IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

SCHUYLER FILE, Plaintiff, v. JILL M. KASTNER, *et al.*, Defendants.	No. 2:19-cv-01063-LA

PLAINTIFF'S RESPONSE TO
BAR DEFENDANTS' MOTION TO DISMISS

The Bar Defendants' memorandum supporting their motion to dismiss generally makes the same arguments as the State Defendants' memorandum. Plaintiffs incorporate the arguments set forth in response to the State Defendants' memorandum in response to the Bar Defendants' motion to dismiss, and out of respect for the Court's time Plaintiff will not repeat the same arguments here. However, several points specific to the Bar Defendants' memorandum call for a response.

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I. The State Bar is unconstitutional in its current form for all attorneys.

The State Bar is unconstitutional in its current form, as laid out in the Plaintiff's response to the State Defendants' motion to dismiss. This is true for all attorneys who are coerced into paying mandatory fees as a condition of their license. Thus, the Complaint is a facial attack on the State Bar as currently constituted. (*See* Compl., Doc. 1, at 9, requesting a declaration and injunction that the rules governing state bar membership are unconstitutional and cannot be enforced).[1]

II. This Court is not bound by the decisions cited by Bar Defendants.

The Bar Defendants' motion to dismiss relies heavily on three other decisions in similar cases. Bar Defendants' Memo. Supporting Motion to Dismiss, Doc. 20, at 9-11 (hereinafter "Bar Defs' Memo."). None are a trustworthy guide to this Court. The Eighth Circuit's second decision in *Fleck v. Wetch*, after the U.S. Supreme Court's grant, vacate, and remand (GVR) order, 139 S. Ct. 590, *1 (2018), focuses its discussion of the mandatory-association claim on the procedural posture and lack of an evidentiary record. The opinion stated that Fleck "misrepresented his position before our court" in his cert. petition, "falsely asserted" that he made certain arguments below, and then actually made those arguments for the first time on

[1] Because it is only a facial and not an as-applied challenge, the Bar Defendants' attack on the Plaintiff's standing is inapplicable. *Contra* Bar Defendants' Memo. Supporting Motion to Dismiss, Doc. 20, at 13-15 ("he fails to meet the pleading standard for any as-applied challenge based on those activities and lacks Article III standing for his claims.").

remand. *Fleck v. Wetch*, 937 F.3d 1112, 1116 (8th Cir. 2019). The court began its substantive discussion by restating its "general rule [that] we will not consider arguments raised for the first time on appeal as a basis for reversal." *Id*. After briefly stating Fleck's arguments as to the effect of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018) on *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990), the court continued,

> We decline to consider these issues because, whatever level of scrutiny is appropriate, the claim must still be decided on an evidentiary record. Based on prior Supreme Court precedent, we conclude the record is inadequate as the result of Fleck forfeiting the issue in the district court and on appeal. Accordingly, we decline to invoke our discretion to take up this claim for the first time on remand.

Id. at 1117. Thus, the Eighth Circuit's decision in *Fleck* can hardly be considered a thorough and thoughtful consideration of the relevant issues. In fact, the court explicitly declined to consider and rule on the issues brought before this Court in this motion to dismiss.

This Court is not bound by decisions from other district courts. Moreover, *Schell* did not undertake the analysis set forth in Plaintiff's response to the State Defendants' motion to dismiss, namely the effect of the GVR order or the possibility of implicit overruling. *See Schell v. Williams*, 5:19-cv-00281-HE (W.D. Okla. 2019), Doc. 61, at 9. *Gruber* did account for the GVR order, but only in a footnote and

without any analysis, and its rejection of *Janus's* implicit overruling of *Keller* did not follow the Seventh Circuit's analysis from *Levine v. Heffernan,* 864 F.2d 457, 461 (7th Cir. 1988). *Gruber v. Or. State Bar*, No. 3:18-CV-1591-JR, 2019 U.S. Dist. LEXIS 88339, at *27-28 (D. Or. Apr. 1, 2019). Thus, this Court should take up the Plaintiff's arguments with fresh eyes.

