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

PLAINTIFF'S RESPONSE TO
BAR DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The First Amendment includes both the freedom to associate and the freedom not to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Plaintiff does not wish to associate with or subsidize the State Bar of Wisconsin. If he exercises that desire, he credibly fears the Wisconsin Supreme Court will enforce its rules against him, costing him professionally and monetarily. So Plaintiff chills his own speech and continues to pay dues and belong to an organization he does not wish to support. In this case, Plaintiff seeks a declaratory judgment and injunction for him and all other Wisconsin lawyers to enjoy a free choice concerning whether to join the State Bar of Wisconsin.

What Plaintiff is not seeking is an end to the regulation of lawyers' professional conduct. States have a compelling interest in ensuring the ethical practice of important professions in our society. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 512-13 (2015). This is as true for lawyers as it is for doctors, dentists, and other regulated professionals. The U.S. Supreme Court has recognized this fact, and permitted states to require lawyers pay fees to entities that regulate the legal profession. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). And Plaintiff here sees the importance and value of this regulation; he makes no objection to his "compulsory dues being spent for activities connected with disciplining members of the bar. . ." *Id.* at 16. Regulation of lawyers' conduct is an important

service to the profession and society, and nothing in Plaintiff's complaint calls for *Keller* to be overturned on this ground.

Plaintiff's argument in this case is different than the arguments put forward in *Jarchow v. State Bar of Wisconsin*, No. 19-CV-266 (W.D. Wis.). There, the plaintiffs are seeking the straightforward overruling of *Keller*, and thus recognize that they may turn only to the U.S. Supreme Court for relief. State Defendants' Memo. Supporting Motion to Dismiss, Doc. 15, at 16 (hereinafter "St. Defs' Memo."). *See Price v. City of Chi.*, 915 F.3d 1107, 1111 (7th Cir. 2019). Plaintiff believes that *Keller* does not need to be overruled but rather that it must be read in light of the Supreme Court's narrowing of *Keller* in *Harris v. Quinn*, 573 U.S. 616, 655 (2014). He also believes the Supreme Court's grant, vacate, and remand (GVR order) in *Fleck v. Wetch*, 139 S. Ct. 590, *1 (2018), gives this Court permission to reconsider *Keller* in light of *Janus v. AFSCME,* 138 S. Ct. 2448 (2018), as will be explained at length below.

When *Keller* is read in the light of *Harris* and *Janus*, this Court must conclude that the State Bar of Wisconsin is unconstitutional in its current form. This is so because the State Bar of Wisconsin, unlike the bar in other states, performs no formal regulatory functions—it is purely a trade association for lawyers. For this reason, it cannot survive exacting scrutiny.

ARGUMENT

I. The standard of review sets a high bar for dismissal.

The U.S. Court of Appeals for the Seventh Circuit has recently restated the standard applicable to this case: The court should "construe the complaint in the light most favorable to the plaintiffs and accept[] all well-pleaded factual allegations as true. To survive a motion to dismiss, the allegations in the complaint must plausibly suggest a right to relief, raising that possibility above a speculative level." *Horist v. Sudler & Co.*, 941 F.3d 274 (7th Cir. 2019). In order to succeed on their motion, the Defendants must show "beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Manning v. Miller*, 355 F.3d 1028, 1031 (7th Cir. 2004). As will be demonstrated in this brief, it is far from beyond doubt that no set of facts justify Plaintiff's case. Rather, Plaintiff has alleged all the facts and arguments necessary to survive Rule 12(b)(1) and (6).

II. This Court has Subject Matter Jurisdiction Under Rule 12(b)(1).

A court may only dismiss a claim under Rule 12(b)(1) if it lacks subject matter jurisdiction because the plaintiff fails to demonstrate constitutional standing under Article III. *See Le v. Kohls Dep't Stores, Inc.,* 160 F. Supp. 3d 1096, 1109 (E.D. Wis. 2016). This Court has subject matter jurisdiction in this case because Plaintiff has all of the prerequisites of Article III standing: he has "been injured, the defendants

caused that injury, and the injury can be redressed by a judicial decision." *Morrison v. YTB Int'l, Inc*., 649 F.3d 533, 536 (7th Cir. 2011).

This is a preenforcement challenge against the Justices of the Wisconsin Supreme Court as the authority that imposes civil penalties for noncompliance with the Supreme Court's rules. (Wis.) S. Ct. R. 21.16 (1m) & (2m). *See Levine v. Heffernan*, 864 F.2d 457, 458 (7th Cir. 1988) (in a previous edition of the State Bar saga, case brought against all the justices of the court). In order to establish standing for a preenforcement challenge, Plaintiff must show "a credible threat of enforcement." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014). Under Wisconsin law, it is the justices who do the "enforcement" of the relevant rules, and thus are the proper subject of a challenge. The U.S. Supreme Court in *Susan B. Anthony List* found a credible threat of enforcement from an administrative agency that adjudicated violations and imposed civil penalties. *Id.* at 165. *See* Ohio Elections Comm. Rules 3517-1-11 and -14 (setting forth the commission's power to make adjudications and levy fines). Specifically, the Supreme Court found that "administrative action" such as "threatened Commission proceedings" constituted "harm sufficient to justify pre-enforcement review." *Susan B. Anthony List*, 573 U.S. at 165.

