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

SCHUYLER FILE,

Plaintiff,

v. Case No. 19-CV-1063

JILL M. KASTNER, et al.,

Defendants.

WISCONSIN SUPREME COURT DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

The Court should dismiss Plaintiff's complaint because it is foreclosed by U.S. Supreme Court and Seventh Circuit precedent. Plaintiff fails to state a claim because *Keller v. State Bar of California*, 496 U.S. 1 (1990), and its progeny hold that a mandatory bar does not violate the First Amendment.

In his response, Plaintiff primarily argues that *Harris v. Quinn*, 573 U.S. 616 (2014), and *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. ___, 138 S. Ct. 2448 (2018), implicitly overruled *Keller* or "narrowed" its holding. (Dkt. 23:2, 12–17, 21.) He misconstrues *Harris*'s impact—if any—on *Keller* by incorrectly asserting that the *Harris* Court held that a mandatory bar association can only be justified by a state's interest in formally regulating the legal profession. (Dkt. 23:14–15.) *Harris* did no such thing, and *Janus* did not disturb *Keller* whatsoever.

Harris and *Janus* did not overrule *Keller*, implicitly or otherwise, and *Keller* bars Plaintiff's claim.

Plaintiff next argues that the U.S. Supreme Court's decision to grant, vacate, and remand (GVR) in *Fleck v. Wetch*, 139 S. Ct. 590 (2018), means that *Keller* is no longer controlling. He suggests the GVR "gives this Court permission to reconsider *Keller*." (Dkt. 23:2.) Not so. Indeed, the post-remand decision in *Fleck* is contrary to his argument. The Eighth Circuit held that "Janus did not overrule Keller." *Fleck v. Wetch*, 937 F.3d 1112, 1118 (8th Cir. 2019), *cert. pending*, No. 19-670 (U.S.).

Plaintiff also makes arguments outside the pleadings and advocates for application of an "exacting scrutiny" standard. (Dkt. 23:2, 26–28.) That is not the test under *Keller*, which is binding Supreme Court precedent that controls this case. The certiorari petition pending in *Fleck* may be an effort to change the rational-basis standard of *Keller*, but that has no bearing on the outcome of this case, where *Keller* controls and remains binding law. Plaintiff's merits arguments also rely upon information outside the allegations of the complaint, which is inappropriate at this stage. (*See* Dkt. 23:27–28.) But even hypothetically considering Plaintiff's extra-pleading merits arguments, he cannot escape the binding precedent holding that the Wisconsin Bar's structure survives the applicable standard of review.

Finally, regarding the Wisconsin Supreme Court Defendants' alternative standing and immunity arguments, Plaintiff's response is unpersuasive. His response largely disregards the complaint's allegations, which do not show standing and confirm immunity. (*See* Dkt. 23:9.) Based upon the allegations, Plaintiff has not shown a credible threat of enforcement by the Justices, who do not prosecute ethics complaints. That is the duty of the Office of Lawyer Regulation (OLR), as already argued.

The Court should grant the motion to dismiss.

ARGUMENT

I. Plaintiff's First Amendment claim is foreclosed by controlling U.S. Supreme Court and Seventh Circuit precedent.

As explained in the Wisconsin Supreme Court Defendants' opening memorandum, *Lathrop v. Donohue*, 367 U.S. 820 (1961), *Keller*, and the Seventh Circuit's decisions rejecting First Amendment challenges to a mandatory bar in *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010), *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th Cir. 1996), *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), and *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988), lead to the conclusion that Plaintiff's complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Court is bound by this precedent, even after *Harris* and *Janus*.

A. Neither *Harris* nor *Janus* overruled *Keller*, which still controls and bars Plaintiff's claim.

In response, Plaintiff primarily points to *Harris* and *Janus* and argues they implicitly overruled or "narrowed" *Keller*. (Dkt. 23:2, 12–17, 21.) They do not.

Plaintiff misconstrues what the *Harris* Court said about *Keller*. He claims, "*Harris* narrowed *Keller* by focusing its characterization of the mandatory bar as the formal regulatory system for lawyers." (Dkt. 23:13.) He also argues, "*Harris* represents a narrowing of the state's sufficient interest in a mandatory state bar to formal ethical regulation." (Dkt. 23:14.)

