UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ADAM JARCHOW AND MICHAEL DEAN, Plaintiffs–Appellants, v. STATE BAR OF WISCONSIN, *et al.*, Defendants–Appellees.	Case No. 19-3444

MOTION FOR SUMMARY AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-3444

Short Caption: Jarchow, et al. v. State Bar of Wisconsin, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervener or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Adam Jarchow, Michael Dean

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Baker & Hostetler LLP, Wisconsin Institute for Law & Liberty

(3) If the party, amicus or intervener is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervener's stock:

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Signature: /s/ Andrew M. Grossman Date: 12/16/2019

Attorney's Printed Name: Andrew M. Grossman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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n/a

Attorney's Signature: /s/ David B. Rivkin Date: 12/16/2019

Attorney's Printed Name: David B. Rivkin

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n/a

Attorney's Signature: /s/ Richard M. Esenberg Date: 12/16/2019

Attorney's Printed Name: Richard M. Esenberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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MOTION FOR SUMMARY AFFIRMANCE

Supreme Court precedent, including *Keller v. State Bar of California*, 496 U.S. 1 (1990), controls the issues presented by this appeal and therefore requires affirmance of the district court's dismissal of the Plaintiffs' complaint. Plaintiffs filed this case to overturn that binding precedent, but they acknowledge that this Court is not able to afford them that relief. The most sensible step now is therefore to summarily affirm the district court. Accordingly, Plaintiffs hereby move this Court to confirm that Supreme Court precedent forecloses their appeal and to affirm the decision of the district court. This will allow Plaintiffs the opportunity to petition the Supreme Court for review of the issues presented.

Background

Wisconsin is one of about 32 states that have an "integrated bar," meaning it requires membership in an expressive association, the Wisconsin State Bar, as a condition for practicing law in the state. *See* Wis. Sup. Ct. R. ("SCR") 10.01(1). Wisconsin law allows only a bar member in good standing to "practice law in [the] state or in any manner purported to be authorized or qualified to practice law."[1] SCR 10.03(4). The Wisconsin State Bar is also empowered to compel payment of dues from members, SCR 10.03(5)(a)—a power it has aggressively exercised. *See* Compl., ECF No. 1, ¶ 23 (alleging that

[1] Wisconsin also permits out-of-state attorneys to participate *pro hac vice* individual cases if certain conditions are satisfied. Attorneys like the Plaintiffs, who are Wisconsin residents and practice regularly in Wisconsin, do not qualify for this exception.

the State Bar's "2019 budget of $11.5 million will be funded with $5.2 million in membership dues."). Failure to pay dues results in automatic suspension of membership and, with it, the right to practice law. SCR ch. 10 app., art. I, § 3(a)–(b); SCR 10.03(6).

The State Bar, in turn, expresses views on a broad range of matters subject to intense public interest. These matters include the death penalty, gender identity, gun rights and regulation, criminal justice initiatives, policies towards suspected sex offenders, President Trump's tweets, immigration policies, and public education. *See* Compl. ¶¶ 26–38. As is inevitable, many members (including Plaintiffs), disagree with the State Bar's positions and speech but are nonetheless forced to associate with it and fund its speech.

This scheme of mandatory payments to fund expressive speech and association was upheld by the Supreme Court in *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990). *Lathrop* upheld compelled membership in an integrated bar, relying principally on decisions authorizing "union shop" agreements. 367 U.S. at 842–43. And *Keller* upheld compelled funding of the bar's speech, also relying on labor-law precedents. 496 U.S. at 12. *Keller* analogized an integrated bar to a state-law mandate for public employees to tender "fair share" payments to public-sector labor unions, as then allowed by the Supreme Court's decision in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 236 (1977).

But, in 2018, the Supreme Court overruled *Abood* and held that compelled subsidization of labor-union speech, even speech connected to

collective bargaining, violates the First Amendment. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018). That case, however, only addressed compelled subsidization of labor-union speech; it left undecided the import of its holding in the integrated-bar context, and the majority opinion did not cite *Keller*, *see* ECF No. 35, MTD Order 2 (noting this fact).

The Plaintiffs here are two attorneys who have been required to join and pay dues to the Wisconsin State Bar. They filed this case in April 2019, contending that *Janus* rejects *Keller*'s First Amendment reasoning and that its holding must fall with holding of *Abood*. The Defendants, the State Bar and its officers named in their official capacities, moved to dismiss.

