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

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

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INTRODUCTION

Defendants Jill M. Kastner (in her official capacity as President of the State Bar of Wisconsin) and Larry Martin (in his official capacity as executive director of the State Bar of Wisconsin) ("Defendants") submit the following Brief in support of their Motion to Dismiss Plaintiff's Complaint.

Plaintiff seeks to challenge Wisconsin Supreme Court Rule ("SCR") 10.03, which requires that lawyers licensed to practice law in Wisconsin join the State Bar and pay mandatory membership dues, as a violation of his First Amendment rights. While the Complaint is unclear as to whether his challenge is facial or as-applied, *Keller v. State Bar of California*, 496 U.S. 1 (1990), and its associated cases bar Plaintiff's claims. Therefore, the Court must dismiss the Complaint for failure to state a claim. Further, Plaintiff has not alleged injury in fact sufficient for Article III standing, and therefore the Court must dismiss the Complaint for lack of subject-matter jurisdiction.

BACKGROUND

I. Structure of the State Bar

Pursuant to Wisconsin Supreme Court Rules, "[t]here shall be an association to be known as the 'state bar of Wisconsin' composed of persons licensed to practice law in this state, and membership in the association shall be a condition precedent to the right to practice law in Wisconsin." SCR 10.01(1). The State Bar of Wisconsin ("State Bar") was created and is governed by the Wisconsin Supreme Court as an "exercise of the court's inherent authority over members of the legal profession as officers of the court." SCR 10.02(1). The U.S. Supreme Court has recognized this exercise of authority as an "extension[ ] of the State's law-making power." *Lathrop v. Donohue*, 367 U.S. 820, 824–25 (1961). The purposes of the State Bar, as laid out in the Supreme Court Rules, are to:

> Aid the courts in carrying on and improving the 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 safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to conduct a program of continuing legal education; to assist or support legal education programs at the preadmission level; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform and the relations of the bar to the public and to publish information relating thereto; to carry on a continuing program of legal research in the technical fields of substantive law, practice and procedure and make reports and recommendations thereon within legally permissible limits; to promote innovation, development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged.

Kingstad v. State Bar of Wisconsin, 622 F.3d 708, 709–10 (7th Cir. 2010) (quoting SCR 10.02 (2)). To advance these purposes, the Supreme Court Rules "permit the State Bar to engage in and fund 'any activity that is reasonably intended' to further the State Bar's purposes." *Id.* at 710 (quoting SCR 10.03(5)(b)).

The funds used to further the State Bar's purposes are derived in large part from membership dues. Because membership in the State Bar is a "condition precedent to the right to practice law in Wisconsin," the Wisconsin Supreme Court requires "[e]very person who becomes licensed to practice law in [Wisconsin]" to "enroll in the state bar by registering." SCR 10.03(2). All members authorized to practice law in Wisconsin are required to pay "annual membership dues." SCR 10.03(4)(a); SCR 10.03(5)(a). Failure to pay required dues can result in a member being "suspended" from the practice of law. SCR 10.03(6). A state bar association, like Wisconsin's, for which "membership and dues are required as a condition of practicing law," is referred to as an "integrated bar." *Keller*, 496 U.S. at 5 (1990); *see also Kingstad*, 622 F.3d at 713, n.3 (7th Cir. 2010) ("integrated," "mandatory," or "unified" bar).

While the U.S. Supreme Court upheld the constitutionality of an integrated bar in *Keller*, it did so on the condition that members be able to withhold the portion of their dues that fund activities not germane to the legitimate government purposes behind the integrated bar. To comply with *Keller*, the Supreme Court Rules "make clear that the State Bar may not use the compulsory dues of any objecting member 'for political or ideological activities that are not reasonably intended for the purpose of regulating the legal profession or improving the quality of legal services.'" *Kingstad*, 622 F.3d at 710 (quoting SCR 10.03(5)(b)1). State Bar policy goes beyond this requirement, holding that "all direct lobbying activity on policy matters before the Wisconsin State Legislature or the United States Congress . . ., even lobbying activity deemed germane to regulating the legal profession and improving the quality of legal services." State Bar of Wisconsin, *Maintaining Your Membership* (2019), https://www.wisbar.org/formembers/membershipandbenefits/Pages/Maintaining-Your-Membership.aspx (under "State Bar of Wisconsin Dues Reduction and Arbitration Process (Keller Dues Reduction)" tab).

