UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ADAM JARCHOW and MICHAEL D. DEAN, Plaintiffs, v. STATE BAR OF WISCONSIN, a professional association; STATE BAR OF WISCONSIN BOARD OF GOVERNORS; CHRISTOPHER E. ROGERS, President of the State Bar of Wisconsin; JILL M. KASTNER, President-elect of the State Bar of Wisconsin; STARLYN R. TOURTILLOTT, Secretary of the State Bar of Wisconsin; JOHN E. DANNER, Treasurer of the State Bar of Wisconsin; ODALO J. OHIKU, Chairperson of the State Bar of Wisconsin Board of Governors, and PAUL G. SWANSON, Immediate Past-president of the State Bar of Wisconsin, in their official capacities, Defendants.	Case No. 3:19-CV-00266

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO STAY FURTHER PROCEEDINGS

TABLE OF CONTENTS

INTRODUCTION

This Court should stay further proceedings in this case in the alternative to considering Defendants' (collectively, "the State Bar") motion to dismiss Plaintiffs' Complaint for failure to state a claim, currently pending before this Court. As the State Bar has argued, Plaintiffs' Complaint raises First Amendment claims that are squarely foreclosed by *Keller v. State Bar of California*, and its progeny. 496 U.S. 1, 5 (1990). However, there is a significant probability that the Supreme Court will address the law governing Plaintiffs' purported claims in the near future. Specifically, in 2018 the Supreme Court entered an order granting, vacating, and remanding the judgment in *Fleck v. Wetch*, a case in which the Eighth Circuit dismissed a First Amendment challenge identical to the case here. Post-remand briefing before the Eight Circuit in *Fleck* is now complete, and that court is set to hear post-remand oral argument on June 13, 2019. Given that the Supreme Court has already acted once before in *Fleck*, it is likely that the Court would use that more-developed vehicle to address the First Amendment landscape governing Plaintiffs' claims here, affirming the existing case law and/or modifying it as the Court deems appropriate. Therefore, engaging in further proceedings in this Court before the Supreme Court has the opportunity to once again act in *Fleck* risks wasting the scarce resources of the Court, the State Bar, and Plaintiffs. Accordingly, a stay is justified, in the alternative to the State Bar's motion to dismiss.[*]

[*] While the State Bar has filed a motion to dismiss Plaintiffs' Complaint for failure to state a claim in its entirety, the State Bar's motion to dismiss, in addition, identifies various grounds for dismissing portions of Plaintiffs' claims. The State Bar respectfully submits that, should the Court conclude that a stay is justified, it resolve these partial motions to dismiss before entering a stay. Those motions are as follows: (a) motion to dismiss Plaintiff Jarchow as to a portion of Count One for lack of Article III standing, Fed. R. Civ. P. 12(b)(1); (b) motion to dismiss all claims against the State Bar and the State Bar Board of Governors under the Eleventh Amendment, since they are arms of the State, *id.*; (c) motion to dismiss all of Plaintiffs' claims against Officer Defendants Kastner, Ohiku, and Swanson under the Eleventh Amendment, since their official duties are not at issue here, *id.*; (d) motion to dismiss Plaintiffs' claims for

BACKGROUND

Plaintiffs filed this Complaint on April 8, 2019, asserting two First Amendment claims against the State Bar. Compl. pp. 24, 26 (Dkt. 1). Plaintiffs are Wisconsin lawyers who are required, pursuant to Chapter 10 of the Wisconsin Supreme Court Rules, to be dues-paying members of the State Bar in order to practice law in Wisconsin. Compl. ¶¶ 2–3. This type of state-bar arrangement, where "membership and dues are required as a condition of practicing law," is referred to as an "integrated bar." *Keller v. State Bar of Cal.*, 496 U.S. 1, 5 (1990); *see also Kingstad v. State Bar of Wis.*, 622 F.3d 708, 713 n.3 (7th Cir. 2010).

Count One of the Complaint claims that "compelling dues payments to the State Bar violates Plaintiffs' First Amendment rights." Compl. p. 24 (capitalization altered; emphasis removed). Count Two claims that "requiring Plaintiffs to join the State Bar violates their First Amendment rights." Compl. p. 26 (capitalization altered; emphasis removed). For relief, the Complaint seeks a declaratory judgment, an injunction, and an order for the State Bar to refund Plaintiffs' past membership dues. Compl. p. 27.