In response, Plaintiffs conceded that the district court was "powerless to afford them relief in the face of contrary Supreme Court precedent." ECF No. 25 at 27. Plaintiffs briefed their position on why this binding precedent should be overturned to preserve the issue and their arguments for appeal. But they requested that the district court promptly decide the motion to dismiss in the Defendants' favor to allow "Plaintiffs to pursue relief in a forum with the authority to align the law in this area with the principles articulated in *Janus*." *Id.* at 2.

The district court followed suit on December 11, 2019, by granting the motion to dismiss. ECF No. 35. It observed that "[i]t may be…that the Court's decision in *Janus* has eroded the foundation of *Keller*," but rightly concluded that "both sides agree that *Keller* still binds this court, and that only the

Supreme Court can say otherwise." *Id.* at 3. Plaintiffs filed a timely notice of appeal.

Argument

Wisconsin's requirements that attorneys like Plaintiffs join the State Bar and fund its speech and expressive association are ongoing violations of their First Amendment rights. But, unfortunately, this Court is no more an appropriate forum than the district court to afford relief.

The proper path forward in this circumstance is for the lower courts to rule against the plaintiffs to open the path for review in the Supreme Court. As the Supreme Court has explained, if one of its precedents "has direct application in in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted).

The district court correctly applied that doctrine to this case. ECF No. 35 at 3. *Keller* and *Lathrop* have a "direct application" here, but their reasoning has been undermined by *Janus*. This Court's role is to follow *Keller* and *Lathrop* and rule against Plaintiffs to allow them to seek review in the Supreme Court. It should do so promptly, without briefing or argument.

Nevertheless, in order to foreclose any possible argument that they have forfeited their positions, Plaintiffs will briefly set forth their reasons for contending that *Keller* and *Lathrop* should be overruled. These arguments demonstrate that Plaintiffs are suffering an ongoing "loss of First Amendment

freedoms," and, "even for minimal periods of time," this "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality); *see also Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013). The Court should act promptly to allow Plaintiffs to seek expeditious relief in the Supreme Court.

I. Requiring Plaintiffs to Join and Fund the State Bar Severely Burdens Their Speech and Association Rights

Wisconsin's integrated bar violates the First Amendment in two separate ways. First, attorneys in Wisconsin are unable to practice law without funding the State Bar's speech and thereby joining into an expressive association with it—the very constitutional injury condemned in *Janus*. Second, attorneys licensed in Wisconsin are compelled to join the State Bar as full-fledged members to practice law, and that requirement would not survive even under a pre-*Janus* precedent, which recognized that this form of compelled association violates First Amendment rights.

A. Compelled Dues Payments Violate the First Amendment

The Supreme Court has expressly recognized that the First Amendment prohibits "compelled subsid[ies]," whereby "an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). The most recent application of that rule was the Supreme Court's *Janus* decision, which struck down required "agency fees," exactions of dues from public employees

for remittance to labor unions. *See* 138 S. Ct. at 2478. Wisconsin's integrated-bar scheme is no different from the agency-fee regime *Janus* condemned.

First and most importantly, the State Bar engages in core protected speech on matters of intense public concern. Using members' funds and claiming to represent their views, the State Bar has spoken and continues to speak on opposing capital punishment, shielding suspected sex offenders, restoring felon voting rights, promoting diversity, condemning the President's political speech, gun rights and regulation, immigration policies, and more.

The State Bar's speech is no different from the speech recognized as core First Amendment speech in *Janus*. There, the Supreme Court concluded that the line drawn in *Abood* between chargeable and non-chargeable speech was unworkable because "the union speech at issue in this case is overwhelmingly of substantial public concern." *Janus*, 138 S. Ct. at 2477. It concluded that even the supposedly non-political subjects of collective bargaining were still matters of public concern because collective bargaining impacts the public fisc, and the more controversial speech from the unions—such as on climate change, sexual orientation and gender identity, and minority religions—were undoubtedly matters of profound public interest. *Id*. at 2476. The Wisconsin Bar's speech is identical with that latter category—indeed, it has spoken on some of the exact same issues. And this case presents even clearer matters of core public concern because, whereas the union in *Janus* could colorably claim that collective-bargaining speech is not "expressive" given its functional purpose of obtaining financial benefits for its members, the Wisconsin Bar does not engage in any

speech that even arguably confers a direct financial or material benefit on Wisconsin attorneys.