State Defendants overstate the Office of Lawyer Regulation (OLR)'s role in prosecuting failure to pay state bar dues. The Supreme Court's rules provide: "If the

annual dues or assessments of any member remain unpaid 120 days after the payment is due, the membership of the member may be suspended in the manner provided in the bylaws; and no person whose membership is so suspended for nonpayment of dues or assessments may practice law during the period of the suspension." (Wis.) S. Ct. R. 10.03(6). The bylaws of the State Bar make suspension *automatic* upon certification by Defendant Mr. Martin: "Failure to pay the dues by October 31 shall automatically suspend the delinquent member. The names of all members suspended from membership by the nonpayment of dues shall be certified by the Executive Director to the Clerk of the Supreme Court and to each judge of a court of record in this state. . ." (Wis.) S. Ct. R. Ch. 10 Appx. (State Bar Bylaws), Art. I, Sec. 3(a). OLR becomes involved if the suspended lawyer continues to practice in violation of the suspension.

If a lawyer does continue to practice after suspension for failure to pay dues, OLR likely must move forward with a case; State Defendants overstate the scope of OLR's supposed prosecutorial discretion. *See* St. Defs' Memo. at 20. The relevant rule says in full: "The office has discretion whether to investigate and to prosecute de minimus violations. Discretion permits the office to prioritize resources on matters where there is harm and to complete them more promptly." (Wis.) S. Ct. R. 21.02(1). The persistent, insistent, intentional nonpayment of state bar dues is unlikely to be classified as a "de minimus" violation in the same way as "slightly

tardy" notification to OLR of a misdemeanor criminal conviction. *In re Netzer,* 2014 WI 7, ¶48. Further limiting OLR's discretion is the Supreme Court's rule that "the court does not allow plea bargaining in attorney disciplinary cases." *In re Rajek*, 2017 WI 85, ¶14. Finally, the Supreme Court's rules specify that the director and staff of OLR "are acting on behalf of the supreme court in respect to the statutes and supreme court rules and orders regulating the conduct of attorneys." (Wis.) S. Ct. R. 21.13. Given that OLR has no discretion in prosecuting substantive violations, is an agency of the court, and acts on behalf of the court, it is clear that the real enforcement authority lies with the justices themselves. (Wis.) S. Ct. R. 21.09(1) ("The supreme court determines attorney misconduct and medical incapacity and imposes discipline or directs other action in attorney misconduct and medical incapacity proceedings. . .").

On top of the foregoing, the Seventh Circuit has said that the possibility of non-prosecution is no bar to standing. *ACLU v. Alvarez*, 679 F.3d 583, 593-94 (7th Cir. 2012) ("It is well established that in preenforcement suits injury need not be certain. . . . Preenforcement suits always involve a degree of uncertainty about future events." (Internal quotations omitted)).

Plaintiff can show an objectively reasonable fear of enforcement by the justices such that he engages in self-censorship: he declines to exercise his constitutional right to withdraw from membership in the State Bar. "Such self-

censorship in the face of possible legal repercussions suffices to show Article III injury." *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012) (quoting *National Org. for Marriage v. McKee*, 649 F.3d 34, 48-49 (1st Cir. 2011)). *Accord Seegars v. Ashcroft*, 396 F.3d 1248, 1254 (D.C. Cir. 2005) ("[O]ur cases upholding preenforcement review of First Amendment challenges . . . appear to have rested on the special concern for 'chilling effects' on speech.").

Additionally, the State Defendants substantially overstate the holding of *Crosetto v. State Bar of Wis*., 12 F.3d 1396 (7th Cir. 1993). St. Defs' Memo. at 21-22. Nowhere in that decision does the Seventh Circuit rely on or even mention the role of OLR as the prosecutor distinguished from the justices as the enforcer of the rules:

> Plaintiffs argue that because the Justices might someday enforce the Bar's rules, Plaintiffs have a ripe claim. We disagree. Before a plaintiff may obtain an injunction against a future enforcement he must show some substantial hardship--the enforcement must be certain and the only impediment to the case's ripeness is a delay before its eventual prosecution. *Steffel v. Thompson*, 415 U.S. 452, 462, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974) (allowing an injunction against police when the plaintiff or his friends had twice before been arrested for distributing the same handbills at the same shopping center). When pressed by the panel during oral argument Plaintiffs' counsel conceded that he was unaware of any Wisconsin lawyer ever being disciplined by the Justices for that lawyer's failure to pay dues to the integrated bar. In the absence of any real threat of harm resulting from noncompliance with the dues requirement, Plaintiffs' immediate claim is not ripe against the Justices, and must be dismissed for lack of subject matter jurisdiction.