To effectuate these rules, the State Bar provides a mechanism allowing members to reduce their annual dues by the pro rata amount used to fund "activities that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services." SCR 10.03(5)(b)1. This process by which members may avoid paying for activities which, under *Keller*, may not be funded by compulsory dues without members' consent, is referred to as the "*Keller* Dues Reduction" as it follows the procedure approved of as constitutionally adequate in *Keller v. State Bar of California.* SCR 10.03(5)(b)2; *see generally* SCR 10 App'x ("State Bar Bylaws"), art. I, § 5. Along with each member's annual dues statement, the State Bar sends a "written notice of the activities that can be supported by

compulsory dues and the activities that cannot be supported by compulsory dues." The notice is based on data from the most recent fiscal year for which there is an audit report available and it "indicate[s] the cost of each activity, including all appropriate indirect expense[s], and the amount of dues to be devoted to each activity," SCR 10.03(5)(b)2, rounded up from the precise calculation. Based on the data in the notice, each member has the opportunity to "withhold" from their "annual dues statement" "the pro rata portion of dues budgeted for [the] activities that cannot be supported by compulsory dues." SCR 10.03(5)(b)2.

The Supreme Court Rules also provide a procedure for a member who "contends that the state bar incorrectly set the amount of dues that can be withheld" to challenge the amount of the *Keller* Dues Reduction through a timely demand for arbitration. SCR 10.03(5)(b)3. The State Bar must then "promptly submit the matter to arbitration before an impartial arbitrator." SCR 10.03(5)(b)4. If the arbitrator concludes that an increased pro rata dues reduction is required, "the state bar shall offer such increased pro rata reduction to members first admitted to the state bar during that fiscal year and after the date of the arbitrator's decision." SCR 10.03(5)(b)5. "The costs of arbitration shall be paid by the state bar." SCR 10.03(5)(b)4.

The constitutionality of the State Bar's *Keller* Dues Reduction procedure, and of the integrated bar structure generally, has been consistently affirmed by the Supreme Court,[1] the Seventh Circuit,[2] and the Wisconsin Supreme Court.[3]

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[1] *Lathrop v. Donohue*, 367 U.S. 820 (1961).

[2] *Kingstad v. State Bar of Wis.*, 622 F.3d 708 (2010); *Thiel v. State Bar of Wis.*, 94 F.3d 399 (7th Cir. 1996); *Crosetto v. State Bar of Wis.*, 12 F.3d 1396 (7th Cir. 1993); *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988).

[3] *Integration of Bar Case*, 11 N.W.2d 604 (Wis. 1943); *In re Integration of the Bar*, 25 N.W.2d 500 (Wis. 1946); *In re Integration of the Bar*, 77 N.W.2d 602 (Wis. 1956); *In re Integration of the Bar*, 93 N.W.2d 601 (Wis. 1958); *Lathrop v. Donohue*, 102 N.W.2d 404 (Wis.

II. Plaintiff's Complaint

On July 25, 2019, Plaintiff File filed this action against officers of the State Bar and the justices of the Supreme Court of Wisconsin. Compl. ¶¶ 6–8. Plaintiff is "an attorney in the private practice of law" and "has been a member of the State Bar of Wisconsin since December 2017." Compl. ¶ 6.