Second, that speech is funded by the dues of attorneys who are forced into its ranks as members, and this differs in no material respect from the agency-fee arrangement *Janus* condemned. The labor law challenged in *Janus* enabled public employers and unions to agree to deduct payments from non-consenting employees' paychecks to fund union speech. 138 S. Ct. at 2460. The Supreme Court held that forcing compelled subsidization of private speech violates fundamental First Amendment rights. *Id*. The challenged action here—forcing the subsidization of speech by the State Bar—is no different. The State Bar forces members to pay an annual membership fee, including $129 for inactive members and $258 for full dues-paying members. Compl. ¶ 20. And, just as the labor law *Janus* invalidated conditioned employment on payment of agency fees, Wisconsin conditions attorneys' livelihoods on the payment of bar dues.

Third, there is a close parallel between labor unions and integrated bar associations. *Keller* acknowledged as much. *See* 496 U.S. at 12 (concluding that there is "a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other."). This is because, like a union, a state bar is funded primarily from its members' funds; like a union, a state bar is restricted to a particular profession; and, like a union, a state bar purports to represent members' interest in their capacity as members of that profession. *See id.* at 11–

13. *Keller* therefore rejected the view, expressed by the California Supreme Court in the case under review, that a state bar is a government agency for First Amendment purposes. The right analogy, *Keller* held, is with a labor union. In articulating First Amendment principles applicable to labor unions, *Janus* also articulated the principles applicable to this case.

Fourth, the line that *Janus* concluded is impossible to draw in the labor-union context between political and non-political speech is equally untenable in this context. *Keller*, after concluding that integrated bars are no different from labor unions for First Amendment purposes, attempted to distinguish between "ideological" and "non-ideological" speech, just as the Court had previously done in *Abood*, 431 U.S. at 236—the case *Janus* overruled. From the start, *Abood* recognized that there would "be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Id*. *Keller* similarly recognized that:

> [p]recisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern.

496 U.S. at 15. *Janus* provided a simple response to both *Abood* and *Keller*: the line seems murky because it does not exist. All public-sector labor-union speech is core speech protected under the First Amendment because it all

concerns matters of intense public concern, the operation of government. As shown above, that is equally true of the Wisconsin Bar's speech. *Abood*'s rules governing unions have been overruled; *Keller*'s governing state bars must be as well.

Fifth, *Keller* erred in failing to consider the possibility that *Abood* sold citizens' First Amendment rights short. Instead, it took *Abood* as a given and applied its principles as settled law. Though erroneous, this was understandable, since *Abood*'s vitality as constitutional law was not challenged in *Keller*. *See* 496 U.S. at 16–17. Quite the opposite, *Keller* addressed the far more aggressive proposition, which the California Supreme Court adopted, that *no* First Amendment restrictions apply to state bars' ability to speak with funding from non-consenting members. The *Keller* Court therefore approached the problem from the other direction, considering whether to apply *Abood*'s restrictive First Amendment regime or *no* First Amendment principles at all. It did not consider the *third* possibility that *Janus* identified as the right answer: that no distinction between "ideological" and "non-ideological" speech is tenable and that compelled dues payments should be subject to heightened scrutiny.

Keller also extended the superficial and antiquated reasoning of *Lathrop v. Donohue*, 367 U.S. 820 (1961), which upheld compelled dues payments to and membership in Wisconsin's integrated bar. But, like *Abood*, that case predated much of the Court's modern First Amendment jurisprudence and contained very little analysis. Instead, it cited an off-hand statement in a labor case,

Railway Employment Department v. Hanson, 351 U.S. 225, 238 (1956), that compelled financial support for unions is no more unconstitutional than a state law forcing a lawyer "to be a member of an integrated bar." *Lathrop*, 367 U.S. at 843 (quoting *Hanson*, 351 U.S. at 238). But, because *Janus* held that compelled financial support for unions *is* unconstitutional, *Lathrop* provides no better basis for *Keller*'s holding than does *Abood*.

Sixth, *Janus* directly refutes any contention that the Wisconsin Bar mitigates or eliminates the mandatory-dues scheme's burden on First Amendment rights by allowing members a reduction for dues payments. *Janus* held that no agency fee is constitutional "unless the employee *affirmatively consents* to pay." 138 S. Ct. at 2486. That holding brought the agency-fee scheme into alignment with ordinary First Amendment principles. After all, no one would seriously contend that Wisconsin may pass a law diverting portions of its citizens' paychecks to a political party with the citizens' only having the ability to opt out of subsidizing portions, but not all, of the political party's speech—and then receiving only half a reduction in the compulsory subsidization. The same principle controls here.