III. The State Bar constantly uses mandatory dues money to speak on issues of public concern.

The Complaint provided several examples of activities undertaken by the State Bar which expose the impossibility of *Keller's* line-drawing exercise. Compl., Doc. 1, at 6-7. These are not an as-applied challenge to those particular activities. *Contra* Bar Defs' Memo. at 11-13. Rather, they "illustrate the simple reality that virtually everything the State Bar does takes a position on the law and matters of public concern." Compl., Doc. 1, at 7.

Abood, *Hudson*, and *Keller* are built on the notion that one can draw an objective line between "advocacy" activities and everything else an organization does. "Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative," and so attorneys may take a *Keller* dues deduction for any such advocacy by a mandatory bar. *See Keller*, 496 U.S. at 17 (discussing *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209 (1977) and *Teachers v. Hudson*, 475 U.S. 292 (1986)). "[A]t the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities

connected with disciplining members of the bar or proposing ethical codes for the profession." *Id*. Between those two points is the bulk of the Bar's work, and *Keller*, adopting *Hudson*, says that an arbitration procedure is best to adjudicate whether a particular expenditure should fall on this or that side of the line. *Id*. at 17. The Court acknowledged the distinction "will not always be easy to discern," *id*. at 15, but trusted arbitrators and lower courts to do their best.

Janus exposes the fallacy of that whole project. *Janus* struck down agency fees because "this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." 138 S. Ct. at 2460. "It is impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great public concern." *Id*. at 2474 (*quoting Harris v. Quinn*, 573 U.S. 616, 654 (2014)). It is equally impossible to argue speech about *the law*—from the most high-brow discussion of the nature of the judicial role to the most specific discussion of a particular municipal code section—is not speech on matters of "great public concern."

Justice Alito's majority opinion goes on to list a number of topics about which unions speak: "controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound value and concern to the public." *Id*. at 2476.

The State Bar may think initially that all of its speech about such topics falls within the *Keller* dues deduction because it is advocacy speech, and thus that Plaintiff is safeguarded from a violation of his rights. But that attitude fails to recognize that even the bar's educational and networking activities, separate from any direct lobbying, is speech about such controversial topics. Consider the topics identified in Justice Alito's majority opinion in *Janus*.

Carl Sinderbrand of the Axley law firm in Madison is "passionate about environmental stewardship." "Carl A. Sinderbrand," Axley, https://www.axley.com/attorney/carl-sinderbrand/. He is a former chairman of a public-interest organization that actively litigates environmental law issues. In 2010, he gave a presentation to the State Bar Annual Convention: "Climate Change: Challenges and Opportunities." *Id*. The year previous, the State Bar's environmental law section cosponsored a symposium on "Global Climate Change and Sustainable Development: Challenges and Opportunities for International Law." "International Law Journal Symposium to Focus on Global Climate Change," Univ. of Wis. Law School (Feb. 2, 2009), https://law.wisc.edu/newsletter/News/International_Law_Journal_Sympos_2009-02-10. The State Bar's website offers a "Climate Change" resources page that includes links to numerous advocacy organizations with specific viewpoints on climate change. "Climate Change Resources," State Bar of Wis.,

https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/article.aspx?Volume=82&Issue=3&ArticleID=1688.

The State Bar also speaks frequently about sexual orientation and gender identity. It published a book, "Sexual Orientation, Gender Identity, and the Law" (PINNACLE 2018). "Issues Facing Transgender Clients: Lawyers, Book Authors Provide Insight," State Bar of Wis. (Sep. 5, 2018), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=10&Issue=15&ArticleID=26546. The State Bar described the coauthors as "[Abby] Churchill, an attorney and longtime LGBTQ community advocate, and Nick Fairweather, a labor and employment attorney who works on transgender issues." *Id*. The State Bar also produced a video series to accompany the book featuring the two attorneys. *Id*. Later that same year, the State Bar gave Churchill its 2018 Legal Innovators Award for founding TransLaw Help Wisconsin. Compl., Doc. 1, at 6. More recently, in June of this year, the State Bar invited "the 'grandmother' of the transgender civil rights movement" to deliver a keynote address that "sheds light on the decades-long struggle" before a State Bar conference. Joe Forward, "Phyllis Frye: The Grandmother of the Transgender Rights Movement," State Bar of Wis. (July 17, 2019), https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=27122.