Crosetto, 12 F.3d at 1403. Plaintiff's counsel here is in a very different position as to the "real threat of harm" based on the record of the justices' disciplinary actions. Indeed, State Defendants' own memorandum names two recent cases where lawyers were subject to disciplinary proceedings for failure to pay bar dues. St. Defs' Memo. at 5 (*citing In re Amoun Vang Sayaovong*, 2015 WI 100, ¶ 16; *In re FitzGerald*, 2007 WI 11, ¶ 6). *See also, e.g., In re White*, 2019 WI 95, ¶14 (administrative suspension for failure to pay bar dues); *In re Eichhorn-Hicks*, 2019 WI 91, ¶17 (same); *In re Grass*, 2019 WI 35, ¶46; *In re Fischer*, 2019 WI 36, ¶15 (same); *In re Burton*, 2019 WI 30, ¶21 (same); *In re Perez*, 2019 WI 99 (attorney disciplined for failure to advise client of suspended license due to failure to pay mandatory dues); *In re Capistrant*, 2015 WI 88, ¶9 (same). As these cases all make clear, the Wisconsin Supreme Court justices regularly impose discipline and sanctions for failure to pay mandatory bar dues, and Plaintiff has an objectively reasonable fear that the same enforcement would occur against him if he acts in accord with his constitutional right to be free from forced association.

Finally, specifically as to Chief Justice Roggensack, she is "the administrative head of the judicial system." Wis. Const. Art. VII, Sec. 3. *Accord* Wis. S. Ct. Internal Operating Procedures I. Making the chief justice of the state supreme court the administrative head of the judicial system was "the most important part" of the 1977 constitutional amendment restructuring the court. Jack Stark, THE WISCONSIN

CONSTITUTION 153 (Oxford U. Press 2011). As such, she is uniquely responsible for the Court's actions as an administrative body and over its administrative subunits such as OLR. Thus, an injunction against her is particularly appropriate as the official ultimately responsible for OLR and the court's other administrative functionaries.

III. The Justices are not immune from suit.

This is not a challenge to the justices in their rule-making capacity, *see* St. Defs' Memo. at 22-23, but rather to the justices as the enforcers of those rules. *See* Compl., Doc. 1, at 9 (seeking as relief an order "[e]njoin[ing] the Justices of the Wisconsin Supreme Court from enforcing their rules requiring State Bar membership through the attorney disciplinary process."). Thus, rulemaking immunity does not protect them. Nor does Plaintiff seek "damages liability for acts performed in their judicial capacities." *Supreme Court of Va. v. Consumers Union of United States*, 446 U.S. 719, 735 (1980).

Rather, this is a suit against them in their administrative capacity as the enforcers of the Wisconsin Supreme Court's administrative rules. When the Court enforces attorney discipline, it acts in its administrative capacity. *See* Wis. Const. Art. VII, Sec. 3(1) ("The supreme court shall have superintending and administrative authority over all courts."). *Accord State ex rel. Moran v. Dep't of Admin.*, 103 Wis. 2d 311, 317 (1981) (describing the Court as "an autonomous administrative body"

in its administration of the courts system). Acting in that capacity, it is comparable to any administrative agency which issues enforcement orders and is thus subject to preenforcement challenges and injunctive relief as to that enforcement power. *See Susan B. Anthony List*, 573 U.S. at 165.

Supreme Court of Virginia is not inapposite. There, the U.S. Supreme Court found "immunity does not shield the Virginia Court and its chief justice from suit in this case . . . because of its own inherent and statutory enforcement powers." 446 U.S. at 737. The U.S. Supreme Court noted that in addition to its inherent contempt powers, a Virginia court may also issue a show-cause order against any attorney if it "observes any act of unprofessional conduct . . . without any complaint being filed by the State Bar or any third party." *Id.* at 724. However, at that point the responsibility for prosecuting the misconduct is given to the commonwealth attorney, after which the case proceeds through normal disciplinary channels. *Id.* The U.S. Supreme Court's ruling encompasses the entirety of the Virginia Supreme Court's "inherent and statutory enforcement powers," including not only initiating a complaint with a show-cause order, but also finding facts, adjudicating guilt, and enforcing penalties. The latter three of these four powers also lie in the Wisconsin Supreme Court.[1]

[1] The U.S. District Court for the District of Oklahoma concluded that the justices of that state's high court did not enjoy legislative immunity from a state bar challenge because they "act in an enforcement capacity" in this instance. *Schell v. Williams*, 5:19-cv-00281-HE (W.D. Okla. 2019),

For similar reasons, the State Defendants have no sanctuary in *Reeder v. Madigan*, where the Seventh Circuit considered the Illinois House of Representatives' "power to enforce those rules via disciplinary proceedings," much like the disciplinary enforcement here. 780 F.3d 799, 805 (7th Cir. 2015). The Seventh Circuit continued, "Reeder's argument falls flat because it does not take into account the raison d'être of the Court's decision in Supreme Court of Virginia. The defendants' decision to deny him [press] credentials was nothing like a prosecution. It did not impose any kind of liability on him, nor did it deprive him of a license or permit." *Id*. The Illinois legislature's decision to deny a press credential to a reporter is very different from the Wisconsin Supreme Court's power to deprive an attorney of his law license, and impose monetary penalties to boot. *See* (Wis.) S. Ct. R. 21.16 (1m). In sum, the justices are not being sued in their legislative capacity, but in their administrative enforcement capacity, and as such they are not immune from suit.

