate the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA") and their constitutional right of privacy. In other states, attorney licensing authorities have abandoned or circumscribed similar questions, either voluntarily or after courts ruled that the questions violate the ADA. See Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 438-41 (E.D. Va. 1995) (listing states that have abandoned or narrowed their mental health questions in light of potential or actual litigation).

The Students claim that the three challenged questions *should* focus on actual, current impairment of an applicant's ability to function as a lawyer. Instead, the questions focus impermissibly on an applicant's status as a person having a past history of diagnosis or treatment for a disability. The questions are unreliable, overbroad, and ineffective in determining which applicants are unfit to practice law, and they deter law students from seeking needed treatment. The Students seek (a) a declaration that the questions violate the ADA and the Constitution and (b) an injunction barring the use of the questions.

B. Course Of Proceedings

On May 20, 1999, the Students filed their original Complaint and named two entities, the Colorado Supreme Court and Colorado Board of Law Examiners, as defendants. Aplt. App. 3.[1] After defendants moved to dismiss on 11th Amendment grounds, the Students filed their Second Amended Complaint (the operative complaint) and pled this case as an official capacity action. Aplt. App. 205-10, 211-44. The Students also filed a Motion for Preliminary Injunction, which they later amended. Aplt. App. 3, 5. The district court never ruled on that motion.

The defendants moved to dismiss on a number of procedural grounds, including ripeness and associational standing. Aplt. App. 67-87. On December 30, 1999, the district court held a scheduled hearing on the Motion to Dismiss. (Tab 1; Aplt. App. at 154-61). However, rather than hear arguments on the Motion, the court raised sua sponte the question whether it should abstain from hearing this case. Tab 1 at 4; Aplt. App. 157. The court expressed its "very strong view that the Supreme Court of Colorado ought to have the first opportunity to deal with this attack on its own rules and procedures for admission to its Bar." Id.

[1] The record is cited as follows. Items in the Appendix are cited as "Aplt. App. [Page #]." Items in the addendum to this brief are cited at "Tab _ at _."

The court ordered the parties to submit briefs on the issue of abstention. Tab 1 at 4-7; Aplt. App. 157-60.

Following the hearing, the Students proposed to the defendants that the parties file a Joint Motion to Stay this action while the Students filed an original proceeding in the Colorado Supreme Court. Aplt. App. 184-86. Students proposed to raise the same claims before the Colorado Supreme Court that they have raised in the instant action. See id. Defendants rejected this proposal. They took the position that the only way the Students could proceed before the Colorado Supreme Court would be to contest the denial of an individual application for admission to the bar. See Aplt. App. 187-89. The parties then submitted their abstention briefs. Aplt. App. 162-91, 192-204.

C. Disposition Below

On July 7, 2000, the district court issued its Order dismissing this action without prejudice. Tab 2; Aplt. App. 245. The Court raised sua sponte the issue of whether John Roe #2 had standing. The Court ruled that neither Roe #2 nor the Potter Chapter had standing because (a) they could not establish that the challenged questions would cause "actual or imminent injury" and (b) the court could not grant effective relief. Tab 2 at 7-8; Aplt. App. 251-52**.** The court held that this ruling also required dismissal on ripeness grounds. Tab 2 at 10-11; Aplt. App. 254-55.

As an alternative ground for dismissal, the court held that Younger abstention applied. Even though no state court proceeding was or is pending, as required by the Younger doctrine, the court abstained because ultimately, bar applicants may have their applications reviewed by the Colorado Supreme Court, which has the authority to direct the Bar Committee to eliminate the challenged questions. Tab 2 at 11; Aplt. App. 255.

STATEMENT OF FACTS

Because defendants' motion to dismiss constituted a facial attack on the sufficiency of the Students' allegations of subject matter jurisdiction, this Court must accept the allegations of the Second Amended Complaint as true. Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995). The following facts are drawn from the allegations of the Second Amended Complaint and documents of record that supplement those allegations.

1. The Students.

John Roe #2 is a law student at the University of Denver College of Law. Aplt. App. 213 ¶ 7. He is also a member of the Ralph Timothy Potter Chapter of the American Civil Liberties Union at the University of Denver College of Law ("Potter Chapter"). He has completed his second year of law school and he expects to graduate in May 2001 and take the Colorado Bar Examination in July 2001. Id.

Due to a past history of treatment, he is required to answer "yes" to question 37 on the Colorado bar application. Id. He objects to answering that question. Id.

The Potter Chapter is a student chapter of the American Civil Liberties Union of Colorado ("ACLU") at the University of Denver College of Law. Aplt. App. 213 ¶ 9. The Chapter is an unincorporated association. Id. Its purpose is to further understanding, protection, and respect for the civil liberties of all people. Id. The Chapter works to enforce the principles of all laws forbidding discrimination, including discrimination against persons with disabilities. Id.

The Potter Chapter's members include students at the University of Denver College of Law who have submitted or plan to submit the Colorado bar application, who will be required to answer all questions on the application, and who object to answering questions 37, 39, and 40. Aplt. App. 213-14 ¶ 10(a). Some of these student members have histories of treatment that would require them to answer affirmatively to Questions 37, 39, and 40 on the Application, and therefore they would be subject to further investigation. Id. These members, including John Roe #2, are suffering immediate or threatened injury because they must disclose their history of treatment in order to obtain a license to practice law in Colorado. Id.