Doe v. Elmbrook was a controversial case from this district that eventually went *en banc* before the Seventh Circuit on appeal. 687 F.3d 840 (7th Cir. 2012). The case pitted the rights of minority religious adherents against the preferences and convenience of a majority of their local community. The majority's opinion siding with the minority religion adherents drew separate, vigorous dissents from Judges Easterbrook, Posner, and Ripple. The State Bar published an extended article which praised the majority opinion for "d[oing] its best with a unique set of facts and an amorphous doctrine," saying "the decision stands as a rebuke to bringing school into church." Christopher P. Keleher, "Church & State: Blurring the Lines," Wis. Law. (Dec. 1, 2012), https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=10527#1.

In all these instances—climate change, sexual orientation and gender identity, minority religions, among many others—by the articles and books it publishes, the speakers it highlights, the awardees it honors, the State Bar speaks on controversial subjects. "To suggest that speech on such matters is not of great public concern—or that it is not directed at the 'public square'—is to deny reality." *Janus*, 138 S. Ct. at 2475 (internal quotation omitted).

The State Bar may object that it is not "speaking" when it publishes an article or hosts a presentation, that it is merely a neutral forum for the discussion of ideas, a nonpartisan facilitator of legal discourse. This conception of its activities fails on

three counts. First, the State Bar's educational activities hardly meet the standard of "viewpoint neutrality" set for the use of mandatory fees in *Board of Regents v. Southworth*, 529 U.S. 217, 230 (2000). There is no "Climate Change Skeptics Resources" page on the State Bar's website, no award for the lawyers who carefully crafted the Wisconsin Marriage Amendment that won the approval of 59.4 percent of Wisconsin voters in 2006. Second, when the State Bar presents awards, it is definitely speaking—it is lifting up certain individuals or causes as worthy of emulation, honor, and praise. Third, when the State Bar hosts CLE presentations or sponsors books, it confers its powerful imprimatur onto them, especially when the bar positions a presentation or book as a definitive, authoritative statement of the law, much like a restatement. Yet just as the American Law Institute has come under criticism for bringing biased viewpoints to its principles and restatements, so too the State Bar's books can bring a bias to their project. *See* Jonathan R. Macey, *The Transformation of the American Law Institute,* 61 GEO. WASH. L. REV. 1212 (1993); Tiger Joyce, "Tort Lawyers Take Over the American Law Institute," Wall St. J. (June 29, 2017), https://www.wsj.com/articles/tort-lawyers-take-over-the-american-law-institute-1498776033; John Fund, "A Powerful Legal Group Changes the Law While Nobody's Looking," Nat. Rev. (May 13, 2018), https://www.nationalreview.com/2018/05/american-law-institute-restatements-politically-correct-agenda/. As Plaintiff said in the Complaint, you are going to get

a different restatement on the law of sexual orientation and gender identity if it is written by the founder of TransLaw rather than the legal counsel for Wisconsin Family Action. Compl., Doc. 1, at 7.

In short, the State Bar *does* speak, regularly, institutionally, about controversial subjects and issues of public concern. It cannot neatly segregate advocacy on the one side and everything else on the other, and provide a deduction just for its lobbying work. Its educational activities, its events, its awards, its magazine, virtually everything it does (except the cruises and the car-rental discounts) addresses issues of substantial public concern. And Defendants' policies and practices force Plaintiff to associate with all of it against his will. That should not stand.

CONCLUSION

For these reasons, and for those given in Plaintiff's response to the State Defendants' motion to dismiss, the Court should deny this motion to dismiss.

Respectfully Submitted,
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/s/ Daniel R. Suhr

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CERTIFICATE OF SERVICE

On Friday, December 5, 2019, I caused this response to be served on the Court and counsel for both sets of defendants via CM/ECF. Per the Court's standing order, I am also mailing a single courtesy copy to chambers.

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