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

SCHUYLER FILE, Plaintiff, vs. JILL M. KASTNER, in her official capacity as president of the State Bar of Wisconsin; LARRY MARTIN, in his official capacity as executive director of the State Bar of Wisconsin; Chief Justice PATIENCE ROGGENSACK, Justices SHIRLEY ABRAHAMSON, ANN WALSH BRADLEY, ANNETTE ZIEGLER, REBECCA BRADLEY, DANIEL KELLY, and REBECCA DALLET, in their official capacities as members of the Wisconsin Supreme Court, Defendants.	)	Case No. 19-cv-1063

REPLY BRIEF IN SUPPORT OF DEFENDANTS JILL M. KASTNER'S AND LARRY MARTIN'S MOTION TO DISMISS

INTRODUCTION

Plaintiff's response brief fails to do the one thing he needed to do to prevail on his claims: prove that *Keller* is no longer good law. Instead, Plaintiff asserts that *Keller* does not need to be overturned for this Court to find Wisconsin's integrated bar to be unconstitutional. Plaintiff goes on at length about the various State Bar activities he claims are ideological or "touch on matters of great public interest." This discussion is a red herring and distracts from the germaneness analysis *Keller* requires. As long as *Keller* is still good law, as it undoubtedly is, Plaintiff's claims must fail.

ARGUMENT

I. *Keller* is Still Good Law.

Keller v. State Bar of California, 496 U.S. 1 (1990), is the controlling Supreme Court precedent on the constitutionality of integrated bars, and *Janus v. AFSCME*, 585 U.S. ___, 138 S. Ct. 2448 (2018), has not changed that fact. Plaintiff concedes as much in his Brief in Opposition to the Supreme Court Justices' Motion to Dismiss. Plaintiff's Brief in Opposition to Justices' Motion to Dismiss ("Justices Opposition") at 2 ("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*. . .")

To support this position, Plaintiff selectively quotes from *Janus* and its predecessor, *Harris v. Quinn*, 573 U.S. 616 (2014), failing to mention that the *Harris* Court also held that "*Keller* . . . fits comfortably within the framework applied in the present case." *Id.* at 655. In fact, the respondents in *Harris* made precisely the argument that Plaintiff espouses here, and it was flatly rejected by the *Harris* majority:

> Respondents contend, finally, that a refusal to extend *Abood* to cover the situation presented in this case will call into question our decisions in *Keller v. State Bar of Cal*., 496 U. S. 1 (1990), and *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217 (2000). Respondents are mistaken.

Id. (emphasis added).

Plaintiff's assertion that *Janus* undermined the foundations of *Keller* by overturning *Abood v. Detroit Bd. of Ed.*, is equally misplaced. *Abood* upheld agency fee arrangements for public-sector unions on the grounds that they served the compelling state interests of promoting "labor peace" and preventing "free-riders." *Abood*, 431 U.S. 209, 224 (1977). The *Janus* Court rejected *Abood's* holding that these interests were sufficiently compelling to justify imposing on the First Amendment rights of non-union members through agency fee arrangements. *Janus*, 138

S. Ct. at 2478. *Janus*, however, did nothing to shed doubt on the strength of the compelling state interests in "regulating the legal profession and improving the quality of legal services," that *Keller* held justify the integrated bar; indeed, it neither mentions those interests or even *Keller* generally. However, in *Harris*, the most recent case to actually consider these interests (and on which *Janus* relies), the Court upheld and reaffirmed the compelling nature of those interests while also declining to extend *Abood*. *Harris*, 573 U.S. at 655–56 ("The portion of the rule that we upheld served the 'State's interest in regulating the legal profession and improving the quality of legal services.'"). Thus, *Janus's* rejection of *Abood* does not change the analysis this Court must apply when considering a constitutional challenge to an integrated bar.

Nor does the Supreme Court's decision to grant, vacate, and remand ("GVR") in *Fleck v. Wetch* change *Keller's* status. GVR is not "a final decision on the merits." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). 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). Thus, any suggestion that the *Fleck* GVR indicates an intention to change the law on integrated bars is contrary to "well-settled" law. *Id.*[1]

Finally, the Western District of Wisconsin recently dismissed a separate challenge to the constitutionality of Wisconsin's integrated bar. *Jarchow v. State Bar of Wis.*, No. 3:19-cv-00266-bbc, Dkt. #35 (W.D. Wis. Dec. 12, 2019). There, Judge Crabb held that *Janus* did not overturn *Keller* and that plaintiffs' facial and as-applied challenges to the constitutionality of the State Bar were barred as a result. "The Supreme Court has made it clear that 'if a precedent of this Court

[1] Alternatively, given that a petition for certiorari has now been filed in *Fleck* asking the Supreme Court to take up the issue, the Court's motion to stay should be granted pending a decision by the Court in that case. *Landis v. N. Am. Co.*, 299 U.S. 248, 256 (1936); *Grice Eng'g, Inc. v. JG Innovations, Inc.*, 691 F. Supp. 2d 915, 921 (W.D. Wis. 2010).

