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

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SCHUYLER FILE,

Plaintiff,

v. Case No. 19-CV-1063

JILL M. KASTNER, et al.,

Defendants.

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**WISCONSIN SUPREME COURT DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS**

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## INTRODUCTION

Plaintiff Schuyler File, an attorney, sued two leaders of the State Bar of Wisconsin and the Justices of the Wisconsin Supreme Court in their official capacities, challenging the requirements of Bar membership and dues to practice law in Wisconsin. His First Amendment claims fail as a matter of law.

The Court should dismiss File's complaint for two reasons.

First, his First Amendment claims are squarely foreclosed by *Keller v. State Bar of California*, 496 U.S. 1 (1990), and related cases. *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. ___, 138 S. Ct. 2448 (2018), did not overrule *Keller*. Nor is *Janus* on point or controlling. Plaintiff has failed to state a claim upon which relief can be granted.

Second, the Court also would lack subject-matter jurisdiction because File does not have Article III standing to pursue his claims against the Justices. The Justices do not initiate or prosecute proceedings for the non-payment of bar dues, and File can show no injury that satisfies Article III's case or controversy requirement. In addition, and for similar reasons, the Justices would be immune from suit: the cases recognize immunity for a court's rulemaking function where, as here, the court does not initiate disciplinary proceedings.

Accordingly, the Court should grant the motion to dismiss.

## BACKGROUND

### I. The State Bar of Wisconsin, the lawyer regulation system, and past challenges to Wisconsin's integrated bar

#### A. Overview of Wisconsin's integrated bar, mandatory membership and dues, and the lawyer regulation system

Membership in the State Bar of Wisconsin is a "condition precedent to the right to practice law in Wisconsin." Supreme Court Rule 10.01(1) (*hereinafter* "SCR ___"). All persons licensed to practice law in the state are organized as an association: the "state bar of Wisconsin." SCR 10.02(1); *see also* SCR 10.03(1) ("As of the effective date of this rule, membership of the state bar consists of all those persons who on that date are licensed to practice law in this state."). The purposes of the association include to aid the courts in carrying on and improving administration of justice; to foster and maintain on

the part of those engaged in the practice of law high ideals of integrity, learning, competence, and public service and high standards of conduct; to conduct a program of continuing legal education; and to promote the innovation, development, and improvement of means to deliver legal services to the people of Wisconsin. SCR 10.02(2).

State bar members must pay annual membership dues. SCR 10.03(5). "The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association set forth in SCR 10.02(2)." SCR 10.03(5)(b)1. "The State Bar may not use the compulsory dues of any member who objects . . . for activities that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services." *Id.* "Expenditures that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services may be funded only with user fees or other sources of revenue." *Id.*

Yearly, the State Bar must publish written notice of the activities that can be supported by compulsory dues and those that cannot. SCR 10.03(5)(b)2. The notice must be sent to every Bar member with an annual dues statement. *Id.* A member may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues. *Id.* A member may challenge the Bar's calculation of these amounts by arbitration. SCR 10.03(5)(b)3., 4., 5.

A member who does not pay annual dues may have his or her membership suspended in the manner specified in the State Bar's bylaws. SCR 10.03(6). No person whose membership is suspended for nonpayment of dues may practice law during the period of suspension. *Id.*

SCR 21 establishes the lawyer regulation system "to carry out the supreme court's constitutional responsibility to supervise the practice of law and protect the public from misconduct by persons practicing law in Wisconsin." SCR 21 Preamble. The system is made up of the OLR, district committees, a preliminary review committee, referees, a board of administrative oversight, and the supreme court. SCR 21.01.

The OLR "receives and responds to inquiries and grievances relating to attorneys licensed to practice law or practicing law in Wisconsin and, when appropriate, investigates allegations of attorney misconduct or medical incapacity." SCR 21.02(1). "The office is responsible for the prosecution of disciplinary proceedings alleging attorney misconduct and proceedings alleging attorney medical incapacity and the investigation of license reinstatement petitions." *Id.* "The office has discretion whether to investigate and to prosecute de minimus violations." *Id.* "Discretion permits the office to prioritize resources on matters where there is harm and to complete them more promptly." *Id.*

The OLR functions pursuant to the procedures in SCR 22. SCR 21.02(2). The director of the OLR initiates "a proceeding alleging [attorney] misconduct by filing a complaint and an order to answer with the supreme court and serving a copy of each on the" attorney. SCR 22.11(1).