The Complaint identifies three activities of the State Bar which Plaintiff alleges involve "direct lobbying" or are "ideologically charged." Compl. ¶¶ 17–18. Plaintiff alleges that these activities "illustrate the simple reality that virtually everything the State Bar does takes a position on the law and matters of public concern." Compl. ¶ 21. He asserts that these activities are akin to the public-sector collective bargaining which the U.S. Supreme Court in *Janus v. AFSCME*, 138 S.Ct. 2448 (2018), held cannot be funded by compulsory agency fees. Count I of the Complaint alleges that "[t]he actions of the Defendants" in compelling Plaintiff to pay dues to the State Bar "constitute[s] a violation of Mr. File's First Amendment rights to free speech and freedom of association to not join or subsidize an organization without his affirmative consent" because "Defendants lack a compelling state interest to justify their actions" and "Defendants' actions are not narrowly tailored to the means least restrictive of Mr. File's freedoms." Compl.

1960); *In re Reg. of the Bar of Wis.*, 81 Wis. 2d xxxv (1978); *State ex rel. Armstrong v. Board of Governors*, 273 N.W.2d 356 (Wis. 1979); *In re Discontinuation of the State Bar of Wis. as an Integrated Bar*, 286 N.W.2d 601 (Wis. 1980); *Report of Comm. to Review the State Bar*, 334 N.W.2d 544 (Wis. 1983); *In re Amend. Of State Bar Rules*: SCR 10.03(5), slip op. (Wis. Jan 21, 1986); *In re Petition to Review State Bar Bylaw Amends.*, 407 N.W.2d 923 (WIs 1987); *In re State Bar of Wisc.: Membership*, 485 N.W.2d 225 (Wis. 1992); *In re Amend. of Sup. Ct. Rules: 10.03(5)(b) – State Bar Membership Dues Reduction*, 174 Wis. 2d xiii (1993); *In re Petition to Amend SCR 10.03(5)(b)1*, No. 09-08 (Wis. Nov. 17, 2010); *In re Petition for a Voluntary Bar*, No. 11-01 (Wis. July 6, 2011); *In re Petition to Review Change in State Bar Bylaws*, No. 11-05, slip op. (Wis. Oct. 7, 2011); *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).

28–30. Plaintiff seeks declaratory and injunctive relief declaring that "the Wisconsin Supreme Court's rules requiring Mr. File to belong to the State Bar of Wisconsin are unconstitutional" and enjoining Defendants from enforcing the Supreme Court Rules relating to State Bar membership against him. Compl. p. 9.

ARGUMENT

I. The Complaint Fails to State a First Amendment Claim as a Matter of Law.

The Complaint alleges that the Defendants violated "Mr. File's First Amendment rights to free speech and freedom of association to not join or subsidize an organization without his affirmative consent." Compl. ¶ 28. Plaintiff further alleges that "[t]he defendants lack a compelling state interest to justify their actions" and "[t]he Defendants' actions are not narrowly tailored to the means least restrictive of Mr. File's freedoms." Compl. ¶¶ 29–30. The Complaint is not explicit as to whether this is a facial or as-applied challenge. A "facial challenge" asserts "that the law is unconstitutional in all of its applications," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008), while an "as-applied challenge," *id.* at 458, claims that a law "is unconstitutional because of the way it was applied to the particular facts of [the] case," *United States v. Salerno*, 481 U.S. 739, 745 n.3 (1987). A complaint purporting to bring either type of constitutional challenge must allege plausible facts sufficient to establish each element of the claim. *See* Fed. R. Civ. P. 12(b)(6); *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1332 (2015); *Enger v. Chicago Carriage Cab Corp.*, 812 F.3d 565, 568–70 (7th Cir. 2016). Plaintiff's Complaint fails to meet this standard for either a facial or as-applied challenge.

A. *Keller* and its progeny bar any facial First Amendment challenge as a matter of law.

To the extent the Complaint alleges that Defendants violated Plaintiff's First Amendment rights by requiring him to join the State Bar as a precondition to practicing law in Wisconsin or by requiring *any* subsidization of the State Bar's activities, it purports to state a facial challenge to SCR 10.03. Any such facial First Amendment challenge to Wisconsin's integrated bar as it is currently constituted under the Supreme Court rules is barred by *Keller* and its progeny.