Harris did no such thing. The only way to reach Plaintiff's conclusion is to ignore language in *Harris* that specifically reiterated *Keller*'s holding that there are two sufficient state interests for a mandatory bar:

> [The *Keller* decision] fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. 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." Ibid.* States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

573 U.S. at 655–56 (emphasis added). Thus, instead of narrowing *Keller*, the *Harris* Court reaffirmed the two legally sufficient bases for a mandatory bar: regulating the legal profession and improving the quality of legal services.

Justice Kagan's *Harris* dissent notes that the Court "reaffirm[ed] as good law" several decisions, including *Keller*. *Id.* at 670 (Kagan, J., dissenting).

Regarding *Janus*, the Court did not mention *Keller*, let alone overrule it. *Janus*, 138 S. Ct. at 2459–86. Presumably, the Court would have found it appropriate to expressly overrule *Keller* if that was its aim. Plaintiff claims the *Janus* Court instead chose to do that work implicitly without even a citation to *Keller* in the decision. (*See* Dkt. 23:21.) That is implausible given the likely impact of such a holding. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (The Court "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). And Justice Kagan's dissent recognizes that the *Janus* majority was not disturbing *Keller*, with no rejoinder from the majority. *See id.* at 2498, 2495 n.3 (Kagan, J., dissenting).

Nonetheless, Plaintiff argues that, under the factors identified in *Levine*, the Supreme Court has implicitly overruled *Keller*. (Dkt. 23:21–24.) *See Levine*, 864 F.2d at 461. That is incorrect for three reasons.

First, no Supreme Court Justice has questioned *Keller*'s validity. *See id.* As argued above, the *Janus* Court did not mention *Keller*, and the *Harris* Court expressly reaffirmed *Keller*. Notwithstanding some Justices' ruminations at oral arguments and Justice Alito's reference to the *Lathrop* dissent (*see* Dkt. 23:22–24), no Justice has taken a written position that undermines *Keller*.

Second, Plaintiff concedes that "no lower courts have abandoned *Keller* yet." (Dkt. 23:23); *see Levine*, 864 F.2d at 461.

Third, *Janus* and *Harris* are not "later Supreme Court decision[s] in the identical area of the law." *Levine*, 864 F.2d at 461. They involved the constitutionality of public-sector union agency fees. While there is doctrinal overlap between that issue and the constitutionality of a mandatory bar, the "area of the law" is not "identical." *Id.* If it were, there would have been no reason for the Court to reaffirm *Keller*'s validity in *Harris*—the Court would have instead explained why *Keller* was being overruled. *See Harris*, 573 U.S. at 655–56. Likewise, the *Janus* Court said nothing of *Keller*.

Plaintiff appropriately recognizes that, to adopt his position, this Court would have to disregard the otherwise "definitive holding" of the Seventh Circuit in *Kingstad* (Dkt. 23:13 n.2), namely, that "Wisconsin's mandatory State Bar is constitutional." 622 F.3d at 714. *Kingstad* is good law after *Harris* and *Janus* because, unless the Supreme Court disturbs *Keller*, *Keller* and its progeny are controlling. And, Plaintiff acknowledges "it is [the U.S. Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); (*see* Dkt. 23:24 n.5).

B. The *Fleck* GVR provides no basis to conclude that *Janus* overruled *Keller*, and the Eighth Circuit's decision on remand confirms that fact.

Plaintiff finds significant the *Fleck* GVR, which "remanded [the case] . . . for further consideration in light of *Janus*." 139 S. Ct. at 590; (Dkt. 23:20–21). Plaintiff sees the GVR as an "invitation" for lower courts to "reconsider" *Keller* in light of *Janus*. (Dkt. 23:20.)

There was no invitation. The GVR provides no basis to conclude *Janus* overruled *Keller*, as the Eighth Circuit's decision on remand confirms.

First, the GVR did nothing more than require the Eighth Circuit to consider its decision further in light of *Janus*. There is no statement in the GVR that *Janus* even applies to the mandatory-bar issue. It does not apply because *Keller* has not been overruled and controls.

Second, on remand the Eighth Circuit concluded that the record was "inadequate" to take up Fleck's First Amendment mandatory-association claim because he forfeited the issue in the district court and on appeal. *Fleck*, 937 F.3d at 1117. Nonetheless, in affirming dismissal of Fleck's "opt-out procedure" claim, the Eighth Circuit correctly held that "Janus did not overrule Keller." *Id.* at 1118. Accordingly, neither the GVR nor the decision on remand in *Fleck* supports Plaintiff's theory that *Janus* overruled *Keller*.