It is professional misconduct for a Wisconsin lawyer to violate a supreme court rule. SCR 20:8.4(f). The OLR has pursued disciplinary proceedings in the Wisconsin Supreme Court involving violations of SCR 10.03(6) when members failed to pay their dues, were suspended, and continued to practice law. *See In re Disciplinary Proceedings Against Amoun Vang Sayaovong*, 2015 WI 100, ¶ 16, 365 Wis. 2d 200, 871 N.W.2d 271; *In re Disciplinary Proceedings Against FitzGerald*, 2007 WI 11, ¶ 6, 304 Wis. 2d 592, 735 N.W.2d 913.

**B. Overview of past challenges to Wisconsin's integrated bar**

This is not the first time Wisconsin's integrated bar has been challenged. The Seventh Circuit has referred to the challenges as "the Wisconsin bar saga." *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 717 (7th Cir. 2010). This case is the latest "chapter." *Id.*

It is not necessary to describe in detail each prior challenge. There are many, and the State Bar's integrated structure has been consistently upheld or reaffirmed by the U.S. Supreme Court, Seventh Circuit, and Wisconsin Supreme Court. *See Lathrop v. Donohue*, 367 U.S. 820 (1961); *Kingstad*, 622 F.3d at

712–13; *Thiel v. State Bar of Wis.*, 94 F.3d 399 (7th Cir. 1996), *overruled in part by Kingstad*, 622 F.3d at 718; *Crosetto v. State Bar of Wis.*, 12 F.3d 1396 (7th Cir. 1993); *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988); *State ex rel. Armstrong v. Bd. of Governors of State Bar*, 86 Wis. 2d 746, 273 N.W.2d 356 (Wis. 1979); *Lathrop v. Donohue*, 10 Wis. 2d 230, 102 N.W.2d 404 (Wis. 1960), *affirmed by Lathrop v. Donohue*, 367 U.S. 820 (1961); *In re Integration of the Bar*, 5 Wis. 2d 618, 93 N.W.2d 601 (Wis. 1958); *In the Matter of the Integration of the Bar*, 273 Wis. 281, 77 N.W.2d 602 (Wis. 1956); *In re Integration of the Bar*, 249 Wis. 523, 25 N.W.2d 500 (Wis. 1946); *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (Wis. 1943).

The Wisconsin Supreme Court has addressed rules petitions to challenge or modify the integrated bar, affirming its mandatory structure and fees each time. *See In re Reg. of the Bar of Wis.*, 81 Wis. 2d xxxv (1978); *In the Matter of the Discontinuation of the State Bar of Wis. as an Integrated Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (Wis. 1980); *Report of Comm. to Review the State Bar*, 334 N.W.2d 544 (Wis. 1983); *In the Matter of the Petition to Review State Bar Bylaw Amendments*, 139 Wis. 2d 686, 407 N.W.2d 923 (Wis. 1987); *In re State Bar of Wis.: Membership-SCR 10.01(1) and 10.03(4)*, 169 Wis. 2d 21, 485 N.W.2d 225 (Wis. 1992); *In the Matter of the Amendment of Supreme Court Rules*: *10.03(5)(b) – State Bar Membership Dues Reduction*, 174 Wis. 2d xiii (1993); *In the Matter of the Petition for a Voluntary State Bar of Wis.*, No.

11-01 (Wis. July 6, 2011); *In the Matter of Petition to Amend Supreme Court Rule 10.03(5)(b)1*, No. 09-08A (Wis. Nov. 11, 2011); *In the Matter of the Petition to Review Change in State Bar Bylaw*, No. 11-05, slip op. (Wis. July 5, 2012); *In re Petition to Repeal and Replace SCR 10.03(5)(b) with SCR 10.03(5)(b)-(e) and to Amend SCR 10.03(6)*, No. 17-04, slip op. (Wis. Apr. 12, 2018); *In the Matter of the Petition to Amend SCR 10.01(1) and SCR 10.02(1), and to Repeal SCR 10.03(1), (2), (3), (4)(a), (5), and (6) – to Create a Voluntary State Bar of Wisconsin*, slip op. (Wis. July 1, 2019). Many of these petitions can be found in the Wisconsin Court system archive. *Supreme Court Rules: Petition Archive*, Wis. Court Sys., https://www.wicourts.gov/scrules/petitionarchive.htm (last updated July 1, 2019).