IV. Plaintiff has stated a claim for which relief can be granted.

Plaintiff has stated a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). To succeed on a motion to dismiss under 12(b)(6), the defendants must demonstrate that the complaint "lack[s] a cognizable legal theory or . . . the absence

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Doc. 61, at 3. The Oklahoma Supreme Court also has an Office of General Counsel that prosecutes all violations, like OLR, but the justices are ultimately responsible for enforcement.

of sufficient facts alleged under a cognizable legal theory." *Tracht Gut, LLC v. L.A. Cty. Treasurer & Tax Collector*, 836 F.3d 1146, 1151 (9th Cir. 2016). *Accord Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042 (7th Cir. 1999) (plaintiff may survive a motion to dismiss by showing his argument "lies in the natural line of the law's development. . ."). Defendants have demonstrated neither the lack of a legal theory nor the lack of necessary facts here.

The Plaintiff's legal theory is simple: the Supreme Court first upheld the mandatory bar in *Lathrop v. Donohue*, 367 U.S. 820 (1961). *Keller* later narrowed and clarified *Lathrop*. *Harris* and *Janus* later narrowed *Keller*. This court must now apply this narrowed holding to the Wisconsin State Bar. This does not require this Court to partially or fully overturn *Keller* or *Lathrop*, but simply to recognize the narrower scope given those decisions by *Harris* and *Janus*. Such an outcome is necessary given the applicable standard of review.

A. The State Bar's activities are subject to exacting scrutiny.

Keller does not invoke a particular standard of review applicable to challenges to a mandatory bar; the closest it comes is identifying "the State's legitimate interests" in two policy objectives. 496 U.S. at 8. The Supreme Court in *Janus* and *Harris*, however, stated that compelled speech and association must survive exacting scrutiny. *Janus*, 138 S. Ct. at 2477, 2483; *Harris*, 573 U.S. at 651. Such exacting scrutiny requires the state to prove both a "compelling interest" and "narrow

tailoring" or "least-restrictive means." *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015); *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014). The State Defendants cannot meet that test here.

B. The State Bar fails to provide the one compelling state interest discussed in *Harris*: formal regulation of professional conduct.

When the Supreme Court first faced the question of the mandatory bar, it upheld it by finding a sufficient state interest in "elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State." *Lathrop*, 367 U.S. at 843. The Supreme Court reiterated that holding in *Keller*, formulating its decision by identifying two sufficient interests: "regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13.

Harris narrowed *Keller* by focusing its characterization of the mandatory bar as the formal regulatory system for lawyers.[2] In *Harris*, the Supreme Court confronted a challenge to *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), by home-care workers paid by a state program. The Court explained the tension between its holding and *Keller* by giving *Keller* a very narrow reading: "members of this bar could not be required to pay the portion of bar dues used for political or

[2] *Harris* is a decision from the Supreme Court in 2014, so its narrowing reading of *Keller* preempts the Seventh Circuit's otherwise definitive holding as to the State Bar in *Kingstad v. State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010).

ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655. In the next paragraph, the Court continued, "States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Id*. at 655-56.

This is the reading that counsel for Petitioner Mark Janus gave at oral argument as the reason why a decision for his client would not require overturning *Keller*: "With respect to the first two instances, the student association or student fees and the bar association fees, those cases are distinguishable for reasons stated in *Harris*. They're justified by different interests. The state bar associations are justified by the state's compelling government interest in regulating the practice of law before its courts." *Janus v. AFSCME* oral argument transcript, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_gebh.pdf, at 5.

Harris represents a narrowing of the state's sufficient interest in a mandatory state bar to formal ethical regulation. When the Supreme Court narrows a prior ruling, lower courts are bound to respect that narrowing. *See, e.g., Guilbeau v. Pfizer Inc.*, 880 F.3d 304, 311 (7th Cir. 2018); *Nichols v. Alcatel USA, Inc*., 532 F.3d 364, 376 (5th Cir. 2008). District courts are equally obliged to recognize and respect when

the Supreme Court narrows the scope of a previous decision. *See, e.g., Tenet Healthcare Corp. v. Cmty. Health Sys*., 839 F. Supp. 2d 869, 871 (N.D. Tex. 2012); *Fox v. City Univ. of N.Y.*, 187 F.R.D. 83, 88 (S.D.N.Y. 1999); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 913 n.10 (D. Minn. 1999); *Armes v. Philadelphia*, 706 F. Supp. 1156, 1164 n.5 (E.D. Pa. 1989).