In this lawsuit, the Potter Chapter seeks to protect interests that are germane to the Chapter's purpose—its members' interests in freedom from discrimination

on the basis of disability and their constitutional privacy interest. Aplt. App. 214 ¶ 10(b). Because the Chapter seeks only declaratory and injunctive relief, not damages, the participation of Chapter members in this lawsuit is not necessary with respect to the claims asserted or relief requested. Aplt. App. 214 ¶ 10(c).

2. The defendants.

The Colorado Supreme Court is the state judicial body which exercises jurisdiction over the licensing of persons to practice law in Colorado. Tab 3, COLO.R.CIV.P. 201.1. That court has delegated to the Executive Director and the Bar Committee of the Colorado Board of Law Examiners the function of determining if candidates are "mentally stable" and "morally and ethically qualified" for admission to the Colorado bar. Aplt. App. 215 ¶ 15; Tab 3, COLO.R.CIV.P. 201.6(1), 201.7.

Defendant Allen Ogden is the Executive Director of the Board of Law Examiners. Aplt. App. 215 ¶ 12. The other named defendants are members of the Bar Committee. Aplt. App. 215 ¶ 13. (For sake of convenience, Mr. Ogden and the members of the Bar Committee shall be referred to collectively as the "Board.")

3. The questions.

In fulfilling its function, the Board asks over forty questions on the Colorado bar application. See Aplt. App. 216 ¶ 16. As of early 1998, the application

contained two questions concerning an applicant's history of dependence on and treatment for the use of alcohol or drugs (questions 37 and 38), one of which contained no time restriction. Aplt. App. 216 ¶ 17. The application also contained a question on an applicant's history of hospitalization for a mental or emotional disorder (question 40). See id. (quoting the text of former questions 37, 38, and 40).

On February 27, 1998, the ACLU wrote to the Board, explained its position that these three questions violate the ADA, and requested that the Board eliminate them from the application. Aplt. App. 227-32. In response, the Board proposed to combine questions 37 and 38 into one question and, among other things, add a 10-year time restriction ("revised question 37"). Aplt. App. 233-35. The ACLU pointed out the continuing deficiencies in revised question 37 and requested the Board to modify all three questions in accordance with questions drafted by the United States Department of Justice. See Aplt. App. 236-42. The Board refused to consider any further revision of questions 37, 38, or 40. See Aplt. App. 243-44.

In the current version of the application, former questions 37 and 38 have been replaced by revised question 37—an implementation of the change the Bar Committee proposed in response to the ACLU's letter—and one new mental health question has been added. The application now contains these three questions:

> 37. Within the past ten years, have you undergone any treatment for or consulted any person about the use of drugs, narcotics, or alcohol, or have you been addicted to or dependent upon their use? **IF YES,** describe all relevant circumstances including, the dates, names and addresses of the doctors consulted.
>
> 39. Within the past five years, have you been diagnosed with or have you been treated for any of the following: schizophrenia or any other psychotic disorder, delusional disorder, bipolar or manic depressive mood disorder, major depression, antisocial personality disorder, or any other condition which significantly impaired your behavior, judgment, understanding, capacity to recognize reality, or ability to function in school work, or other important life activities? (If you are uncertain of a diagnosis, it is your responsibility to check with your treating health care professional.)
>
> 40. During the last five years, have you at any time been **admitted as a patient to a hospital**, either on a voluntary or involuntary basis, for treatment of any **emotional or mental disability or disorder**? If **YES**, describe in detail, all relevant circumstances for each such episode including, the nature of the disability or disorder, the dates and place(s) of hospitalization, the names and address of the treating medical practitioner(s), and the prescribed treatment.

Aplt. App. 50, 217-18 ¶ 19 (emphasis in original).

4. The Colorado bar application and review process.

Bar applicants may apply to take the Colorado bar examination if they have graduated (or will soon graduate) from law school. See Aplt. App. 58; Tab 3, COLO.R.CIV.P. 201.5(2). An applicant's failure to answer a question, and any

affirmative answers, are not investigated by the Board until after the applicant passes the bar exam. Aplt. App. 87C-87D.

After passing the bar exam, if an applicant has answered "yes" to any of the challenged questions, the Board requires the applicant to provide supplementary information and documents. Aplt. App. 57. The Board also requires applicants to sign an "Authorization and Release" which permits the Board or its agents to obtain, inspect, and make copies of documents, records and other information, including highly personal medical and psychiatric records. See Aplt. App. 22, 218 ¶ 20. The Board further makes direct inquires of applicants' treating professionals and compels applicants to surrender all rights to patient confidentiality. Aplt. App. 218-19 ¶¶ 22-24.