## II. Plaintiff's complaint

### A. The parties

Plaintiff is an attorney in private practice who resides in Waukesha County, Wisconsin, and has been a member of the State Bar of Wisconsin since December 2017. (Dkt. 1:3 ¶ 6.)

Defendants Jill M. Kastner and Larry Martin are the President and Executive Director, respectively, of the State Bar of Wisconsin. (Dkt. 1:3 ¶ 7.) "In those roles, they are responsible for maintaining the mandatory [State Bar] membership requirement and collecting the mandatory [State Bar] dues." (Dkt. 1:3 ¶ 7.)

Defendants Chief Justice Patience Roggensack and Justices Ann Walsh Bradley, Annette Ziegler, Rebecca Bradley, Daniel Kelly, Rebecca Dallet, and Brian Hagedorn are Wisconsin Supreme Court Justices and "are responsible for promulgating the Supreme Court Rules (SCR)." (Dkt. 1:3 ¶ 8.) Justice Brian Hagedorn is substituted for retired Justice Shirley Abrahamson. Fed. R. Civ. P. 25(d). The Justices are sued in their official capacities. (Dkt. 1:1.)

### B. Plaintiff's claims and the relief requested

The following summarizes Plaintiff's allegations, as stated in the complaint.

Plaintiff claims that the defendants are violating his First Amendment rights to free speech and association by "continuing to mandate his [State Bar] membership and charge him dues." (Dkt. 1:8.) The Justices "have adopted a requirement of mandatory membership [in the State Bar] and dues for all attorneys licensed in Wisconsin." (Dkt. 1:8 ¶ 24.) These rules are found in SCRs 10.01(1), 10.03(1), 10.03(4)(a), and 10.03(5)(a). (Dkt. 1:4 ¶¶ 11–12.) Plaintiff alleges that if he practices law in Wisconsin and fails to maintain State Bar membership and pay dues, "he could be sent to jail for a year and fined $500 or both for engaging in the unauthorized practice of law. Wis. Stat. § 757.30." (Dkt. 1:4 ¶ 13.)

Defendants Kastner and Martin "are enforcing that mandatory membership requirement and charging dues from Mr. File under color of state

law." (Dkt. 1:8 ¶ 25.) The association of the State Bar allegedly "forces Mr. File to be associated with and support speech with which he may not agree." (Dkt. 1:8 ¶ 26.) Defendants' actions allegedly constitute a violation of Plaintiff's rights "to not join or subsidize an organization without his affirmative consent." (Dkt. 1:9 ¶ 28.)

Plaintiff alleges that the State Bar "does not serve as a formal regulatory system for legal ethics in Wisconsin." (Dkt. 1:5 ¶ 15.) Instead, he alleges the Board of Bar Examiners, OLR, Judicial Education Committee, and Judicial Commission serve various legal-ethics regulatory functions. (Dkt. 1:5 ¶ 15.)

Plaintiff complains the State Bar's lobbying and other public-facing activities violate his First Amendment free speech and association rights. (Dkt. 1:5–7.) He alleges the State Bar spent over $520,000 last legislative term lobbying the Wisconsin State Legislature and that the State Bar engages in legislative advocacy activities with Congress and through the American Bar Association. (Dkt. 1:5–6 ¶ 17.) The State Bar allegedly also "engages in a wide variety of ideologically charged activities that fall outside the formal confines of 'lobbying.'" (Dkt. 1:6 ¶ 18.)

Plaintiff highlights activities the State Bar allegedly engaged in: (1) naming as a 2018 "Legal Innovator" the founder of TransLaw Help Wisconsin, who also co-authored a book published by the State Bar in 2018 titled *Sexual Orientation, Gender Identity, and the Law*, (Dkt. 1:6 ¶ 19); and (2) including as

a speaker at its 2018 annual meeting Richard Painter, a vocal critic of President Donald Trump "who served in the White House of [President] George W. Bush but became a Democrat and was at the time of his speech a Democratic candidate for U.S. Senate." (Dkt. 1:6 ¶ 20.) These examples allegedly "illustrate the simple reality that virtually everything the State Bar does takes a position on the law and matters of public concern." (Dkt. 1:7 ¶ 21.)