C. "Exacting scrutiny" is not the legal standard, and Plaintiff's merits argument should not be addressed now, and, in any event, it would fail under controlling precedent.

Plaintiff argues that "the State Bar's activities are subject to exacting scrutiny." (Dkt. 23:12.) He claims that "*Keller* does not invoke a particular standard of review applicable to challenges to a mandatory bar; the closest it comes is identifying 'the State's legitimate interests' in two policy objectives." (Dkt. 23:12 (quoting *Keller*, 496 U.S. at 8).) He asserts that *Janus* and *Harris* require "exacting scrutiny," and that "the State Defendants cannot meet that test here." (Dkt. 23:12–13.)

As an initial matter, Plaintiff's arguments are inappropriate because they rely upon information outside the complaint. (*See* Dkt. 23:27–28 (discussing practice-management counseling, continuing legal education offered by non-State Bar entities, professional "coaches," etc.); *see also* 24:8–10 (responding to the State Bar Defendants' motion to dismiss and discussing a State Bar Annual Conference presentation about climate change and a State Bar article about *Doe v. Elmbrook*, 687 F.3d 840 (7th Cir. 2012) (en banc), an Establishment Clause case).) The Court should disregard this information, as this is a motion to dismiss for failure to state a claim. *Thomason v. Nachtrieb*, 888 F.2d 1202, 1205 (7th Cir. 1989) ("consideration of a motion to dismiss is limited to the pleadings").

Setting aside that Plaintiff is arguing the merits in response to a Rule 12(b)(6) motion, his take on the legal standard is not the reality.

The certiorari petition pending in *Fleck*, in particular, illustrates that exacting scrutiny is not the prevailing standard, but rather is what Plaintiff is pressing in an effort to change the law. The first question presented in Fleck's certiorari petition is: "Are laws mandating membership in a state bar association subject to the same 'exacting' First Amendment scrutiny that the Court prescribed for mandatory public-sector union fees in *Janus*?", Petition for a Writ of Certiorari at i, *Fleck*, No. 19-670 (U.S.), available at https://www.supremecourt.gov/DocketPDF/19/19-670/123251/20191121144037011_Petition.pdf. The petition goes on to describe "the rational basis standard that *Keller* used, 496 U.S. at 8," *id.* at 12, and advocates for exacting scrutiny. *See also id.* at 17, 20, 24, 25, 26, 27 (describing *Keller* as applying a rational-basis standard).

Exacting scrutiny is not the legal standard under *Keller*, which quoted *Lathrop* for the proposition that Wisconsin "might reasonably believe" that the activities of its integrated bar association "elevat[ed] the educational and ethical standards of the Bar to the end of improving the quality of legal services to the people of the State," which is a "legitimate end of state policy." *Keller*, 496 U.S. at 8 (quoting *Lathrop*, 367 U.S. at 843).

The standard under *Keller* is rational basis, and the State Bar of Wisconsin meets that standard for the reasons explained in *Lathrop*, *Keller*, *Kingstad*, *Thiel*, *Crosetto*, and *Levine*. The Seventh Circuit summed it up: "Wisconsin's mandatory State Bar is constitutional, and the Objectors may be compelled to pay their share of direct and indirect expenses that are reasonably incurred by the State Bar to serve its dual constitutional purposes of regulating the legal profession and improving the quality of legal services." *Kingstad*, 622 F.3d at 714. Since Plaintiff's "is a facial attack on the State Bar as currently constituted" (Dkt. 24:4), the claim fails under controlling precedent.

The Court should not take up the merits because Plaintiff's claim is foreclosed by *Keller* and its progeny. If it addresses the merits now, the Court should hold that Plaintiff's claim fails rational-basis scrutiny.

II. Alternatively, Plaintiff lacks Article III standing, and the Justices are immune from suit.

A. Plaintiff's complaint does not establish standing.

In the alternative, Plaintiff lacks standing. His response focuses on this case being a pre-enforcement challenge (*see* Dkt. 23:4), but his complaint does not allege that, due to a threat of enforcement of the challenged SCRs by the Justices, he has decided to forego *not* paying bar dues and practicing law without being a State Bar member. That is fatal to standing.