The Executive Director reviews applications and makes a determination as to which applicants are mentally stable. Tab 3, COLO.R.CIV.P. 201.7. Those he does not certify as mentally stable are referred to an inquiry panel of the Board's Bar Committee. Id. If the inquiry panel finds "probable cause to believe that an applicant is mentally unstable," the matter is referred to a hearing panel of the Bar Committee. See Tab 3, COLO.R.CIV.P. 201.10(1). Ultimately, the hearing panel's determination is reviewable in the Colorado Supreme Court. See id. Again, none of these proceedings begin until after an applicant has passed the bar exam.

SUMMARY OF ARGUMENT

The district court erred in dismissing this case on standing and ripeness grounds. The court ruled that the Students suffered no actual or imminent injury. In reaching this conclusion, the court disregarded the Students' allegations that they would apply for and take the Colorado bar exam at a date certain in the future, and hence, are threatened with imminent injury. The court also failed to account for the Students' allegations, argument, and evidence that they have suffered actual injury due to the chilling effect of the challenged questions. Under applicable standing and ripeness case law, these allegations were sufficient to establish both imminent and actual injury.

The court also erred in its application of the Younger abstention doctrine. Younger abstention applies only if there is a pending state proceeding. The court implicitly acknowledged that there was (and is) no proceeding pending before the Board or the Colorado Supreme Court. Yet, the court abstained because of the availability of such a proceeding for bar applicants in the future, after they pass the bar exam. The court thus misapplied the Younger doctrine.

Taken together, the district court's rulings vitiate the well-settled jurisdiction of federal district courts to hear general challenges to state bar rules. Under the court's rulings, bar applicants have no standing until they pass the bar exam, but at that point, the federal court must abstain. This Court cannot permit bar applicants to be denied their right to a federal forum by virtue of this jurisdictional Catch-22.

ARGUMENT

II. THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED SUBJECT MATTER JURISDICTION.

A. Standard Of Review.

The district court dismissed the Students' claims on grounds of standing, associational standing, and ripeness.[2] Tab 2 at 3, 7-11; Aplt. App. 247, 251-55. Standing and ripeness are challenges to a court's subject matter jurisdiction, and this Court reviews such challenges *de novo*. See Sac and Fox Nation of Mo. v. Pierce, 213 F.3d 566, 570-71 (10th Cir. 2000) (standing); New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1498-99 (10th Cir. 1995) (ripeness).

Because they raise the issue of subject matter jurisdiction, motions to dismiss based on standing and ripeness are dealt with as Rule 12(b)(1) motions. See New Mexicans for Bill Richardson, 64 F.3d at 1498-99. Rule 12(b)(1) motions take two forms: facial attacks on the sufficiency of the allegations of subject matter jurisdiction, and challenges to the factual basis upon which subject matter jurisdiction depends. See Holt v. United States, 46 F.3d 1000, 1002-03 (10th Cir. 1995). Here, the jurisdictional challenges are facial attacks on the

[2] The district court raised and decided the issue of individual standing *sua sponte* in its Order granting defendants' motion to dismiss. See Aplt. App. 247-55. The associational standing and ripeness issues were raised at Aplt. App. 75-83, 96-105, and ruled on at Aplt. App. 247-55.

allegations of the Second Amended Complaint. In such a facial attack, "'the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.'" Wise v. United States, 8 F. Supp.2d 535, 541 (E.D. Va. 1998) (quoting Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982)).

B. The Students Had Standing.

The standing inquiry requires a plaintiff to show three elements: (1) an injury in fact, i.e., an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the challenged act, such that the injury is fairly traceable to the challenged act; and (3) a likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Here, the district court held that the Students did not have standing for two reasons: they had not alleged an "imminent" injury in fact, and their alleged injury was not one that the court could redress. Tab 1 at 7-8; Aplt. App. at 251-52. The Students address each of these factors in turn.

1. The Students alleged both imminent and actual injuries.

The district court focused its attention primarily on whether John Roe # 2 and the Potter Chapter were faced with an "imminent" injury in fact. The court held that they were not because neither Roe #2 nor any member of the Potter

Chapter had graduated from law school or passed the Colorado bar examination. See Aplt. App. At 9-10; Aplt App. 253-54. In so holding, the court disregarded the relevant allegations that the students have concrete plans to graduate and take the bar exam, and that the Students are injured even before they apply.

a) The Students faced imminent injury.

In holding that the Students were not threatened with imminent injury, the district court failed to account for settled precedent from the Supreme Court, this Court, and other federal courts as to when allegations relating to the timing of injuries are sufficient to support standing. The Supreme Court addressed this issue in Lujan, where the plaintiffs challenged an Endangered Species Act regulation that made the Act inapplicable to federal agency actions in foreign countries. The plaintiffs claimed imminent injury based on the fact that they wished to travel to foreign countries to view endangered species at some undetermined future time. 504 U.S. at 563-64. The Court held that these allegations were insufficient:

> Such "some day" intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the "actual or imminent" injury that our cases require.

Id. at 564 (emphasis in original). By contrast, when plaintiffs present concrete plans that go beyond "some day" intentions, courts have routinely found that the plaintiffs had standing. Many of these cases have arisen in scenarios like the one at

bar, where a plaintiff plans to apply, but has not yet applied, for a license or benefit.