B. Compelled Membership Violates the First Amendment

If anything, Wisconsin's integrated-bar arrangement imposes a greater burden on First Amendment rights than the agency-fee arrangement *Janus* condemned because it imposes a mandatory duty to belong to the State Bar as a formal member, whereas the public-sector workers in *Janus* already had a recognized right *not* to join the union.

An integrated state bar is an expressive association like a church, fraternal organization, civic association, or advocacy group. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). Allowing state-compelled membership in an expressive association is a striking constitutional anomaly because it has been clear for decades that forced union membership as a condition of public employment is unconstitutional, *Abood*, 431 U.S. at 235, and it has been clear since at least *Elrod v. Burns*, 427 U.S. 347, 357 (1976), that *no* type of membership can be commanded as a condition of state-sanctioned livelihood. Wisconsin nevertheless persists in demanding that attorneys join the State Bar as members and thereby consent to its speech on their behalf. That is an independent First Amendment violation, apart from the compelled exaction of dues. Yet the Supreme Court, with scant reasoning, upheld such compelled membership in *Lathrop*. 367 U.S. at 843.

The Wisconsin State Bar is an expressive association. It speaks on a wide range of matters subject to substantial public interest, including opposing capital punishment, shielding suspected sex offenders, restoring felon voting rights, promoting diversity, condemning the President's political speech, gun rights and regulation, and immigration policies—all subjects protected as core First Amendment speech. And, when it speaks on such subjects, it typically takes *one* side irrespective of the fact that some among its members may disagree. Consequently, the element that distinguishes a parade from a mere walk "to reach a destination" is present here: the purpose to "mak[e] some sort of collective point, not just to each other but to bystanders along the way."

Hurley, 515 U.S. at 568. After all, the State Bar speaks loudly on some of the most hot-button issues of the day, which it does specifically to make a political point on behalf of a group—i.e., a collective point.

And that would be fine, except that Wisconsin law requires *all* attorneys to join—not only to fund the Bar's speech, but to call themselves members and suffer the Bar to speak for them. There is zero difference between that arrangement and mandatory membership in any other advocacy organization. And the violation of First Amendment principles is so plain that even *Abood* rejected that as a constitutionally permissible scenario. There, the Court wrote that "[o]ur decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments" and it was "[e]qually clear…that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." 431 U.S. at 234. Likewise, the lead *Janus* dissenting opinion also recognized that a formal-membership requirement would violate the Constitution. *See Janus*, 138 S. Ct. at 2487–90 (Kagan, J., dissenting) (describing the proper "balance" as protecting citizens' rights not to join a labor union).

Yet Wisconsin law demands actual membership in the State Bar. This underscores further the errors of *Keller* and *Lathrop*. Although *Abood* recognized a unique harm from compelled membership—a harm elaborated in far greater detail in more recent associational case law—*Lathrop* inexplicably treated the

dignitary harm of forced association as having no independent meaning apart from compelled funding (which it concluded, from *Hansen*, is constitutional). The Court concluded that, because a bar member "is free to attend or not attend [the bar's] meetings or vote in its elections," it was "confronted…only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." 367 U.S. at 828. It is hard to imagine a ruling more at odds with subsequent precedent, which treats the "freedom not to associate" as a constitutional right independent of any financial obligation. *Jaycees*, 468 U.S. at 623.

But rather than re-assess *Lathrop*'s reasoning in light of the Court's more recent expressive-association precedent, *Keller* compounded its errors, extending its holding to sanction compelled subsidization of speech. *See* 496 U.S. at 9. Both should be revisited and overruled.

II. Wisconsin's Compulsory Dues and Membership Requirements Fail Any Potentially Applicable Standard of Review

Because Wisconsin's integrated bar scheme imposes a substantial burden on First Amendment rights—by both mandating dues and forcing membership itself—it must be subject to constitutional scrutiny. Whether that level is "strict" or "exacting" scrutiny remains unclear because *Janus* expressly left the question open. *See Janus*, 138 S. Ct. at 2465. It did so because the agency-fee arrangement it addressed would fail either test. So too does Wisconsin's integrated bar scheme.