Plaintiff requests declaratory and injunctive relief against all Defendants. He requests: (1) a declaration that the SCRs requiring him to belong to the State Bar are unconstitutional; (2) an order enjoining the Justices from "enforcing their rules requiring State Bar membership through the attorney disciplinary process"; (3) an order enjoining Defendants Kastner and Martin from enforcing the mandatory membership rule or charging mandatory dues to Plaintiff; (4) attorney fees and costs; and (5) any further relief to which he is entitled. (Dkt. 1:9–10.)

## APPLICABLE MOTION TO DISMISS STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), the defense of "failure to state a claim upon which relief can be granted" may be asserted by motion. When evaluating the sufficiency of a complaint under Rule 12(b)(6), a court must "construe it in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in [the nonmoving party's] favor." *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010).

"Legal conclusions [in a complaint] do not get the same benefit; those [a court] may disregard." *Alarm Detection Sys., Inc. v. Vill. of Schaumburg*, 930 F.3d 812, 821 (7th Cir. 2019). "Dismissal is proper if it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to the relief requested." *Enger v. Chicago Carriage Cab Corp.*, 812 F.3d 565, 568 (7th Cir. 2016) (citation omitted).

## ARGUMENT

The Court should dismiss Plaintiff's complaint against the Justices. On the merits, *Keller* and the related cases squarely foreclose Plaintiff's First Amendment claims. *Janus* did not overrule *Keller* and is not on-point. Further, the Court would lack subject-matter jurisdiction because Plaintiff has not alleged facts sufficient to show he has Article III standing. In particular, the Justices do not initiate disciplinary actions, meaning they cause Plaintiff no redressable injury. And, for similar reasons, the Justices would be immune from suit.

## I. *Keller* and related cases foreclose Plaintiff's First Amendment claims, and *Janus* is inapposite.

### A. *Keller* and related cases control, meaning Plaintiff cannot prevail as a matter of law.

*Keller* and related cases foreclose Plaintiff's First Amendment claims. In other words, the Court should grant the motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

In *Keller*, a unanimous U.S. Supreme Court upheld California's "integrated bar," described as "an association of attorneys in which membership and dues are required as a condition of practicing law in the State." 496 U.S. at 5. Members of the State Bar of California sued the Bar claiming that "use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment." *Id.* at 4. The Supreme Court upheld mandatory bar membership and dues under the First Amendment but circumscribed what Bar activities may be financed by dues. *Id.* at 4, 14–15.

Specifically, the Supreme Court held that "lawyers admitted to practice in the State [of California] may be required to join and pay dues to the State Bar." *Id.* at 4. "[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 14. The Bar "may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members."

*Id.* "It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.* "[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* (quoting *Lathrop*, 367 U.S. at 843 (plurality opinion)).

*Keller* built upon the Court's decision upholding Wisconsin's integrated bar in *Lathrop v. Donohue*, 367 U.S. 820 (1961). Writing for a plurality of four, Justice Brennan concluded Wisconsin's integrated bar did not infringe upon First Amendment association rights. *Id.* at 842–44. The plurality held that the State Bar served the legitimate ends of "elevating the educational and ethical standards of the Bar" and "improving the quality of the legal service available to the people of the State." *Id.* at 843. The fact that the State Bar "engages in some legislative activity" and collects mandatory dues did not, on its face, violate the First Amendment right of association. *See id.* The plurality declined to address the First Amendment free-speech claim presented, which was resolved in *Keller*. *See id.* at 844–48; *Keller*, 496 U.S. at 14–15.

Two Justices would have resolved *Lathrop* by holding the Court's decision in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), "lays at rest all doubt that a State may constitutionally condition the right to practice law upon membership in an integrated bar association, a condition

fully justified by state needs as the union shop is by federal needs." *Lathrop*, 367 U.S. at 849 (Harlan, J. concurring, joined by Frankfurter, J.).

After *Keller*, the Seventh Circuit addressed Wisconsin's Bar in *Kingstad v. State Bar of Wisconsin*. There, the Seventh Circuit held that "Wisconsin's mandatory State Bar is constitutional." 622 F.3d at 714. The Seventh Circuit held "that to withstand scrutiny under the First Amendment, State Bar expenditures funded by mandatory dues must be germane to the legitimate purposes of the State Bar," and that Wisconsin's bar association satisfied that requirement. *Id.* at 709.