For instance, in Buchwald v. University of New Mexico Sch. of Med., 159 F.3d 487, 494 (10th Cir. 1998), this Court indicated that a plaintiff seeking admission to a government program can withstand a challenge to her standing by asserting her intent to apply for the program "in the near future." In Buchwald, the court noted that plaintiff, a rejected medical school applicant, would have been entitled to prospective injunctive relief if she had provided evidence that she would reapply to the university in the future, thus establishing that she would be judged based on the challenged criteria. Id. at 493-94. The court suggested that she could rectify her ripeness problem by amending her complaint to demonstrate that she intended to reapply. See id. at 494, n.2.[3]

Likewise, in a case involving issues similar to those in the instant case, Applicants v. Texas State Bd. of Law Examiners, No. A 93 CA 74055, 1994 WL 923404, at *5 (W.D. Tex. Oct. 11, 1994), the court held that three law students—two first year students and one second year student—had standing to challenge

[3]The district court attempted to distinguish Buchwald by noting that the Colorado Supreme Court can ultimately "remove the barrier or accommodate the applicant's claims of protected interest." Tab 2 at 9-10; Aplt. App. 253-54. This "distinction" improperly meshes standing and abstention considerations. The question whether the Students have asserted an imminent injury for standing

mental health questions on the Texas bar application, even though they had neither applied for the bar nor been denied a license. The court noted that the students would be required to answer the challenged questions when they applied for the bar and would then be subjected to further investigation. See id.[4]

Federal courts have reached similar conclusions in other licensure cases involving challenges based on ripeness.[5] See, e.g., Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1433-36 (9th Cir. 1996) (group that organized educational trips to Cuba and three individuals wishing to visit Cuba were not required to apply for license to go on trips planned in the future before they could challenge the validity of licensing regulations limiting travel to Cuba); Triple G Landfills, Inc. v. Bd. of Comm'rs, 977 F.2d 287, 288-91 (7th Cir. 1992) (company that acquired option to purchase land which it planned to use as a landfill could attack the validity of an ordinance regulating landfills, even though it had yet to purchase the

---

(cont'd)..
purposes is entirely separate from the question whether a state court can review their claim of injury.

[4] The district court attempted to distinguish this case by noting that in Texas, law students file a declaration of intent to study law. See Tab 2 at 9; Aplt. App. 253. This is a distinction without a difference. The key fact, according to the Texas federal district court, was that the students "would be" required to answer the questions on the Texas bar application, and that fact established their standing.

[5] These cases apply because ripeness "shares with standing the constitutional requirement of standing" that an injury in fact be imminent. National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996).

land or apply for a permit); New Mexicans for Bill Richardson, 64 F.3d at 1499-1502 (congressman could challenge statute prohibiting the use of contributions solicited or received for federal election campaign in state election campaign, even though he had not even announced his intention to run for state elective office).

Here, the Students' allegations demonstrate that they have more than vague "some day" intentions of getting a law degree, applying for the Colorado bar exam, and taking the exam. Joe Roe #2 and members of the Potter Chapter applied for and were accepted into the University of Denver College of Law, a school located in Colorado. Aplt. App. 213 ¶¶ 7 & 9. They have pursued J.D. degrees for one to three years at considerable time, effort and expense. See id. They have specific plans to take the Colorado bar exam. John Roe # 2 plans to apply for admission in May 2001 and take the bar exam in July 2001. Id. ¶ 7. Likewise, members of the Potter Chapter "have submitted or plan to submit" the application and thus plan to take the exam in the near future. See id. Because the Board made a facial attack on standing, these undisputed facts must accepted as being true, and viewed in a light most favorable to the Students. See Holt, 46 F.3d at 1002-03. These facts demonstrate that the Students' rights under the ADA and the Constitution are on a collision course with the Board's questions.

(cont'd.)..

Moreover, as the Board's own statistics bear out, 80% of University of Denver law students who take the Colorado bar exam for the first time pass the exam. See http//:www.courts.state.co.us/ble/results/LawSchoolStats0002.htm (Colorado Board of Law Examiners official web site, compiling statistics for the July 2000 Colorado bar examination). Roe # 2 and members of the Potter Chapter would be first-time takers of the exam. Accordingly, both Roe # 2 and the Potter Chapter have sufficiently alleged an imminent injury for standing purposes.

b) The Students suffered an actual injury.

The Students also alleged, argued, and presented evidence that the Board's questions injure them even before they must answer the questions. Inquiries into an applicant's history of treatment for mental health and substance abuse have a proven chilling effect on a law student's decision whether to seek out professional advice on such issues. Law students who know they will have to reveal their treatment history to bar examiners are reluctant to undergo such treatment for that very reason. See Carol J. Banta, Note, The Impact of the Americans with Disabilities Act on State Bar Examiners' Inquiries Into the Psychological History of Bar Applicants, 94 Mich. L. Rev. 167, 183-84 (1995).

Research corroborates the validity of these concerns. In a recent survey of over 13,000 law students, when asked if they would seek assistance for a substance abuse problem, only 10% answered with an unqualified "yes," while 41%

responded that they would seek assistance only if they were sure that bar officials would not have access to the information. See American Association of Law Schools, Report of the AALS Special Comm. on Problems of Substance Abuse in the Law Sch., 44 J. Legal Educ. 35, 55 (1994). Dr. Howard Zonana, Director of the Law and Psychiatry Division and Professor of Psychiatry at the Yale University School of Medicine, has noted that

> [t]his conclusion applies with even stronger force to hospitalization for mental health treatment. Research indicates that mental health treatment still carries a significant stigma in our society, and hospitalization for mental health treatment carries a particularly powerful stigma.