Harris provides a clear, bright line that courts can easily apply to a state bar's activities: does it function as the state's formal regulatory process for lawyers? Under it, the State Bar of Virginia would be constitutional, as it is charged by the Supreme Court of Virginia with administering the attorney regulatory system of that state. *See* Virginia State Bar, "About the bar," https://www.vsb.org/site/about. The State Bar of Wisconsin, as enforced by the justices and operated by Ms. Kastner and Mr. Martin, is not the formal ethics regulatory system for the state, and thus fails to meet the standard set by *Harris*.

What does the Wisconsin State Bar undertake as "activities connected with proposing ethical codes and disciplining bar members"? *Harris*, 573 U.S. at 655. It does propose amendments to the ethical codes governing lawyers. *See, e.g., In the Matter of the Petition to Amend Supreme Court Rule Chapter 31 and Chapter 10.03* [15-05]. Yet the State Bar is hardly unique in this regard. Other individuals and entities far more frequently bring petitions to change the rules governing bar admission or ethical practices. *See, e.g., In the Matter of Petition to Amend Board of*

Bar Examiners Rule 6.02 [17-10] (private attorney); *In the matter of amending Supreme Court Rules pertaining to referees and attorney discipline* [19-04] (Office of Lawyer Regulation); *In the Matter to Amend SCR 31.02 and 31.05 Relating to Continuing Legal Education Requirements* [16-06] (Board of Bar Examiners); *In the Matter of Petition proposing an amendment to SCR 31.05 concerning teaching as means to satisfy the requirements of SCR 31.02* [11-06] (thirteen private attorneys); *In the Matter of Petition to Amend or Repeal SCR 40.03* [09-09] (71 private attorneys). Moreover, oftentimes the State Bar's proposed changes to the ethical code begin with the American Bar Association, which is a voluntary bar. *See, e.g., In the Matter of Petition for Amendments to Rules of Professional Conduct for Attorneys* [15-03] (State Bar petition begins by acknowledging, "The petition reflects the recent American Bar Association ("ABA") Ethics 20/20 amendments to the Model Rules of Professional Conduct…"). In fact, the last time the Wisconsin Supreme Court ordered a thorough review of the entirety of the professional code, it entrusted the task to a specially created committee of its own choosing rather than to the State Bar. *See In the matter of the Petition for Amendment to Supreme Court Chapter 20 – Rules of Professional Conduct for Attorneys* [04-07].[3]

[3] It is also worth noting that even when "proposing ethical codes," a state bar may step into controversial issues of substantial public concern. *See, e.g.,* David L. Hudson, Jr., "States split on new ABA Model Rule limiting harassing or discriminatory conduct," ABA J. (Oct. 1, 2017), http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct (reporting on religious liberty and First Amendment concerns that have prompted widespread opposition to ABA Model Rule 8.4(g)); Kim Colby, "Why D.C. Should Not Adopt ABA Model Rule 8.4(g),"

What does the State Bar do in terms of "disciplining bar members"? Nothing. The Board of Bar Examiners is the agency of the judicial branch responsible for ensuring the character and competence of new entrants to the practice. (Wis.) S. Ct. R. Ch. 40. *See* Nat. Conf. of Bar Examiners, "Directory of State Bar Admission Agencies," http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf (listing eight states where the state bar is responsible for attorney admissions; Wisconsin is not one of them). The Board of Bar Examiners is also the state agency responsible for ensuring compliance with the Wisconsin Supreme Court's rules for continuing legal education. (Wis.) S. Ct. R. Ch. 31. *See* Continuing Legal Edu. Regulators Asso., "Directory," https://www.clereg.org/directory (listing 21 states where the state bar is responsible for CLE compliance; Wisconsin is not one of them). The Office of Lawyer Regulation is the state agency of the judicial branch responsible for investigating compliance with the Rules of Professional Conduct governing attorneys in Wisconsin. (Wis.) S. Ct. R. Ch. 21. *See* American Bar Asso., "Directory of Lawyer Disciplinary Agencies," https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/current_disciplinary_agency_directory_online.authcheckdam.pdf (listing 18

The Federalist Society (March 12, 2019), https://fedsoc.org/commentary/blog-posts/why-d-c-should-not-adopt-aba-model-rule-8-4-g (reporting that 11 states have explicitly or practically rejected movements to adopt 8.4(g)). Plaintiff believes that this part of *Keller*/*Harris*, along with the interest in the "quality of legal services," must also be set aside in light of *Janus*.

states where the attorney discipline function is housed in the state bar; again, Wisconsin is not among them).[4] Thus, this Court should reach the same conclusion as then-Justice Shirley Abrahamson of the Wisconsin Supreme Court:

> I would not reinstitute a unified bar because these two activities, regulating the legal profession and improving the quality of legal service, are performed primarily by the Wisconsin supreme court, not the State Bar of Wisconsin. . . . In 1976, the court explicitly removed these responsibilities from the Bar and placed them under the court's supervision to assure the public that lawyer discipline, bar admission, and regulating competence through continuing legal education would be conducted for the benefit of the public, independent of elected bar officials.