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 this Court the prerogative of overruling its own decisions.'" *Id.* at 3 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997).) This decision adds to the growing ranks of district courts which have upheld *Keller* in the wake of *Janus*. The same reasoning applies here.

Plaintiff clarifies in his opposition brief that he is bringing only a facial challenge to the constitutionality of the State Bar. Bar Opposition at 4. As long as *Keller* is good law, as it undoubtedly still is, a facial challenge to an integrated bar must fail.

II. Plaintiff's Argument Ignores the Analysis Required by *Keller*.

Plaintiff's focus on the State Bar activities he sees as involving "matters of great public concern" ignores the analysis required by *Keller* and *Kingstad v. State Bar of Wis*. Under *Keller*, as clarified by *Kingstad*, the crucial determination is whether State Bar activities are germane to the constitutionally legitimate purposes of the State Bar, not whether those activities touch on "matters of great public concern." "[T]he key is the overall 'germaneness' of the speech to the governmental interest at issue. The political or ideological nature of the speech factors into that ultimate analysis." *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 716 (7th Cir. 2010). But "[t]he political or ideological nature of the [State Bar's] speech" is just one "factor[ ]" for the Court to consider. *Kingstad*, 622 F.3d at 716. So long as challenged activities are sufficiently germane to the purposes of the State Bar, they may be funded with mandatory dues regardless of whether they are political, ideological or otherwise "of great public concern," and regardless of a member's objections.

Thus, Plaintiff's quotes from the *Janus* majority about the unavoidably ideological nature of speech by public-sector unions hold little relevance to analysis under *Keller*. The same is true

of Plaintiff's litany of purportedly ideological State Bar activities. Plaintiff's Complaint cites three examples of State Bar activities as evidence that "virtually everything" the State Bar does touches on matters of great public concern. (Compl. at 5–7.) Perhaps realizing that three examples is hardly "everything," Plaintiff supplements with an additional eight examples in his opposition brief.[2] (Bar Opposition at 8–10.) Whether or not these activities do in fact touch on matters of great public concern, Plaintiff never alleges that they are non-germane as required for a challenge under *Keller*. Plaintiff's anticipatory responses to straw man arguments, that the State Bar is not speaking through the challenged activities or that it is simply providing a neutral forum (Bar Opposition at 10–11), are similarly red herrings, as they focus entirely on questions of ideological speech, not germaneness.

Underlying Plaintiff's argument is his assertion that it is "impossible" for the State Bar, and courts in challenges like this one, to effectively draw the line between ideological and non-ideological activities. (Bar Opposition at 6 ("The Complaint provided several examples of activities undertaken by the State Bar which expose the impossibility of *Keller's* line-drawing exercise.")) Again, this assertion misapprehends the nature of the State Bar's duty under *Keller*.[3] The only meaningful distinction under *Keller* is whether activities are germane or non-germane. While this germaneness analysis may consider the ideological nature of activities as one factor, the State Bar is not required to ferret out any activity which "touches on matters of great public concern." *Id.* Further, while drawing such distinctions may be difficult, as Plaintiff claims, courts

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[2] To the extent these additional examples raise factual allegations not included in the original Complaint, they represent an attempt by Plaintiff to improperly supplement his Complaint in violation of Federal Rule of Civil Procedure 15.

[3] Additionally, the Complaint's discussion of these activities never establishes that they represent a failure of "*Keller's* line-drawing exercise," as Plaintiff never alleges that they were funded with mandatory dues or that they were improperly categorized.

draw such lines all the time. The fact that doing so may be difficult at times does not mean that it is impossible to do so as *Keller* requires.

Further, the State Bar sets a stricter standard for classifying its activities as "chargeable" than *Keller* requires. Under *Keller*, not all lobbying activities are inherently non-chargeable, as such activities can reasonably relate to the legitimate goals of the State Bar. However, as an additional effort to protect members' First Amendment rights, the State Bar classifies all lobbying activities as "non-chargeable." *See* Br. in Supp. of Motion to Dismiss, Exhibit A. The State Bar also rounds up its "strict calculation results" for the *Keller* Dues Reduction to "give those who take the reduction the benefit of any error that may have been made in the calculation." *Id.* Thus, not only is "*Keller's* line-drawing exercise" not "impossible," the State Bar has successfully implemented a "line-drawing exercise" that is even more restrictive than what *Keller* requires.

Even if Plaintiff had alleged that the activities he complains of were funded with mandatory dues and that they are non-germane to the purposes of the State Bar (he did neither), the Bar has a *Keller*-approved mechanism for addressing such complaints. If Plaintiff does not wish to support non-germane activities with his dues, all he needs to do is take his *Keller* Dues Reduction. SCR 10.03(5)(b)2. If he believes that the *Keller* Dues Reduction was not properly calculated, he may challenge it in arbitration. SCR 10.03(5)(b)3. This is all *Keller* requires.

CONCLUSION

For all these reasons, as well as those set forth in the State Bar's Opening Brief and the Justices' Opening and Reply Briefs, the Court should dismiss the Complaint for failure to state a claim.

Dated: December 20, 2019

Respectfully submitted,

/*s/ Roberta F. Howell*

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