Aplt. App. 145-46 ¶ 14; see Aplt. App. 141-46.[6] John Roe # 2 has expressed this same concern. See Aplt. App. 260.

Several courts have noted this chilling effect in striking down questions about mental health treatment history. See, e.g., Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 438 ("Faced with the knowledge that one's treating physician may be required to disclose diagnosis and treatment information, an applicant may be less than totally candid with their therapist. Without full disclosure of a patient's condition, physicians are restricted in their ability to

[6] By attaching this affidavit to their response to the motion to dismiss, the Students did not convert defendants' Rule 12(b)(1) motion into a summary judgment motion. See Deuser v. Verera, 139 F.3d 1190, 1191 n.3 (8th Cir. 1998).

accurately diagnose and treat the patient."); In re Petition and Questionnaire for Admission to the R.I. Bar, 683 A.2d 1333, 1336 (R.I. 1996) (mental health questions are impermissible because they discourage future bar applicants from taking advantage of opportunities to learn coping strategies); In re Petition of Frickey, 515 N.W.2d 741, 741 (Minn. 1994) (striking mental health inquiries because they "unduly deter law students from seeking mental health counseling"). Thus, the challenged questions create a very direct and immediate dilemma for students who plan to apply for admission to the Colorado bar. The court erred by failing to acknowledge this actual harm.

2. The Students alleged an injury that is capable of being redressed by a favorable decision.

The district court also suggested that the Students' injuries could not be redressed by declaratory or injunctive relief. The court reasoned as follows:

> If this court were to enjoin the defendants from continuing to ask the three challenged questions, the Bar Committee may and presumably would find other means to make the inquiries necessary to determine the fitness of applicants. Eliminating these questions by a prohibitory injunction would not, therefore, be effective relief.

Tab 2 at 7; Aplt. App. 251.

The court's reasoning is flawed. The Students seek to compel the Board to narrow its questions and focus on current functioning ability as opposed to past treatment history. In other states, in response to actual or threatened litigation, bar

examiners have abandoned or circumscribed similar questions, either voluntarily or after courts ruled that the questions violate the ADA. E.g., Clark v. Virginia Bd. of Bar Examiners, 880 F. Supp. 430, 438-41 (E.D. Va. 1995) (listing states that have narrowed their mental health questions in light of potential or actual litigation under the ADA); Doe v. Judicial Nominating Comm'n, 906 F. Supp. 1534, 1543-45 (S.D. Fla. 1995) (summarizing the emerging body of case law in ADA cases challenging mental health and substance abuse questions on state bar applications). Indeed, when faced with the prospect of a court challenge based on the invalidity of its questions, the Board agreed to narrow the scope of one of its substance abuse questions by adding a time restriction. See supra at Statement of Facts § 3. However, even as revised, the question violates the ADA and the Constitution.

On this record, there was no basis for the district court to assume that the Board would ignore a declaration that its questions violate federal law or an injunction prohibiting the use of the questions. Therefore, the court erred in holding that the Students' injury could not be effectively redressed.

C. The Potter Chapter Has Organizational Standing.

The Potter Chapter has standing to sue on behalf of its members provided that (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of the

individual members in the lawsuit. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); Comm. to Save the Rio Hondo v. Lucero, 102 F.3d 445, 447 n. 3 (10th Cir. 1996) (applying the Hunt test). Here, the district court ruled that the Potter Chapter satisfied the second and third parts of the Hunt test but failed the first part for the reasons discussed above: no "imminent" injury in fact and no redressable injury. See Tab 2 at 9-10; Aplt. App. 253-54.

The court's conclusion as to the first prong of the Hunt test was erroneous. To satisfy this prong, "[t]he association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." Warth v. Seldin, 422 U.S. 490, 511 (1975) (emphasis added); see EEOC v. Nevada Resort Ass'n, 792 F.2d 882, 885-86 (9th Cir. 1986) (upholding standing of organization to litigation rights of one specific member); Central & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 312 (D.C. Cir. 1985) (quoting Warth and emphasizing phrase *any one of them*).

The Students have set forth above the reasons why Joe Roe # 2, who is a member of the Potter Chapter, and other members of the Potter Chapter, have individual standing. See supra Argument § I.B. Thus, the Potter Chapter passes the first part of the Hunt test.

Finally, the district court correctly held that the Potter Chapter passed the second and third parts of the Hunt test. The Chapter met the second part of the test because this lawsuit, which seeks to enforce a law that forbids discrimination against persons with disabilities, goes to the core of the Chapter's reason for being. The Chapter met the third part because it seeks only declaratory and injunctive relief, and therefore, individual Chapter members are not necessary parties to the litigation. See Medical Society of New Jersey v. Jacobs, No. 93-3670, 1993 WL 413016, *4 (D. N.J. Oct. 5, 1993). Thus, all three Hunt factors were present, and the Potter Chapter established organizational standing.