1. *Keller* and its progeny control on the constitutionality of integrated bars.

In *Keller*, the U.S. Supreme Court rejected claims that California's integrated bar violated the plaintiffs' First Amendment free-speech and free-association rights. 496 U.S. at 1. There, the Supreme Court held that "lawyers admitted to practice in the State [California] may be required to join and pay dues to the State Bar." *Id.* This "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 13–14. Thus, requiring lawyers to join the State Bar and "provide financial support for group speech" is permissible, even though it implicates the First Amendment, because it serves "legitimate governmental purposes for the benefit of all members." *Kingstad*, 622 F.3d at 712–13.

Given the holding in *Keller*, any facial challenge to Wisconsin's integrated bar must fail. Wisconsin Supreme Court Rule 10.03, which establishes the mandatory membership and compulsory dues requirements, closely mirrors the language of *Keller*. *Compare* SCR 10.03(2), (5)(a) ("[e]very person who becomes licensed to practice law in [Wisconsin] shall enroll in the state bar" and shall pay "annual membership dues"); *Keller*, 496 U.S. at 4 ("lawyers admitted to practice in the State may be required to join and pay dues to the State Bar"). Based on this similarity, the Seventh Circuit has repeatedly upheld Wisconsin's integrated bar in the face of

First Amendment free-speech and free-association challenges. *See Kingstad*, 622 F.3d 708; *Thiel v. State Bar of Wis.*, 94 F.3d 399 (7th Cir. 1996); *Crosetto v. State Bar of Wis.*, 12 F.3d 1396 (1993); *Levine v. Heffernan*, 864 F.2d 457, 462–63 (7th Cir. 1988). In light of these precedents, Count I fails to state a facial First Amendment challenge, and must be dismissed.

The Complaint seems to suggest that the Supreme Court's recent decision in *Janus v. AFSCME* controls this decision rather than *Keller*. Compl. ¶¶ 4, 21. In *Janus*, the Supreme Court held that public-sector unions may not "extract agency fees from nonconsenting employees," 138 S. Ct. at 2486, even where the funds derived from agency fees were used only for activities "germane to the union's duties as collective-bargaining representative," *id.* at 2460 (alterations omitted; citations omitted). The *Janus* majority does not even discuss or cite *Keller*, let alone overrule it. *See id.* at 2459–86. Only Justice Kagan, in her dissent, mentioned *Keller*. *Id.* at 2498; 2495, n.3 (Kagan, J., dissenting). The *Janus* majority's silence with respect to *Keller* should not be a surprise, however, as the Supreme Court had expressly distinguished *Keller* from its line of cases involving mandatory union dues in *Harris v. Quinn*, 573 U.S. 616 (2014), a predecessor to *Janus*. In *Harris*, the Court noted the importance of the "State's interest in regulating the legal profession and improving the quality of legal services" and "allocating to the members of the bar . . . the expense of ensuring that attorneys adhere to ethical practices," and held that *Keller* "fits comfortably within the [First Amendment] framework" that was ultimately applied in *Janus* itself. *Id.* at 655–56 (citations omitted); *see Janus*, 138 S. Ct. at 2471–85 (discussing *Harris*). In short, *Keller* still controls on the constitutionality of integrated bars, even after *Janus*, requiring dismissal of any facial challenges to Wisconsin's integrated bar. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (holding that lower courts should follow any Supreme Court "case which

directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions" (citations omitted)).