In re State Bar of Wis., 169 Wis. 2d 21, 35-36 (1992) (Abrahamson, J., dissenting).

The Wisconsin State Bar is simply unlike other states where the bar serves as the primary regulatory agency authorized by the state's high court to admit, investigate, and discipline attorneys. This state has separate agencies for all of that.

[4] In fact, State Defendants' argument as to standing under Rule 12(b)(1) reinforces this point. As the State Defendants' point out in their brief, the Office of Lawyer Regulation investigates and charges unethical practices, and the Wisconsin Supreme Court enforces and assesses penalties. *See* St. Defs' Memo. at 22. Nowhere in that process does the State Bar have a role.

The Wisconsin State Bar, as currently constituted, does not exercise the sufficient state interest discussed in *Harris*: functioning as the formal regulatory system for lawyers in a state.

C. The State Bar of Wisconsin cannot draw an enforceable line between its advocacy activities and its educational activities after *Janus,* and its procedures on deductions are fundamentally flawed.

In the U.S. Supreme Court's original decision on the mandatory bar, the justices declined to overrule the Wisconsin Supreme Court's holding below that "the appellant may constitutionally be compelled to contribute his financial support to political activities which he opposes." *Lathrop*, 367 U.S. at 847-48.

Keller itself, then, can be read as a narrowing of *Lathrop*, because it explicitly held that dues could not be used for "activities having political or ideological coloration." 496 U.S. at 15. The Court recommended using a procedure similar to the system set forth under *Abood* and *Teachers v. Hudson*, 475 U.S. 292 (1986), *id*. at 17, though it acknowledged that the line between political and nonpolitical activities "will not always be easy to discern." *Id*. at 15.

Janus found that "*Abood's* line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision," and thus is unworkable. *Janus*, 138 S. Ct. at 2481. It also rejected the *Hudson* arbitration procedure commended by the Court to state bars in *Keller* as impracticable and insufficient in practice. *Id*. at 2482.

In the wake of *Janus*, the Supreme Court "GVRed" *Fleck v. Wetch*, a challenge to the mandatory bar in North Dakota, for reconsideration "in light of" *Janus*. *Fleck v. Wetch*, 139 S. Ct. 590, *1 (2018). The Supreme Court's decision to "grant, vacate, and remand" or GVR a case for reconsideration in light of another opinion is made when "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration. . ." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). A GVR is the Supreme Court's way of saying that it finds its new opinion "sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Henry v. Rock Hill*, 376 U.S. 776, 777 (1964).

After the Supreme Court has "GVRed" a lower court's decision, the lower court is not bound to rule opposite to the decision that has been vacated, but rather should do exactly as the Supreme Court ordered, and reconsider issue in light of the new precedent. *Klikno v. United States,* 928 F.3d 539, 544 (7th Cir. 2019). Though a GVR order is not a decision on the merits, any judge may take judicial notice of it and embrace the invitation to reconsider a previous rule in light of a new opinion. *See id*. ("The GVR order . . . is an efficient way for the Supreme Court to obtain the views of the lower courts on the effect of a new decision."). *See, e.g., Byars v. State,* 336 P.3d 939, 946 (Nev. 2014); *Amaral v. Ryan*, No. CV-16-00594-PHX-JAT

(BSB), 2017 U.S. Dist. LEXIS 184976, at *6 (D. Ariz. Nov. 8, 2017). In this case, the Court should take the GVR in *Fleck* as "a clear statement from the Supreme Court that the [*Janus*] decision does apply to this situation." *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735, 748 (W.D. Tex. 2007).

If this Court does not agree that the GVR order in *Fleck* grants permission for lower courts to reconsider *Keller* in light of *Janus*, then the Court should instead decide that *Janus* implicitly overruled *Keller*. State Defendants are quite right that only the U.S. Supreme Court may overrule its own precedents. St. Defs' Memo. at 19. But that does not end the inquiry, as the Supreme Court may overrule its prior precedents implicitly or by implication. The Seventh Circuit explained the relevant analysis in a previous edition of the State Bar saga: "The Court, however, does not have to explicitly state that it is overruling a prior precedent in order to do so. Thus, if later Supreme Court decisions indicate to a high degree of probability that the Court would repudiate the prior ruling if given the opportunity, a lower court need not adhere to the precedent." *Levine v. Heffernan*, 864 F.2d 457, 461 (7th Cir. 1988).

Levine identifies three factors to consider whether a decision has been implicitly overruled: a Supreme Court justice questions its ongoing validity; lower courts abandon the precedent; and the later-in-time decision from the Supreme Court is in an identical area of law. *Id*.