D. The Students' Claims Are Ripe.

The ripeness inquiry is two pronged. It requires this Court to evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967); Rocky Mtn. Oil & Gas Ass'n. v. Watt, 696 F.2d 734, 741 (10th Cir. 1982).

As the district court noted, ripeness shares with standing the constitutional requirement of standing that an injury in fact be imminent. Tab 2 at 10; Aplt. App. 254. See National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996). Therefore, no separate analysis of "fitness" is required here. If the Students have standing, then they *necessarily* pass the "fitness" portion of the ripeness test. See id. at 1428 ("if the threatened injury is sufficiently

'imminent' to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied"). The Students have demonstrated actual and imminent injury, see supra Argument § I.B., and thus, their claims are fit for judicial decision.

The Students also satisfy the hardship prong. The Students have invested significant time, money, and energy in their legal careers. If they are forced to wait until they pass the bar exam to challenge the questions at issue, then they will be faced with a Hobson's choice: answer the questions in the affirmative or refuse to answer. If they answer "yes," they waive their substantive rights, their challenge becomes moot, and they subject themselves to the very inquiries and investigations they believe are illegal.

If they refuse to answer, they may spend significant time, resources, and energy unnecessarily. They may complete their application, pay the application and investigation fees, study for and pass the bar exam, and have their claims reviewed by Mr. Ogden, the inquiry panel, the hearing panel, and the Colorado Supreme Court. At the end of that process, they may be told that they still must answer these questions, and after answering, they are subject to the same onerous investigation and review process. While their challenge is pending, they cannot begin their legal careers without a license to practice law. They should not be forced to expend such time energy and money when the passage of time will not

change the legal question they present. See Triple G Landfills, 977 F.2d at 290 (plaintiff placed in an unwarranted dilemma because there was no countervailing benefit—to the judicial process or the public interest—that would attend a postponement of the resolution of their claims).

Moreover, as discussed above, the Board's inquiries have a proven chilling effect even before a law student is faced with the choice of whether to answer the questions. See supra Argument § I.B.1.b. The Students will be disinclined to seek treatment or to be as candid as possible in counseling sessions if they know that the challenged questions and the corresponding medical records requests await them.

By contrast, the Board will suffer no equivalent hardship. The Students are challenging the scope of three questions on the Colorado bar application. They are not seeking to revamp the Board's entire application, examination, investigation, and review process. The Board's administrative process has gone forward during the pendency of this suit and will continue uninterrupted if the Court remands this case for trial. If the Students prevail, they will work with the Board to fashion questions that do not violate federal law. In sum, the balance of hardships weighs strongly in favor of a finding that the Students' claims are ripe.

III. THE DISTRICT COURT'S DECISION TO ABSTAIN WAS ERROR.

The United States Supreme Court has repeatedly stated that "'[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.' Abstention

rarely should be invoked, because the federal courts have 'virtually unflagging obligation . . . to exercise the jurisdiction given to them.'" Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) (citation omitted) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 817 (1976)).

Here, the district court failed to fulfill its unflagging obligation. The court gave deference to a non-existent state proceeding and thus misapplied the Younger abstention doctrine. See Younger v. Harris, 401 U.S. 37 (1971). Moreover, as discussed below, the court's ruling nullifies the jurisdiction granted to federal district courts to hear general constitutional challenges to state bar rules and leaves the Students without an effective remedy. For either of these reasons, this Court should reverse and remand this case for trial.[7]

A. The District Court Misapplied The Younger Abstention Doctrine By Relying On The Possibility Of A Future State Proceeding.

The district court correctly articulated the Younger doctrine: "Deference to the adjudicative authority of state courts requires abstention *when litigation is pending there before the filing of the federal action* that implicates important state interests and where the federal plaintiff will have an adequate opportunity to raise

[7] This Court reviews decisions to abstain under Younger *de novo*. Taylor v. Jaquez, 126 F.3d 1294, 1296 (10th Cir. 1997), cert. denied 523 U.S. 1005 (1998). The issues raised in this section III were raised at Aplt. App. 162-91, 192-204. The district court ruled on them at Aplt. App. 255.

and resolve the claims brought in the federal court." Tab 2 at 11; Aplt. App. 255. (emphasis added) (citing Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) and J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1291 (10th Cir. 1999)). But even though no state action was (or is) pending, the court abstained because a state action *could* be instituted sometime *in the future*. The court reasoned that "the Colorado Supreme Court must grant or deny each application for Bar Admission and there is no impediment to an applicant's urging that court" to grant the relief requested here. Tab 2 at 11; Aplt. App. 255.

Contrary to this holding, the Supreme Court has squarely rejected the notion that a federal court may invoke Younger when there is no pending state action:

> Though we have extended *Younger* abstention to the civil context, we have never applied the notions of comity so critical to *Younger's* "Our Federalism" when no state proceeding was pending . . . . In this case, there is no allegation by respondents of any pending state proceedings . . . . Absent any *pending* proceedings in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous.