Specifically, in *Kingstad*, the plaintiffs argued a 2007 State Bar "public image campaign" meant to "improv[e] the public's perception of Wisconsin lawyers" was not a use of bar dues consistent with the First Amendment. *Id.* The Seventh Circuit disagreed and concluded the campaign was "germane to the Bar's constitutionally legitimate purpose of improving the quality of legal services available to the Wisconsin public." *Id.* at 721. The Seventh Circuit applied *Keller*, *Lathrop*, and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), which held that "Objecting members [are] not required to give speech subsidies for matters not germane to the larger regulatory purpose which justifie[s] the required association." *Kingstad*, 622 F.3d at 716 (alteration in original) (quoting *United Foods*, 533 U.S. at 413–14); *see id.* at 713–15 (applying *Keller* and *Lathrop*).

This holding overruled one of the alternative holdings of *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996), a prior case that upheld Wisconsin's integrated bar in the face of a First Amendment challenge. *Id.* The court overruled *Thiel*'s alternative holding that "the First Amendment does not prohibit the Bar from funding non-ideological, non-germane activities with compelled dues." *Id.* at 717 (quoting *Thiel*, 94 F.3d at 405); *see id.* at 718. This holding "effectively f[ound]" the second sentence of then-existing SCR 10.03(5)(b)1. was "too narrow because it authorize[d] objections to the use of mandatory dues only for political and ideological activities that are not reasonably related to the constitutional purposes of regulating the legal profession and improving the quality of legal services." *Id.* at 718. In response, the Wisconsin Supreme Court amended that rule. *See In the Matter of Petition to Amend Supreme Court Rule 10.03(5)(b)1*, No. 09-08A (Wis. Nov. 11, 2011), https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=73817.

In addition to *Kingstad* and *Thiel*, the Seventh Circuit upheld Wisconsin's integrated bar in the face of First Amendment challenges in *Crosetto*, 12 F.3d at 1404–05, and *Levine*, 864 F.2d at 458.

In short, *Keller* squarely forecloses Plaintiff's claims. Plaintiff is making the same First Amendment arguments the Supreme Court has rejected. *Keller*, 496 U.S. at 1, 4–5; *Lathrop*, 367 U.S. at 842–44 (plurality opinion); (*see* Dkt.

1:8–9). And the Seventh Circuit has repeatedly upheld Wisconsin's integrated bar, as described above. This Court should apply *Keller*, *Lathrop*, *Kingstad*, *Thiel*, *Crosetto*, and *Levine* and dismiss the case.

Finally, the Court should be aware of developments in a parallel case pending in the Western District of Wisconsin before U.S. District Judge Barbara Crabb, *Adam Jarchow v. State Bar of Wisconsin*, No. 19-CV-266 (W.D. Wis.). In *Jarchow*, the plaintiffs conceded that *Keller* and its progeny foreclose their claims and that the district court should grant the defendants' motion to dismiss. *Id.* at Dkt. 25:2, 10, 27. Plaintiffs' counsel in *Jarchow* has made some of the filed documents in that case, including the complaint and some motion-to-dismiss briefing, available on its website. Wis. Inst. for Law & Liberty, *Jarchow v. State Bar of Wisconsin*, http://www.will-law.org/our-cases/free-speech/jarchow-v-state-bar-of-wisconsin/#case-documents (last visited Nov. 14, 2019).

### B. *Janus* does not control, and Plaintiff cannot obtain the relief he seeks in this Court.

*Janus* is not on point and did not overrule *Keller*. Only the Supreme Court can overrule *Keller*. Plaintiff's claims thus fail as a matter of binding Supreme Court precedent.

In *Janus*, the Supreme Court considered whether requiring nonconsenting nonmembers of public-sector unions to pay an "agency fee"—a

percentage of full union dues—violates the First Amendment. 138 S. Ct. at 2460. Nonmembers had to pay the fee even if they "strongly object to the positions the union takes in collective bargaining and related activities." *Id.* The Court concluded "this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.*

In so holding, the Court overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *Id.* Under *Abood*, nonmembers of a public-sector union could be "charged for the portion of union dues attributable to activities that are 'germane to [the union's] duties as collective-bargaining representative,' but nonmembers may not be required to fund the union's political and ideological projects." *Id.* at 2460–61 (alteration in original) (quoting *Abood*, 431 U.S. at 235). The Court held that *Abood* was "inconsistent with other First Amendment cases and has been undermined by more recent decisions." *Id.* at 2460.