Although the result would be the same under either standard, Supreme Court precedent indicates that strict scrutiny should apply. Like Illinois's unconstitutional agency-fee scheme, Wisconsin's statutory scheme for the State Bar similarly constitutes "the compelled subsidization of private speech," which "seriously impinges on First Amendment rights." *Id.* at 2464. A statute compelling the subsidization of private speech is not analogous to a commercial-speech regulation. *See Harris v. Quinn*, 134 S. Ct. 2618, 2639 (2014) ("[I]t is apparent that the speech compelled in this case is not commercial speech."). It is, rather, a content-based restriction because a statutory scheme that selects a certain speaker and then requires members of a profession to financially support and associate with that speaker necessarily restricts the content of the speech, allowing the speaker to exercise government-granted discretion over the message. That is not materially different from a statutory codification of favored and disfavored speech. Such compelled subsidies also amount to compelled speech. Under either view, strict scrutiny is the appropriate level of review for that inherently suspect arrangement, and strict scrutiny requires proof of a "compelling necessity" and a statutory arrangement that is "precisely tailored." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).

In all events, the integrated-bar arrangement fails any applicable level of scrutiny. Under exacting scrutiny, the more government-friendly standard, "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational

freedoms.'" *Janus*, 138 S. Ct. at 2465 (quoting *Knox*, 567 U.S. at 310). As noted, Wisconsin's statutory scheme compelling licensed attorneys to join and fund the State Bar is materially indistinguishable from Illinois's statutory scheme compelling public employees to fund labor unions. And the principal justification offered to support agency-fee arrangements—the interest of "labor peace"—is obviously inapplicable in this context.

The possible justifications here fare no better. *Keller* recognized only two possible justifications for an integrated bar: (1) improving the quality of legal services and (2) regulating the legal profession. *Keller*, 496 U.S. at 13. Both purported interests fail to justify the burdens on speech and association rights.

Quality of Legal Services. The first interest fails because it is not a compelling governmental interest. A state may legitimately seek to advance almost any particular public interest—kindness and compassion among its citizens, the provision of services to the poor, economic growth, etc.—but simply naming such an interest does not suffice to justify impingement of First Amendment rights. The Supreme Court's jurisprudence recognizes that the First Amendment does *not* permit government to "substitute its judgment as to how best to speak for that of speakers and listeners" or to "sacrifice speech for efficiency." *Riley*, 487 U.S. at 791, 795. That is the general rule, fully applicable here.

At best, an asserted interest in improving the quality of legal services is merely another way of articulating the "free rider" argument *Janus* rejected—i.e., that labor unions' bargaining efforts benefit an entire unit and forced

funding of that effort prevents unit employees from benefiting from those efforts without paying their fair share. The assumption behind an interest in "improving the quality of legal services" is, by the same token, that improvement of the profession benefits all attorneys and should be funded by all attorneys. *See Keller*, 496 U.S. at 8 (quoting *Lathrop*, 367 U.S. at 842–43 (plurality opinion)), for the proposition that "the costs of improving the profession…should be shared by the subjects and beneficiaries of the regulatory program…."). But "free-rider arguments are generally insufficient to overcome First Amendment objections." *Janus*, 138 S. Ct. at 2466 (quoting *Knox*, 567 U.S. at 311) (alterations omitted). As *Janus* observed:

> To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?
>
> Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible.

Id. Yet that appears to be all the improvement-of-the-profession argument means, that the State Bar lobbies or speaks for the purpose of advancing the interests of the legal profession. The argument fares no better here than in *Janus*. There is no compelling interest in making lawyers pay for the State Bar's speech expressing its view of what is and is not good for the profession.

Finally, even if that interest were considered compelling in some respect, compelling attorneys to join the bar and subsidize its speech is not tailored to achieve it, because that same end could be achieved through means significantly less restrictive of associational freedoms. It is not apparent, to say the least, what compulsory membership in an advocacy organization has to do with improving the quality of legal services. As for subsidies, the state could fund any program that it believes necessary to improve the quality of legal services out of tax revenues, in the same way that it seeks to advance almost every other interest. Given the state's unchallenged power to tax and spend, it has no need to impinge attorneys' First Amendment rights.

Regulating the Legal Profession. The second interest, in regulating the legal profession, is not compelling for the same reason as the "quality of legal services" rationale: the government's convenience in carrying out its functions is no basis to impinge core First Amendment rights.