This Court should find the necessary support to reach that conclusion in this case. Numerous Supreme Court justices have questioned *Lathrop*/*Keller's* ongoing viability. In *Harris*, Justice Alito's majority opinion quotes approvingly from the dissent in *Lathrop*:

> [I]n his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment did not permit compulsory membership in an integrated bar. *See* 367 U. S., at 878-880, 81 S. Ct. 1826, 6 L. Ed. 2d 1191. The analogy drawn in *Hanson*, he wrote, fails. "Once we approve this measure," he warned, "we sanction a device where men and women in almost any profession or calling can be at least partially regimented behind causes which they oppose."

Harris, 573 U.S. at 630. At the oral argument in the *Friedrichs* case (which anticipated *Janus* by one year, but left the question unresolved due to a 4-4 tie following Justice Scalia's passing), Justice Breyer said that overruling *Abood* "would require overruling a host of other cases, I think, at least two or three that I can find," specifying "[i]t would certainly affect the integrated bar." *Friedrichs v. Calif. Teachers Assoc.* oral argument transcript, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-915_e2p3.pdf, at 28. Justice Ginsburg returned to her colleague's question, characterizing it by saying, "[I]f *Abood* falls, then so do our decisions in *Keller* on mandatory bar association, on student activities fees." *Id.* at 35. Justice Kagan continued, pushing back on counsel's suggestion that *Abood* was merely one citation among many, saying, "Those cases start with *Abood*, [counsel]. Those cases say

Abood is the framework, and those cases decide the questions that they decided specifically within that framework." *Id*. Justice Sotomayor reiterated the point in the oral argument of *Janus*, saying a mandatory bar was "no different" than a union agency fee or a mandatory student life fee: "These are all forcing the subsidization of private interests for a government purpose." *Janus v. AFSCME* oral argument transcript, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1466_gebh.pdf, at 7. In other words, numerous justices have observed *Keller's* feebleness given the overruling of *Abood* by *Janus*.

Though no lower courts have abandoned *Keller* yet, a number of other authorities recognize that its demise is compelled by *Janus*. William Baude & Eugene Volokh, *The Supreme Court 2017 Term: Comment: Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 196-98 (2018). *Accord* James Coppess, *Symposium: Four propositions that follow from* Janus, SCOTUSblog (Jun. 28, 2018, 2:36 PM), https://www.scotusblog.com/2018/06/symposium-four-propositions-that-follow-from-janus/.

These authorities also recognize that the area of law is identical. *See Kingstad v. State Bar of Wis*., 622 F.3d 708 (7th Cir. 2010) (relying on cases from mandatory union subsidies and mandatory agricultural marketing subsidies to decide a mandatory bar case). "Compulsory bar dues have long been treated the same as

public employee union agency fees." Baude & Volokh, 132 HARV. L. REV. at 196. *Accord* Brief of 24 Past Presidents of the D.C. Bar in *Janus v. AFSCME*, 2018 U.S. S. Ct. Briefs LEXIS 224. In short, if this Court does not believe that the GVR order in *Fleck* frees it to reconsider *Keller* in light of *Janus*, then this Court should find that the *Levine* factors are sufficiently present such that it may conclude that *Janus* implicitly overruled *Keller*.[5]

Applying *Janus* to this situation means recognizing that the Bar's educational and professional activities are just as fraught with ideology as its advocacy activities. Virtually everything the State Bar does takes a position on the law and matters of public concern. The recipients of awards, the topics and authors it selects for books and articles, the topics and speakers it selects for continuing legal education seminars and conferences—everything about the State Bar requires it to pick-and-choose as it speaks and publishes about the law. Like the public-sector collective bargaining in *Janus*, almost all of its activities are inherently about the law and thus of public concern; there can be no logical line drawn that sets "direct lobbying" on one side and renders everything else non-ideological and of private concern. The other interest identified in *Keller*, "improving the quality of legal services," suffers from

[5] If the Court disagrees that the GVR grants it permission to reconsider *Keller* in light of *Janus*, and if the Court further disagrees that the *Levine* factors showing implicit overruling are met in the alternative, then Plaintiff states his belief that *Keller* should be partially overruled. Plaintiff recognizes that this form of relief can only come from the U.S. Supreme Court, and here only preserves the argument in this alternative for his appeal.

the same defect as the majority critiqued in *Janus*: "That formulation is broad enough to encompass just about anything that the [bar] might choose to do." 138 S. Ct. at 2481.

For instance, when the State Bar picks the founder of TransLaw to write a supposedly definitive, restatement-like book on sexual orientation in Wisconsin law, it will likely get a different text than if it had asked the legal counsel to Wisconsin Family Action. *See* Abby Churchill, et al. *Sexual Orientation, Gender Identity, and the Law* (State Bar of Wis. PINNACLE 2018). When it asks a prominent landlord-side attorney to write a neutral book on landlord-tenant law, it will likely get a different text than if it had asked a tenants' rights lawyer. *See* Tristan R. Pettit, *Wisconsin Landlord-Tenant Manual* (State Bar. of Wis. PINNACLE forthcoming). Because the State Bar is always speaking about the law, and because lawyers come to the law with different viewpoints, jurisprudential principles, backgrounds, and experiences, the State Bar's speech on all legal topics contains some element of ideology and touches on issues of public concern.