While, the *Keller* Court discussed *Abood* approvingly, it of course addressed a different topic: bar associations, not labor unions. *See Keller*, 496 U.S. at 9–17. And the *Janus* Court did not address *Keller* whatsoever, much less overrule it. *Janus*, 138 S. Ct. at 2459–86. To the contrary, Justice Kagan's dissent noted that the Court has relied upon *Abood* "when deciding cases involving compelled speech outside the labor sphere—*cases today's*

*decision does not question*. See, *e.g., Keller v. State Bar of Cal.*, 496 U.S. 1, 9–17, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990) (state bar fees)." *Id.* at 2498 (Kagan, J. dissenting) (emphasis added). Justice Kagan also noted the Court has "blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression) . . . See *Keller v. State Bar of Cal.*, 496 U.S. 1, 14, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990)." *Id.* at 2495 n.3 (Kagan, J., dissenting). The *Janus* Court did not respond to either of Justice Kagan's references to *Keller*, yet it responded to many of her other points. *See id.* at 2465, 2467 n.4, 2476, 2477 n.23, 2481 n.25, 2482 n.26, 2485 n.27, 2486 n.28.

That *Keller* remains good law is also confirmed by *Harris v. Quinn*, 573 U.S. 616 (2014), a predecessor to *Janus*. The *Harris* Court refused to extend *Abood* to cover union agency fees paid by certain "personal assistants" who provide homecare services to Illinois Medicaid recipients. *See id.* at 620, 645–46. Refusing to extend *Abood* to cover those public employees did not "call into question" *Keller*. *Id.* at 655. "[*Keller*] fits comfortably within the framework applied in [*Harris*]." *Id.* The Court distinguished *Keller* from its public-sector agency-fee cases based on the "State's interest in regulating the legal profession and improving the quality of legal services" and "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 (citation omitted). Justice Kagan's dissent in *Harris* notes that the Court "reaffirm[ed] as good law" several decisions, including *Keller*. *Id.* at 670 (Kagan, J., dissenting).

Consistent with that, on remand from the Supreme Court in light of *Janus*, the Eighth Circuit recently rejected similar First Amendment challenges to the State Bar of North Dakota's mandatory membership and dues requirements in *Fleck v. Wetch*, 937 F.3d 1112, 1117–19 (8th Cir. 2019).

In summary, *Janus* did not overrule *Keller*, and the agency-fee issue it addressed is distinct from the integrated-bar and mandatory-bar-dues issues here. *Keller* remains valid and binding on all lower courts, despite the fact *Janus* overruled *Abood*. In any event, as the Seventh Circuit recently reiterated, "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case [that] directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019) (quoting *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997)). The same holds true in this Court. *Keller* and the related cases require the dismissal of Plaintiff's First Amendment claims.[1]

[1] If Plaintiff's aim is to see *Keller* overruled, he cannot achieve that goal here or in the Seventh Circuit. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

## II. The Court lacks jurisdiction because Plaintiff has shown no Article III standing to assert his claims against the Justices; further, the Justices are immune from suit.

Even if this case were not squarely foreclosed by *Keller*, the claims against the Justices still be would subject to dismissal because Plaintiff lacks standing to sue the Justices and the Justices enjoy immunity.

### A. Plaintiff lacks Article III standing.

The Justices do not threaten Plaintiff with a redressable injury. OLR, not the Justices, has discretion to decide whether to pursue a violation of the SCRs, including the rules Plaintiff challenges: SCRs 10.01(1), 10.03(1), 10.03(4)(a), and 10.03(5). *See* SCR 21.02(1) ("Discretion permits the office to prioritize resources on matters where there is harm and to complete them more promptly.").

Under Federal Rule of Civil Procedure 12(b)(1), the defense of "lack of subject-matter jurisdiction" may be asserted by motion. Article III of the Constitution limits a federal court's authority to the resolution of "Cases" or "Controversies." U.S. Const. art. III, § 2. "The elements of standing are well settled: the plaintiff must allege an injury in fact that is traceable to the defendant's conduct and redressable by a favorable judicial decision." *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). "If the plaintiff does not

claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." *Id.*

"If a complaint fails to include enough allegations to support Article III standing for the plaintiffs, the court has only two options: it can either dismiss the complaint with leave to amend, or it can dismiss the case for want of jurisdiction and hence without prejudice." *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 935 F.3d 573, 581 (7th Cir. 2019).