Lacking an allegation in his complaint that he has cancelled nascent plans to violate the challenged SCRs, there is no credible threat of enforcement and no standing. *See Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 161 (2014) (the plaintiff must show "a credible threat of enforcement"). Plaintiff argues that "he engages in self-censorship" and "declines to exercise his constitutional right to withdraw from membership in the State Bar," but he does not cite any allegations in his complaint that support a claim of stifled "plans." (Dkt. 23:6); *see Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984), *cert. denied,* 470 U.S. 1054 (1985) ("it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss"). Based upon the allegations contained in the four corners of his complaint, there is no credible threat of enforcement because there is no possible violation to enforce.

Furthermore, even if Plaintiff's complaint had alleged this "self-censorship" plan, the Justices' alleged involvement in a hypothetical action by OLR for a potential SCR violation Plaintiff might commit is too speculative to confer standing. As the Justices argued in their opening memorandum, Plaintiff has not alleged how the Justices—and not OLR—might cause him to suffer an actual injury that this Court can redress. (Dkt. 15:21 (citing *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019); Fed. R. Civ. P. 12(b)(1)).)

Finally, Plaintiff's point that Chief Justice Roggensack is "the administrative head of the judicial system," does not confer standing. (Dkt. 23:8–9.) The Chief Justice has no unique authority that would allow her to initiate an enforcement action against Plaintiff.

B. The Justices are immune from suit because they do not have authority to prosecute ethics complaints.

Alternatively, the Justices are immune from suit under *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719 (1980).

First, Plaintiff argues that his "is not a challenge to the justices in their rulemaking capacity" (Dkt. 23:9), but the allegations in his complaint show otherwise. Paragraph 8 states: "Defendants Chief Justice Patience Roggensack and the justices of the Wisconsin Supreme Court are responsible for promulgating the Supreme Court Rules (SCR). These rules make bar membership mandatory for attorneys in Wisconsin. SCR 10.01(1). The rules also empower the bar to set annual dues attorneys must pay. SCR 10.03(5)." (Dkt. 1:3 ¶ 8; *see also id.* at 4 ¶¶ 11, 12 ("the rules adopted by the justices"); 8 ¶ 24 ("The Chief Justice and Justices of the Wisconsin Supreme Court have adopted a requirement of mandatory membership and dues for all attorneys licensed in Wisconsin.").) The factual allegations plainly involve rulemaking.

Supreme Court of Virginia holds that "legislative immunity" applies to a state supreme court's members whose allegedly unconstitutional conduct is

"the issuance of or failure to amend, the challenged [attorney disciplinary] rules." 446 U.S. at 734. This immunity would apply to the Justices, to the extent the complaint challenges their rulemaking.

Second, Plaintiff tries to analogize the Justices' enforcement authority to that of the Virginia Supreme Court (*see* Dkt. 23:9–10), but there is a key difference: "[The Virginia Supreme Court] hears appeals from lower court decisions in disciplinary cases, a traditional adjudicative task; and *in addition, it has independent enforcement authority of its own*." 446 U.S. at 734 (emphasis added). "§ 54–74 gives the Virginia Court *independent authority of its own to initiate proceedings against attorneys*." *Id.* at 736 (emphasis added). "*For this reason* the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were." *Id.* (emphasis added).

The Justices do not possess independent authority to initiate proceedings against attorneys. While they ultimately enforce the SCRs if a complaint reaches them, only the OLR can initiate an enforcement proceeding by filing a complaint. SCR 22.11(1). Thus, in the alternative, *Supreme Court of Virginia* bars Plaintiff's claim against the Justices for declaratory and injunctive relief. 446 U.S. at 736–37.

Finally, Plaintiff's discussion of *Reeder v. Madigan*, 780 F.3d 799 (7th Cir. 2015), makes the Justices' point. (Dkt. 23:11.) The Justices' authority

is limited to adjudicating ethics cases and imposing penalties when the OLR presents a meritorious complaint. Thus, *the Justices'* enforcement authority is "nothing like a prosecution." (Dkt. 23:11 (quoting *Reeder*, 780 F.3d at 805).) The Justices have no prosecutorial authority, which was the lynchpin of the immunity holding in *Supreme Court of Virginia*. *See* 446 U.S. at 736–37.

CONCLUSION

The Court should grant the motion to dismiss.

Dated this 20th day of December, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 20, 2019, I electronically filed the foregoing Wisconsin Supreme Court Defendants' Reply 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 20th day of December, 2019.

s/ Clayton P. Kawski
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