The State Bar has moved to dismiss the Complaint in its entirety because *Keller* and its progeny squarely foreclose both of Plaintiffs' First Amendment claims. Fed. R. Civ. P. 12(b)(6). Specifically, the State Bar argued that the Supreme Court has already held that the payment of mandatory dues to the State Bar does not violate the First Amendment when those dues are used for expenditures that are "germane to the legitimate purposes of the State Bar." *Kingstad*, 622 F.3d at 709; *Keller*, 496 U.S. at 13–14. Further, the Supreme Court has also already held that mandatory membership in the State Bar does not violate the First Amendment because of "the

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damages under the Eleventh Amendment, *id.*; and (e) motion to dismiss all damages claims against all Officer Defendants under the doctrine of qualified immunity.

State's interest in regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13.

In *Fleck v. Wetch*, the Eighth Circuit recently considered a challenge to North Dakota's integrated bar that included, among other claims, plaintiff-Fleck's First Amendment claim that "an integrated bar violates [the] freedoms not to associate and to avoid subsidizing speech with which he disagrees." 868 F.3d 652, 653 (8th Cir. 2017), *cert. granted, judgment vacated*, 139 S. Ct. 590 (2018) (mem.). There, as the Eighth Circuit explained, plaintiff-Fleck "concede[d] [that the court was] bound by *Keller*" on this claim, so the court simply dismissed it without "further address[ing] this issue." *Id.* Fleck petitioned the Supreme Court for a writ of certiorari; the Court granted the petition, vacated the Eighth Circuit's judgment, and remanded the case for "further consideration in light of *Janus v. State, County, and Municipal Employees*, [138 S. Ct. 2448] (2018)." 139 S. Ct. 590 (mem.). *Janus* held that "public-sector unions" may not "extract agency fees from nonconsenting employees," 138 S. Ct. at 2486, which fees were used to fund union "activities that [were] germane to the union's duties as collective-bargaining representative," *id.* at 2460 (alterations omitted; citations omitted). Post-remand briefing before the Eight Circuit in *Fleck* is now complete, and the Court has set post-remand oral argument for June 13, 2019. *Fleck v. Wetch*, Text Order Entered 1-11-2019 (8th Cir. No. 16-1564); *Fleck*, Dkt. Entry 4-18-2019 (8th Cir. No. 16-1564).

ARGUMENT

I. The Court Should Stay Further Proceedings, in the Alternative to Considering the State Bar's Motion to Dismiss, Pending the Supreme Court's Resolution of *Fleck v. Wetch*.

"The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket," *Clinton v. Jones*, 520 U.S. 681, 706 (1997), which power it should use to maximize "economy of time and effort for itself, for counsel, and for litigants," *Landis v. N. Am.*

Co., 299 U.S. 248, 254–55 (1936). When considering a request to stay further proceedings, this Court often balances the following factors: "(1) whether the litigation is at an early stage, (2) whether a stay will unduly prejudice or tactically disadvantage the non-moving party; (3) whether a stay will simplify the issues in question and streamline the trial; and (4) whether a stay will reduce the burden of litigation on the parties and on the court." *Grice Engineering, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 920 (W.D. Wis., 2010) (citations omitted); *see also, e.g.*, *Waterstone Mortg. Corp. v. Offit Kurman, LLC*, Civ. No. 17-cv-796-jdp, 2019 WL 367642, at *1 (W.D. Wis., Jan 30, 2019) (applying *Grice* factors); *Hogen v. Prof'l Serv. Bureau, Inc.*, Civ. No. 16-cv-602-wmc, 2017 WL 5067607, at *1 (W.D. Wis. Mar. 9, 2017) (same); *Woodman's Food Mkt., Inc. v. Clorox Co.*, No. 14-cv-734-slc, 2015 WL 4858396, at *2 (W.D. Wis. Aug. 13, 2015) (same). Applying the *Grice* factors here, a stay of further proceedings pending the Supreme Court's resolution of *Fleck* is warranted, as an alternative to the State Bar's motion to dismiss.