Similarly, the State Bar's process to determine the scope of the *Keller* dues deduction fails because of *Janus*. The Wisconsin Supreme Court has set out an arbitration process by which attorneys may challenge the State Bar's allocation of its expenses to the *Keller* deduction. *See* (Wis.) S. Ct. R. 10.03(5)(b)1-5. This arbitration process suffers all the same faults found in *Janus*: members lack detailed

information, and must bear substantial attorney and expert costs to make out a case. *See Janus*, 138 S. Ct. at 2482. Moreover, the entirety of the framework for an opt-out system of dues deductions rather than an opt-in system of affirmative consent is problematic after *Janus*. *Id*. at 2486 ("Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met." Internal citations omitted).

D. The State Bar fails the narrow tailoring required by exacting scrutiny.

Under exacting scrutiny, the state must prove not only a compelling interest (which it cannot do here), but also that it has tailored its imposition on plaintiff's rights as narrowly as possible, or put differently that it has adopted the least restrictive means of achieving its interest. The State Bar likes to suggest that it does the two things that fit within *Keller*: "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. As has been demonstrated above, it does not regulate the legal profession, which is the only compelling interest stressed in *Harris*. And as has also been shown above, its efforts to "improve the quality of

legal services" cannot be parceled into neat categories that segregate its advocacy from its educational activities.

The Defendants may argue that the State Bar *does* have a role in the ethical regulatory system because it provides practice-management counseling, a legal ethics advisory service, mental and emotional health support, reporting of disciplinary decisions, and continuing legal education, including ethics credits. First off, all of these services are on the edge of the ethics system, not its core. To say the State Bar helps lawyers avoid discipline by offering ethics CLE is hardly the same as saying the State Bar enforces discipline when a lawyer fails his CLE obligation.

Second, numerous private providers also offer all of these services. Professional "coaches" and attorneys specializing in professional responsibility and malpractice offer practice-management counseling and ethics counseling to other firms. Such specialized attorneys or law professors may also offer non-binding advisory opinions as to the probity of particular policies or courses of action. These attorneys, law professors, and the Wisconsin Supreme Court's own website may circulate or make available the court's decisions in ethics cases. And numerous for-profit and not-for-profit organizations offer ethics CLE; the Board of Bar Examiners has granted plenary approval to any CLE offered by the State Bar of Wisconsin and 36 other organizations, including numerous voluntary bar associations. *See* "2018-2019 GENERAL PROGRAM APPROVAL (GPA) SPONSORS," Bd. of Bar

Examiners, https://www.wicourts.gov/services/attorney/docs/gpalist.pdf. In short, Wisconsin does not need a mandatory bar for the few ethics-related activities offered by the State Bar. All of these same services could be undertaken by a voluntary bar, and are offered by numerous other providers besides. Thus, the mandatory bar is not tailored to fit the state's interests here, which are easily accomplished by alternative means in a free market for legal services.[6]

CONCLUSION

The State Bar of Wisconsin is not the formal regulatory system for Wisconsin's legal profession; in fact, it plays no role in attorney discipline whatsoever. Given the U.S. Supreme Court's narrowing reading of *Keller* in *Harris*, it cannot stand as currently constituted. Moreover, the Supreme Court's GVR order in *Fleck* invites lower courts to reconsider *Keller* in light of *Janus*. Such reconsideration clearly shows that *Keller* can only survive if read narrowly to permit mandatory participation in a state bar that functions as the formal regulatory system

[6] The State Bar also does a bunch of other stuff that is neither regulation nor improvement. It offers its members a number of programs that are entirely extraneous or superfluous to the state's interest in a mandatory bar, such as discounts on car purchases, car rentals, computer purchases, discounts on document shipping, and office supplies. "Discount Programs," State Bar of Wisconsin, https://www.wisbar.org/aboutus/membership/membershipandbenefits/Pages/Discounts-Affiliated-Programs.aspx. The State Bar offers special rates on a wide variety of insurance products: Cyber, Crime, Surety Bond, Auto and Home, Health, Dental, Life, Long-term Care, Long-term Disability, Professional Liability, Accidental Death and Dismemberment, and Property and Casualty. *Id*. In case one is interested, one can even choose to travel the world with other lawyers, with annual trips to "the Mediterranean and Greek Isles, Europe, Scandinavia, Asia, South Pacific, North America, Caribbean & Panama Canal, Israel & Egypt, and South America." *Id*. These are the activities of a trade association, not a regulatory body. They do nothing to improve the quality of legal services in the state. They bear no relation to the state's interests.

for lawyers, which is not the case in Wisconsin. Anything more crosses lines into advocacy, ideology, and issues of public concern. But if the Plaintiff acts on these conclusions, he has a credible fear of enforcement action against him by the justices. Therefore, Plaintiff has demonstrated constitutional standing and a viable legal theory sufficient to survive a motion to dismiss under Rule 12(b)(1) and (6).

Respectfully Submitted,

SCHUYLER FILE

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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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