In any instance, the government's regulatory interest (as well as its interest in improving the quality of legal services) does not justify the integrated-bar regime because Wisconsin does not need an integrated bar to regulate lawyers. Compelled speech and association are permissible only when they "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465. It is therefore dispositive that at least 18 states do *not* have integrated bars and therefore do not wed the bar's regulatory and expressive activities. *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 841

N.W.2d 167, 171 (Neb. 2013) (listing the following states as having non-integrated bars: Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont). That 18 states regulate the legal profession without an integrated bar demonstrates that significantly less restrictive means exist for accomplishing that interest.

Equally unavailing is the argument that an integrated bar is necessary for funding the activities of a state bar. First, the State of Wisconsin has the power to tax, which generally impinges no First Amendment right. And second, this argument is circular: there is only a compelling interest in funding the activities of the bar if those activities justify burdens on First Amendment rights. Certainly, the Republican Party or the Catholic Church might view compulsory funding by state coercion as helpful to fund their activities, but that is, of course, irrelevant to whether those activities justify the First Amendment burden of compulsory dues. *See Janus* at 2485–86 (rejecting the argument that termination of agency fees "may cause unions to experience unpleasant transition costs in the short term and may require unions to make adjustments in order to attract and retain members").

A related argument is that integrated bars are more effective at raising funds than voluntary bar associations. But *any* organization—the ACLU, the Libertarian Party, the Mennonite Church, and everyone else—could plausibly claim that donations would increase if membership were mandatory, and no one could seriously contend that the government would have a compelling

interest in forcing membership. *See Janus*, at 2486 (referring to compulsory fees to labor unions as a "windfall" that "cannot be allowed to continue indefinitely").

Finally, if it were not obvious enough that the role of regulating lawyers could be delegated to a state agency that does not engage in extensive, often entirely irrelevant, advocacy, it bears emphasizing that, in Wisconsin, the State Bar does *not* in fact hold ultimate responsibility for regulating lawyers: that prerogative is vested in the Wisconsin Supreme Court and its Office of Lawyer Regulation ("OLR"). SCR 21.01(1) (providing components of the lawyer regulation system); SCR 21.02 (providing the OLR "responds to [attorney-related]…grievances…and, when appropriate, investigates allegations of attorney misconduct"); SCR 21.09 ("The supreme court determines attorney misconduct and medical incapacity and imposes discipline or directs other action in attorney misconduct and medical incapacity proceedings filed with the court."); *see also* Supreme Court Offices: Office of Lawyer Regulation, Wisconsin Court System (OLR "is an agency of the Wisconsin Supreme Court. OLR receives grievances relating to lawyer misconduct, conducts investigations, and prosecutes violations of lawyer ethics rules.").

It is plain that there are less restrictive means than an integrated bar to achieve state interests in this area when the State Bar itself is not principally responsible for vindicating those interests. Because the State of Wisconsin could regulate lawyers in any number of ways without forcing speech and

expressive association, its present system of compelling attorneys to join and fund the State Bar fails any level heightened scrutiny.

Conclusion

The Court should grant Plaintiffs' motion and summarily affirm the district court's judgment. It should do so quickly to allow Plaintiffs a prompt opportunity to seek relief from their "loss of First Amendment freedoms" and "irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality).

December 16, 2019

Respectfully submitted,

/s/ Andrew M. Grossman

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. 27(d)(2) because it is 4953 words. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced typeface with serifs.

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case. I also certify that a copy of the foregoing was sent via first-class mail, postage prepaid, to:

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Attachment A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

- -

ADAM JARCHOW AND MICHAEL D. DEAN,

Plaintiff,

v.

STATE BAR OF WISCONSIN, STATE BAR OF WISCONSIN BOARD OF GOVERNORS, CHRISTOPHER E. ROGERS, JILL M. KASTNER, STARLYN R. TOURTILLOTT, KATHLEEN A. BROST, ERIC L. ANDREWS AND KORI L. ASHLEY,

Defendants.