Ankenbrandt, 504 U.S. at 705 (emphasis in original). Accord, Centifanti v. Nix, 661 F. Supp 993, 994 (E.D. Pa. 1987) (in deciding to address constitutional challenge to Pennsylvania Supreme Court's bar rules, court rejected the notion that it should abstain based on "the possibility of a future state action").

The two cases upon which the district court relied do not support its decision to abstain. Both involved application of the Younger doctrine out of deference to a *pending* state proceeding. See Middlesex County, 457 U.S. at 432-37 (applying Younger abstention when federal jurisdiction conflicted with a *pending* state bar disciplinary proceeding); Valdez, 186 F.3d at 1291 (applying Younger abstention because the New Mexico Children's Court had adjudicated the custody of the plaintiff children and had "continuing jurisdiction" over them).

In sum, there was no legal basis for the district court's extension of Younger to cases where there is no pending state proceeding. As with the lower courts in Ankenbrandt, the district court erred in abstaining under these circumstances.

B. Absent A Pending State Proceeding, Abstract Concerns About Comity Do Not Justify Younger Abstention.

In the court below, the Board asserted that it need not satisfy Younger's requirement of a pending state proceeding. The Board based this argument on a footnote in Penzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987). The Penzoil Court held that a federal district court should have refrained from enjoining enforcement of a state court judgment. In the course of explaining why it was relying on Younger rather than Pullman abstention, the Court noted that Younger and Pullman involve similar considerations and that "[t]he various types of abstention are not

pigeonholes into which federal courts must try to fit cases." Id. at 11, n.9; see Aplt. App. 196.

The Board used this footnote as a springboard to argue that the district court should abstain regardless of the absence of any pending state proceeding. The Board asserted that it was enough that the Colorado Supreme Court has an established procedure in which bar applicants may challenge bar admission rules. See Aplt. App. 194, 199-201.

The Board's approach is flawed. The United States Supreme Court has never analyzed abstention issue in this manner. Just two years after it decided Penzoil, the Court reaffirmed that it had "carefully defined" the limited classes of cases in which abstention is permissible, and clarified that its footnote in Penzoil was not meant to suggest that the various abstention doctrines could be meshed into one, nor that the specific requirements of Younger need not be satisfied:

> While we acknowledge that "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," [citing Penzoil, 481 U.S. at 11, n.9], the policy considerations supporting *Burford* and *Younger* are sufficiently distinct to justify independent analysis.

New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 359-60 (1989). Three years later, in Ankenbrandt, the Court conducted separate analyses of Burford and Younger abstention and reiterated that Younger does not apply

absent a pending state proceeding. See 504 U.S. at 705-06. See also Valdez, 186 F.3d at 1291-95 (debating whether state court's continuing jurisdiction and periodic hearings satisfied Younger's requirement of a pending state proceeding).

In rejecting a similar attempt by state judicial authorities to invoke Younger in the absence of a pending state proceeding, the Fifth Circuit retorted:

> Younger principles are not invoked by the mere fact that federal relief has an impact on state government machinery . . . . The Younger principles simply are not what the defendants would have them be: a broad, discretionary device for the evasion of the responsibility of federal courts to protect federal rights from invasion by state officials.

Morial v. Judiciary Comm'n, 565 F.2d 295, 299 (5th Cir. 1977).

The Board also relied on Hawaii Hous. Auth. v. Midkiff, 467 U.S. 299 (1984) and Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) for the proposition that Younger abstention is proper even when the federal proceeding predates the state proceeding. See Aplt. App. 199. However, in those cases, state proceedings commenced shortly after the federal proceedings had commenced, and in each case, the question was whether the state proceedings were initiated prior to "proceedings of substance on the merits" in federal court.

Here, by contrast, the Board has admitted that it conducts no proceedings relating to a bar applicant's answer (or refusal to answer) to questions on the bar application until *after* an applicant has passed the bar exam. Aplt. App. 80, 87C-

87D, 149. Indeed, this is the basis designed for the Board's argument that the plaintiffs' claims are not ripe. See Aplt. App. 80, 149. In sum, there were and are no pending state proceedings, and hence, there are no comity concerns that would justify Younger abstention in this case.

C. The District Court's Failure To Exercise Its Jurisdiction Leaves The Students Without An Effective Remedy.

By adopting the Board's reasoning, the district court has left the plaintiffs in a Catch-22 that denies them a federal forum for their federal claims: Their claims are not ripe and they lack standing until they pass the Colorado bar examination; yet, once they pass the exam, a state proceeding begins, and Younger abstention applies. This Catch-22 yields two very troubling consequences.

First, it completely undermines District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), under which federal district courts have jurisdiction over the type of claims that the Students have asserted in this case. The Feldman Court established that a bar applicant can sue a state supreme court in federal district court if the suit presents a general challenge to state bar admission rules. See id. at 482-83, 486. The rational for this rule was recently reexamined by the District of Columbia Circuit, which noted that a federal district court has no jurisdiction to review judgments of state supreme courts.

> In promulgating rather than applying bar rules, however, [a state supreme court] acts in a legislative rather than a

> judicial capacity. Accordingly, a district court confronted with a simple challenge to the validity of such rules "is not reviewing a state-court judicial decision" and thus has subject matter jurisdiction.