A. A stay would simplify this case and reduce the burden of litigation because *Fleck* may alter the governing law.

Beginning with the third and fourth *Grice* factors, a stay is warranted if it will "simplify" the case and "reduce the burden of litigation on the parties and on the court." *Grice*, 691 F. Supp. 2d at 920; *see Kilty v. Weyehaeuser Co.*, Civ. No. 16-cv-515-wmc, 2016 WL 6585597, at *1 (W.D. Wis. Nov. 7, 2016) (considering these factors in tandem). This Court has repeatedly held that these two elements are satisfied by the resolution of "pending proceedings" in another court that are "directly related to the issue in dispute," *Grice*, 691 F. Supp. 2d at 921 (citing *Landis*, 299 U.S. at 256); *Woodman's Food Mkt.*, 2015 WL 4858396, at *3, particularly when that other court may bind this Court, *Kilty*, 2016 WL 6585597, at *1 (stay pending resolution of Seventh Circuit cases); *Woodman's Food Mkt.*, 2015 WL 4858396, at *3 (Seventh Circuit); *compare Hy Cite Corp. v. Regal Ware, Inc.*, No. 10-cv-168-wmc, 2010 WL 2079866, at *1 (W.D. Wis., May

19, 2010) (refusing to stay for resolution of another district court case). These circumstances simplify and ease litigation because the higher court's resolution may "demarcate—and likely narrow—the playing field for this court and for the parties" in the case at hand. *Woodman's Food Mkt.*, 2015 WL 4858396, at *3. Finally, entering a stay pending resolution of related proceedings in another court is even more appropriate in cases raising important legal issues relevant to the general public. *See Landis*, 299 U.S. at 249, 256 (applying the "Public Utility Holding Company Act of 1935").

Here, staying this case pending the Supreme Court's opportunity to act again in *Fleck* would greatly "simplify" this case and "reduce the burden of litigation on the parties and on the court." *Grice*, 691 F. Supp. 2d at 920; *e.g.*, *Kilty*, 2016 WL 6585597, at *1 (decision from binding courts more likely to satisfy this factor). *Fleck* raises issues "directly related to the issue[s] in dispute" here. *Grice*, 691 F. Supp. 2d at 921; *Woodman's Food Mkt.*, 2015 WL 4858396, at *3. There, plaintiff-Fleck claims that "an integrated bar violates [his] freedoms not to associate and to avoid subsidizing speech with which he disagrees." 868 F.3d at 653. And here, Plaintiffs claim that "requiring [them] to join the State Bar" and "compelling dues payments to the State Bar" "violates their First Amendment rights." Compl. pp. 24–26. If the Supreme Court takes substantive action in *Fleck* after the remand, such action would define the elements of Plaintiffs' First Amendment claims, thus "demarcat[ing]—and likely narrow[ing]—the [First Amendment] playing field for this court and for the parties." *Woodman's Food Mkt.*, 2015 WL 4858396, at *3. This would influence all further proceedings in this Court—from what facts the parties would seek to uncover in discovery, to the framing of any future dispositive motions, and to what must be proven at trial. Finally, a stay is especially appropriate under the circumstances here since this

case involves the First Amendment and so raises important legal issues relevant to the general public. *See Landis*, 299 U.S. at 256.

All that said, the Supreme Court granting the first certiorari petition in *Fleck*, vacating the Eighth Circuit's judgment, and remanding for reconsideration in light of *Janus* does not undermine *Keller* or its progeny, thus this Court granting the State Bar's motion to dismiss the Complaint is warranted as an alternative to entering a stay. *See generally Lawrence v. Chater*, 516 U.S. 163, 167–68 (1996) (per curiam) (describing the grant, vacate and remand ("GVR") procedure). A GVR order is not "a final determination on the merits." *Henry v. City of Rock Hill*, 376 U.S. 776, 777, (1964). Therefore, it "has no precedential weight and does not dictate how the lower court should rule on remand." *Texas v. United States*, 798 F.3d 1108, 1116 (D.C. Cir. 2015) (calling this proposition "well-settled"). A review of *Janus* shows that it does not overrule or undermine *Keller*, given that the *Janus* majority neither discusses nor even cites this settled precedent, *see* 138 S. Ct. at 2459–86, and a predecessor to that case, *Harris v. Quinn*, explicitly distinguished *Keller* from the Court's mandatory-union-dues jurisprudence, 573 U.S. 616, 655–56 (2014). So, since *Keller* remains valid post-*Janus*, dismissing the Complaint in full is still appropriate.