2. Other courts have held that *Janus* did not overturn *Keller*.

Since *Janus* was decided, a number of other federal courts have had occasion to consider the argument that *Janus* overturned *Keller* and is now controlling law in the context of integrated bars. *See, e.g., Fleck v. Wetch*, 2019 WL 4126356 (8th Cir. 2019); *Crowe v. Oregon State Bar*, 3:18-cv-02139-JR (D. Or. 2019); *Gruber v. Oregon State Bar*, 3:18-cv-01591-JR (D. Or. 2019); *Schell v. Williams*, 5:19-cv-00281-HE (W.D. Okla. 2019). Like Plaintiff here, the plaintiffs in these cases claimed that mandatory membership and dues in an integrated bar violated their First Amendment free speech and free association rights. They also argued that *Janus* overturned *Keller* and that, under *Janus*, integrated bars are unconstitutional. In each of these cases, the court held that *Janus* did not overturn *Keller* and that an integrated bar that complies with *Keller* is facially constitutional. This Court should follow similar logic and hold that *Janus* does not control the constitutionality of Wisconsin's integrated bar.

Crowe and *Gruber*, consolidated cases challenging the constitutionality of Oregon's integrated bar, were brought by members objecting to press releases from the Oregon Bar Association opposing "white nationalism and the normalization of violence." *Crowe v. Oregon State Bar*, 3:18-cv-02139-JR, dkt. #29 at 4 (D. Ore. 2019); *Gruber v. Oregon State Bar*, 3:18-cv-01591-JR, dtk. #44 at 4 (D. Ore. 2019). The magistrate's Findings & Recommendation for the consolidated cases, adopted by the District Court, found that *Janus* had not explicitly overruled *Keller* and that nothing in the *Janus* opinion abrogated *Keller*. *Id.* at 20. "The Supreme Court has determined that exacting scrutiny is wholly consistent with the holding in *Keller* . . . With respect to affirmative consent before using compulsory Bar dues for political speech, the Supreme Court made no such proclamation and therefore this court is prohibited from assuming that Janus

impliedly overruled *Keller*." *Id.* On this reasoning, the court dismissed the facial challenges in both *Crowe* and *Gruber*. *Id.*

The court in *Schell* also found that *Janus* did not overturn *Keller*. *Schell*, 5:19-cv-00281-HE, dkt. # 61 at 9 (D. Okla. 2019). The *Schell* court dismissed a facial challenge to the Oklahoma integrated bar, relying on *Keller*. *Id.* "While there are some parallels between *Janus* and the circumstances here, there are also differences. There is also no suggestion in *Janus* that either *Lathrop* or *Keller* were overruled or otherwise called into question. In such circumstances, the court is obliged to follow the cases which most directly control . . ." *Id.*

In *Fleck*, the Eighth Circuit considered a challenge to North Dakota's integrated bar on remand from the U.S. Supreme Court with instructions to consider North Dakota's integrated bar in light of the *Janus* decision. 2019 WL 4126356, *1.[4] As in Wisconsin, North Dakota requires that "every resident lawyer maintain membership and pay annual dues to the State Bar Association of North Dakota." *Id.* The *Fleck* court not only held that *Janus* did not overrule *Keller*, *id.* at *1–*2, but affirmed that the North Dakota State Bar's *Keller* dues reduction procedures comply with the First Amendment, *id.* at *4. North Dakota's *Keller* dues reduction procedures are nearly identical to Wisconsin's, requiring that "[e]ach member must determine how much he or she owes in annual dues[, including whether the member opts to take the *Keller* dues reduction,] and then write a check to pay that amount. The member's right to pay or refuse to pay dues to subsidize non-chargeable expenses is clearly explained on the fee statement and accompanying instructions, in advance of the member consenting to pay by delivering a check." *Id.* Given the similarities between the Wisconsin integrated bar requirements and those in the

[4] Plaintiff-Appellant Arnold Fleck filed a petition for writ of certiorari to the Supreme Court on November 21, 2019. Petition for Writ of Certiorari, *Fleck v. Wetch* (filed Nov. 21, 2019).

cases cited above, this Court should follow the example of the other courts and continue to look to *Keller* rather than *Janus* as controlling precedent on the constitutionality of the integrated bar.