Stanton v. District of Columbia Ct. of Appeals, 127 F.3d 72, 75 (D.C. Cir. 1997) (quoting Feldman, 460 U.S. at 486). See Razatos v. Colorado Supreme Ct., 746 F.2d 1429, 1432-33 (10th Cir. 1984) (to the same effect).

In the present case, the Students challenge the validity of state bar rules. They allege that the Board's questions about mental health and substance abuse treatment violate the ADA and the Constitution. None of the Students have been denied admission to the bar, and consequently, they do not challenge a judicial determination of their individual application. Under these circumstances, the district court clearly had subject matter jurisdiction over their claims.

When presented with such general challenges to rules governing admission to a state bar, federal district courts have routinely exercised jurisdiction. See, e.g., Razatos, 746 F.2d at 1432-33 (10th Cir. 1984) (district court had jurisdiction to review general challenge to attorney disciplinary procedures), cert. denied, 471 U.S. 1016 (1985); Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489, 1495 (S.D. Fla. 1995) (district court had jurisdiction over general ADA challenge to bar application questions about mental health treatment history); Clark v. Virginia Bd. of Bar Examiners, 861 F. Supp. 512, 518-19 (E.D. Va. 1994) (while it

lacked jurisdiction over applicant's claim for bar examiners to grant her a license, district court had jurisdiction over applicant's ADA challenge to questions about mental health treatment). Moreover, in challenges to bar admission or disciplinary rules, federal district courts have repeatedly rejected abstention arguments similar to those made by the Board in the instant case. See, e.g., Centifanti, 661 F. Supp at 994-95; Ktsanes v. Underwood, 467 F. Supp. 1002, 1005-07 (N.D. Ill. 1979); Shapiro v. Cooke, 552 F. Supp. 581, 584-85 (N.D.N.Y. 1982), aff'd 702 F.2d 46 (2d Cir. 1983).

Yet, under the district court's reasoning, federal courts would virtually never exercise the jurisdiction recognized in Feldman, because bar applicants' claims would never be ripe until the time when the district could would be compelled to abstain. Surely the Supreme Court's decision in Feldman provides bar applicants with more than a theoretical right to a federal forum.

There is a second, and even more troubling, consequence of the district court's rulings: The rulings leave the Students without an effective remedy for one very critical aspect of their claims. As discussed above, see supra Argument § I.B.1.b., the Students alleged, argued, and presented evidence that the mere presence of the challenged questions on the Colorado bar application harms them by imposing additional burdens on disabled persons, and by deterring them from seeking treatment or from being as candid as necessary with their treatment

providers. See Aplt. App. 101-02; 145-46 ¶ 14; 218-19, ¶¶ 20-25; 260. In the court below, the defendants never contested these assertions. Indeed, as this case was decided on a motion to dismiss, they were bound to accept the Students' allegations as true.

Yet, the defendants took the position that the only way the Students could proceed before the Colorado Supreme Court would be to contest the denial of an individual application for admission to the bar. See Aplt. App. 188. ("The Court will not deviate from the procedures that are available to all bar applicants."). They refused to hear the Students' federal claims except in a proceeding that would take place *after* the Students passed the bar examination. Because the Students showed that they are harmed long before they are denied a license to practice law, such after-the-fact review would be inadequate. See Middlesex County Ethics Comm., 457 U.S. at 432 (Younger abstention does not apply unless the federal plaintiff has an adequate opportunity to present the federal challenge in the state proceeding).

In sum, under the district court's ruling, Feldman jurisdiction would virtually cease to exist. Moreover, notwithstanding the district court's extensive discussion of the procedures available to Colorado bar applicants, those procedures would come too late to redress the Students' claims concerning the chilling effect of the challenged questions and the Students' corresponding rights under the ADA

and the Constitution. The Students urge the Court to extract them from this procedural quagmire and remand this case for trial.

CONCLUSION

For the foregoing reasons, the Students request this Court to reverse the judgment of the district court and remand this case for a trial on the merits.

STATEMENT CONCERNING ORAL ARGUMENT

The Students request the Court to hear oral argument for the following reasons. This appeal raises important issues concerning the scope of federal jurisdiction and the application of the standing, ripeness, and abstention doctrines. The appeal also raises important issues with respect to the proper balancing of a litigant's right to have his federal claim heard in federal court versus the rights of a state with respect to its bar admissions process. These are issues that are likely to recur when law students challenge Colorado's bar admission rules.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel states that this brief complies with the type-volume limitation of less than 14,000 words set forth in Rule 32(a)(7)(B), because this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii) contains ____ words.

Dated October 6, 2000.

Respectfully submitted,

David D. Powell, Jr.
Stephen Masciocchi
Susannah Pollvogt
HOLLAND & HART LLP
555 Seventeenth Street, Suite 3200
Post Office Box 8749
Denver, Colorado 80201-8749
(303) 295-8000

In cooperation with the American Civil Liberties Union Foundation of Colorado

Mark Silverstein
American Civil Liberties Union Foundation of Colorado
400 Corona Street
Denver, Colorado 80218
(303) 777-5482

ATTORNEYS FOR APPELLANT