B. A stay of further proceedings will not unduly prejudice or tactically disadvantage Plaintiffs.

The second *Grice* factor is "whether a stay will unduly prejudice or tactically disadvantage the non-moving party." *Grice*, 691 F. Supp. 2d at 920; *Woodman's Food Mkt.*, 2015 WL 4858396, at *3 (looking for "significant harm" to the nonmoving party). When a party requests a stay in light of a pending case that may influence the merits of the case at hand, this *Grice* factor considers whether there is "obvious, substantial work that can be done—and needs to be done—before" the resolution of that pending proceeding would become relevant in the case. *Hogen*, 2017 WL 5067607, at *1; *see Grice*, 691 F. Supp. 2d at 920 (looking to non-moving party's interest in

"prosecut[ing] this case"). This factor also considers the certainty of "when" that pending case "will be resolved." *Grice*, 691 F. Supp. 2d at 921; *Hy Cite Corp.*, 2010 WL 2079866, at *2 (refusing to stay pending resolution of a Federal Circuit case in part because that case "is only now being briefed and no date has been assigned for oral argument").

Granting a stay here will not unduly or significantly harm the Plaintiffs. *Grice*, 691 F. Supp. 2d at 920; *Woodman's Food Mkt.*, 2015 WL 4858396, at *3. If the Supreme Court were to take substantive action in *Fleck*, it would affect Plaintiffs' claims immediately and completely. *Compare Hogen*, 2017 WL 5067607, at *1. As explained above, Part I.A., *supra*, *Fleck* raises identical First Amendment issues as Plaintiffs' Complaint; therefore, if Plaintiffs' claims were to survive *Keller*, the Court's substantive resolution of *Fleck*, if any, would define the elements of those claims. Indeed, as Plaintiffs have framed their claims, Compl. pp. 24–26, there is likely to be little, if any, "work that can be done" that would *not* be altered by the Supreme Court acting in *Fleck*, *compare Hogen*, 2017 WL 5067607, at *1. In that regard, a stay would also inure to Plaintiffs' benefit, since it would avoid their risk of incurring duplicative litigation expenses—once for pre-*Fleck* activities, and again for post-*Fleck* activities. *See Woodman's Food Mkt.*, 2015 WL 4858396, at *3 (considering benefits to nonmoving party in terms of "reduc[ing] [its] burden of litigation"). Finally, staying for a resolution in *Fleck* will not cause untoward delay: post-remand briefing in the Eighth Circuit is already complete, and that court has set post-remand oral argument for June 13, 2019. *Fleck v. Wetch*, 1-11-2019 Text Order, Dkt. Entry 4-18-2019 (8th Cir. No. 16-1564); *compare Hy Cite Corp.*, 2010 WL 2079866, at *2 (briefing deadlines and setting of oral argument date relevant to consideration of this factor).

C. This litigation is at an early stage since the Complaint was filed in April 2019 and the only other material filing is the Motion to Dismiss.

The final *Grice* factor is "whether the litigation is at an early stage," *Grice*, 691 F. Supp. 2d at 920, which is unquestionably met here. Plaintiffs filed their Complaint on April 8, 2019, so this case has been pending for less than two months, as of this filing. *Hy Cite Corp.*, 2010 WL 2079866, at *1 ("no question" that litigation begun less than two months earlier was "in the early stages"). Further, the only substantive filings thus far are Plaintiffs' Complaint and the State Bar's motion to dismiss. *Woodman's Food Mkt.*, 2015 WL 4858396, at *3 ("complaint," "amended complaint," and "three motions to dismiss" satisfy early-stage factor).

CONCLUSION

For the foregoing reasons, the Court should stay further proceedings pending the Supreme Court's resolution of *Fleck v. Wetch*, in the alternative to considering Defendants' motion to dismiss Plaintiffs' Complaint.[†]

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Respectfully submitted,

/s/ Roberta F. Howell

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[†] As noted above, the State Bar respectfully submits that, before entering any stay, the Court resolve its motion to dismiss Plaintiff Jarchow for lack of Article III standing, its motions to dismiss based on the Eleventh Amendment, and its motion to dismiss based on qualified immunity.