B. Plaintiff's as-applied First Amendment claim also fails as a matter of law.

To the extent that Count I can be understood as an as-applied challenge to the integrated bar rather than (or in addition to) a facial challenge, it similarly fails as a matter of law and must be dismissed. The Complaint notes three separate State Bar activities that Plaintiff asserts he cannot be compelled to associate with or subsidize without violating the First Amendment. Compl. ¶¶ 17, 19, 20. Specifically, Plaintiff points to direct lobbying operations, Compl. ¶ 17; the State Bar's selection of the founder of TransLaw Help Wisconsin as one of its six "Legal Innovators" for 2018, Compl. ¶ 19; and the State Bar's selection of Richard Painter as a featured speaker at the State Bar's 2018 annual meeting, Compl. ¶ 20, as examples of the State bar "tak[ing] a position on the law and matters of public concern," Compl. ¶ 21. These allegations, however, fail to state a cognizable as-applied First Amendment challenge under *Keller* because: (1) the Complaint never claims that these activities are not germane to the legitimate constitutional purposes of the State Bar; (2) the Complaint never alleges that any of these activities were funded by compulsory dues; and (3) Plaintiff lacks Article III standing to bring an as-applied challenge, as the Complaint does not allege that he took the *Keller* Dues Reduction available to him.

1. The Complaint fails to allege that the cited State Bar activities are not germane to the State Bar's legitimate constitutional purposes.

While the Complaint repeatedly alleges that the challenged activities "contain[ed] some element of ideology and touch[ed] on issues of public concern," Compl. ¶ 21, it never alleges that those activities are not germane to the State Bar's legitimate constitutional purposes. Under *Keller*, the State Bar may use the proceeds from the "mandatory dues of all members" to fund

activities "germane to" "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13–14; *accord Kingstad*, 622 F.2d at 709. Non-germane activities may not be funded by mandatory dues. *See Keller*, 496 U.S. at 14–16; *accord Kingstad*, 622 F.3d at 714–15, 718. Thus, lack of germaneness of a particular activity is an essential element of any as-applied challenge. *See Keller*, 496 U.S. at 14–16; *accord Kingstad*, 622 F.3d at 714–15, 718.

A member of the State Bar challenging the germaneness of an expenditure bears the "burden" of specifically identifying the expenditures alleged to be "improperly classified as germane." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 877–78 (1988) (citations omitted).[5] To proceed with such a claim, a challenger must meet his burden "with the degree of specificity appropriate at each stage of litigation the[ ] case reaches." *Id.* at 878. A "generally phrased complaint" is insufficient at any stage. *Id.* At the motion to dismiss stage, Plaintiff has the burden to allege that specific expenditures were non-germane. *Id.*at 877–78; *see Omnicare*, 135 S. Ct. at 1332 (complaint must allege all essential elements).

Plaintiff has completely failed to carry this burden. There is no allegation anywhere in the Complaint that any of the three State Bar activities he discusses are not germane to the purposes of the State Bar. Rather, he provides only "generally phrased" statements that the activities complained of are ideological or involve the public interest. The question under *Keller,* however, is not whether an activity is "political" or "ideological", but whether it is germane. [CITE kingstad] Thus, plaintiff's allegations are insufficient to meet the *Air Line Pilots* standard, and this Court must dismiss Count I for failure to state a claim.

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[5] While *Air Line Pilots* dealt with a union's expenditure of mandatory dues, applying the procedures approved in *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 306 – 07 (1986), *see* 523 U.S. at 877–78, challenges to the germaneness of expenditures by an integrated bar may be assessed following similar procedures, *see Keller*, 496 U.S. at 16–17.