Here, OLR's pursuit of a disciplinary proceeding is entirely hypothetical, but even in the hypothetical scenario, the Justices would not initiate such proceedings. They accordingly do not cause Plaintiff to suffer an actual injury that this Court can redress. *See Casillas*, 926 F.3d at 333; Fed. R. Civ. P. 12(b)(1).

That is consistent with the Seventh Circuit's affirmance of a dismissal of the Justices in a previous challenge to Wisconsin's mandatory bar. *Crosetto*, 12 F.3d at 1403. In *Crosetto*, the plaintiffs argued "that because the Justices might someday enforce the Bar's rules, Plaintiffs ha[d] a ripe claim [against them]." *Id.* The Seventh Circuit disagreed that the plaintiffs' request for injunctive relief against the Justices presented an Article III case or controversy—the case was unripe because the plaintiffs could not demonstrate a real threat of harm resulting from noncompliance with the mandatory-dues requirement. *Id.*

Likewise, here, File identifies no redressable injury attributable to the Justices. Their alleged involvement in a hypothetical action by OLR for a potential SCR violation Plaintiff might commit is too attenuated and speculative to confer standing to sue.

It is true that, since *Crosetto*, the Seventh Circuit has considered Article III standing in "pre-enforcement" First Amendment challenges, which can satisfy Article III in certain circumstances. *See Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 147 (7th Cir. 2011); *see also Korte v. Sebelius*, 735 F.3d 654, 667 (7th Cir. 2013); *Bauer v. Shepard,* 620 F.3d 704, 708 (7th Cir. 2010) (the "existence of a statute implies a threat to prosecute, so pre-enforcement challenges are proper [under Article III], because a probability of future injury counts as 'injury' for purposes of standing."). But Plaintiff's case against the Justices is not a pre-enforcement challenge like those permitted in *Barland*, *Korte*, or *Bauer*. The Justices do not initiate enforcement of the SCRs. The Justices' "enforcement"—if it ever happens—must be triggered by the *OLR's* independent actions of investigation and pursuing a disciplinary proceeding by filing a complaint.

**B. The Justices are immune from suit.**

For similar reasons, where, as here, the Justices do not initiate disciplinary actions, immunity would apply. The U.S. Supreme Court has explained that, when acting purely in its rulemaking capacity in "the issuance

of, or failure to amend, the challenged [attorney disciplinary] rules," a state supreme court and its members "are immune from suit." *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 734 (1980). That immunity applies here because the Justices are being sued in that rulemaking capacity. (Dkt. 1:3 ¶ 8 ("Defendants Chief Justice Patience Roggensack and the justices of the Wisconsin Supreme Court are responsible for promulgating the Supreme Court Rules (SCR).").)

The exception to that immunity rule is for courts that initiate claims, acting like prosecutors. But the exception is inapplicable here. Specifically, as the U.S. Supreme Court has stated, a court that "shares direct enforcement authority with the State Bar is subject to prospective judgments just as other enforcement officials are," where the courts have the power to *initiate* the proceeding. *Supreme Court of Va.*, 446 U.S. at 730; *see also id.* at 736 (noting that the "Virginia Court [had] independent authority of its own to initiate proceedings against attorneys"). Consistent with that, the Seventh Circuit has discussed that prospective claims are allowed where a supreme court has authority to "*initiate* disciplinary proceedings." *See Reeder v. Madigan*, 780 F.3d 799, 805 (7th Cir. 2015) (emphasis added) (discussing *Supreme Court of Va.*).

However, that exception to immunity does not apply to Wisconsin's Justices. They do not initiate actions, like prosecutors, but rather OLR

exercises that discretion and authority. SCR 21.01(2); SCR 22.11(1). Accordingly, the Justices retain their immunity.

Thus, in addition to failing on the merits under *Keller*, Plaintiff's claims against the Justices would properly be dismissed for lack of standing and due to the Justices' immunity.

## CONCLUSION

The Court should grant the motion to dismiss.

Dated this 15th day of November, 2019.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on November 15, 2019, I electronically filed the foregoing Wisconsin Supreme Court Defendants' Memorandum of Law In Support of Their Motion to Dismiss with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 15th day of November, 2019.

s/ Clayton P. Kawski
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