OPINION AND ORDER

19-cv-266-bbc

- -

Lawyers who are licensed to practice law in Wisconsin must join the State Bar of Wisconsin and pay mandatory annual dues. Wis. S. Ct. R. (SCR) 10.01(1); 10.03. The State Bar uses compulsory member dues to fund various activities. Plaintiffs Adam Jarchow and Michael D. Dean are lawyers licensed in Wisconsin who disagree with the State Bar's activities and oppose being compelled to support it financially with their membership dues. They contend that being compelled to join the State Bar and pay dues violates their rights under the First Amendment to the United States Constitution. In support of their claims, plaintiffs rely primarily on Janus v. American Federation of State, County and Municipal Employees, Council 31, 138 S. Ct. 2448, 2486 (2018), in which the Supreme Court held that public sector unions may not deduct agency fees from nonconsenting employees.

Defendants have moved to dismiss plaintiffs' complaint on various grounds, including

that all of plaintiffs' claims are barred by Keller v. State Bar of California, 496 U.S. 1 (1990). Dkt. #15. In Keller, the Court held that an integrated bar, such as the State Bar of Wisconsin, may, consistent with the First Amendment, use a member's compulsory fees to fund activities germane to "regulating the legal profession and improving the quality of legal services," but not to fund "activities of an ideological nature" that are not reasonably related to the advancement of such goals. Id. at 13-15. The Supreme Court reached its conclusion in Keller after applying its decision in Abood v. Detroit Board of Education, 431 U.S. 209, 235-36 (1977), in which it held that public-sector unions could collect compulsory "agency fees" from nonmembers within the bargaining unit to fund activities germane to collective bargaining, but could not use those fees to fund non-germane political or ideological activities that a nonmember employee opposed.

The parties in this case agree that under Keller, the State Bar of Wisconsin can compel lawyers to join the State Bar and pay mandatory dues without running afoul of the First Amendment. Plts.' Br., dkt. #25, at 3, 10; Dfts.' Br., dkt. #16, at 8. However, plaintiffs contend that the Supreme Court's 2018 decision in Janus undermined the reasoning and holding of Keller. In Janus, the Supreme Court overruled Abood, and held that public-sector unions may not deduct agency fees or "any other payment to the union" from the wages of nonmember employees unless the employees waive their First Amendment rights by "clearly and affirmatively consent[ing] before any money is taken from them." Id. at 138 S. Ct. at 2486. The majority in Janus did not discuss Keller nor respond to the dissent's citation to Keller. Id. at 138 S. Ct. at 2498 (Kagan, J., dissenting).

It may be, as plaintiffs contend, that the Court's decision in Janus has eroded the foundation of Keller. However, both sides agree that Keller still binds this court, and that only the Supreme Court can say otherwise. Plts.' Br., dkt. #25, at 3, 10; Dfts.' Br., dkt. #16, at 8. The Supreme Court has made it clear that "if a precedent of this Court has direct application in a case [here, Keller], yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997). See also Price v. City of Chicago, 915 F.3d 1107, 1119 (7th Cir. 2019) (applying Agostini). Because this court is bound by Keller, and because the parties agree that plaintiffs' challenges fail under Keller, plaintiffs' claims fail in this court. Therefore, I will grant defendants' motion to dismiss plaintiffs' claims. Plaintiffs must seek relief in a higher court.

Because I am dismissing plaintiffs' claims as barred by Keller, I do not need to resolve the other arguments for dismissal raised by defendants.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants State Bar of Wisconsin, State Bar of Wisconsin Board of Governors, Christopher E. Rogers, Jill M. Kastner, Starlyn R. Tourtillott, Kathleen A. Brost, Eric L. Andrews and Kori L. Ashley, dkt.

#15, is GRANTED. The clerk of court is directed to enter judgment and close this case.

Entered this 11th day of December, 2019.

BY THE COURT:

/s/

_____
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ADAM JARCHOW and MICHAEL D. DEAN,

Plaintiffs,

Case No. 19-cv-266-bbc

v.

STATE BAR OF WISCONSIN, STATE BAR OF WISCONSIN BOARD OF GOVERNORS, CHRISTOPHER E. ROGERS, JILL M. KASTNER, STARLYN R. TOURTILLOTT, KATHLEEN A. BROST, ERIC L. ANDREWS and KORI L. ASHLEY,

Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants State Bar of Wisconsin, State Bar of Wisconsin Board of Governors, Christopher E. Rogers, Jill M. Kastner, Starlyn R. Tourtillott, Kathleen A. Brost, Eric L. Andrews and Kori L. Ashley against plaintiffs Adam Jarchow and Michael D. Dean dismissing this case.

s/ A. Wiseman, Deputy Clerk
Peter Oppeneer, Clerk of Court

12/13/2019
Date