Further, Plaintiff cannot challenge the germaneness of expenditures for the 2018 Wisconsin Legal Innovators award, Compl. ¶ 19, because they occurred after the most recent available audit. *Keller* requires only that the State Bar provide all members with an optional "advance reduction of dues" *Hudson*, 475 U.S. at 304, based on "the breakdown [of germane and non-germane activities]" from the most recent available yearly audit. *Knox v. Service Employees Intern. Union, Local 1000*, 567 U.S. 298, 318 (2012); *see generally Keller*, 496 U.S. at 17 ("We believe an integrated bar could certainly meet its [First Amendment] obligation by adopting the sort of procedures described in *Hudson*."). The most recent *Keller* Dues Reduction Notice at time of filing was based on the audit for Fiscal Year 2018—which ran from July 1, 2017 to June 30, 2018. *See* Exhibit A (Notice for Fiscal Year 2020). The Wisconsin Legal Innovators award Plaintiff challenges was awarded in November 2018. Compl. ¶ 19. Thus, the State Bar has not yet had the opportunity to audit the Wisconsin Legal Innovators award for germaneness, rendering any as-applied First Amendment challenge based on the award unripe for adjudication.

2. The Complaint fails to allege that the cited State Bar activities were funded with compulsory dues, or that Plaintiff has availed himself of his remedies under the Keller Dues Reduction Procedure.

The Complaint fails to allege that the activities Plaintiff challenges were funded with revenues from mandatory dues, generally, or those paid by the Plaintiff. Under *Keller*, "the First Amendment prohibits the State Bar from funding non-germane activities with compelled dues." *Kingstad*, 622 F.3d at 718; *Keller*, 496 U.S. at 13–14. Therefore, the First Amendment rights of objecting members extend only to challenging the State Bar's use of mandatory dues, not to the State Bar's use of voluntary dues. *See Keller*, 496 U.S. at 14; *accord Kingstad*, 622 F.3d at 718.

Plaintiff makes no allegations one way or the other as to how the activities about which he complaints were funded. As a member's First Amendment rights are implicated only by the

expenditure of mandatory dues, Plaintiff's failure to allege that mandatory dues funded the activities he is challenging means that he has failed to meet his pleading burden under *Air Line Pilots*, as explained above.

Further, the direct lobbying activities described in paragraph 17 of the Complaint are never funded with mandatory dues per State Bar policy. State Bar of Wisconsin, *Maintaining Your Membership* (2019), https://www.wisbar.org/formembers/membershipandbenefits/Pages/Maintaining-Your-Membership.aspx (under "State Bar of Wisconsin Dues Reduction and Arbitration Process (Keller Dues Reduction)" tab). Plaintiff has not alleged that the State Bar has violated this policy, and therefore he cannot base an as-applied challenge on expenditures for direct lobbying activities.

Plaintiff also fails to plead the personal injury-in-fact necessary for Article III standing. Federal Rule of Civil Procedure 12(b)(1) requires the Court to dismiss a complaint if the Court lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). This includes cases where the Plaintiff fails to establish Article III standing. *See Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 691–92 (7th Cir. 2015). Standing under Article III requires that a plaintiff show "an injury in fact—an invasion of a legally protected interest"—that is "fairly traceable to the challenged action of the defendant" and that is "likely" to be redressed by a favorable decision." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992). Because Plaintiff has not alleged that he has ever availed himself of his remedy under taken the *Keller* Dues Reduction Procedure, he has not plausibly alleged the fact necessary to support Article III standing.

The "legally protected interests" Plaintiff seeks to assert here are his First Amendment rights. Compl. ¶ 28. However, under *Keller*, Plaintiff's First Amendment rights are implicated only if the State Bar uses his mandatory dues for non-germane expenditures without

his consent. *See Keller*, 496 U.S. at 13–14; *accord Kingstad*, 622 F.3d at 712–13. Thus, where Plaintiff has consented to the use of his mandatory dues for non-germane expenditures, he cannot assert an injury to his legally protected interests. *Lujan*, 504 U.S. at 560; *Keller*, 496 U.S. at 13–14; *Kingstad*, 622 F.3d at 712–13.

In line with *Keller*, the State Bar has established a procedure for obtaining consent to use dues on non-germane activities. SCR 10.03(5)(b); State Bar Bylaws, art. I § 5; *see Crosetto*, 12 F.3d at 1404–05 (describing and affirming the State Bar's procedure). Under these procedures, by electing not to withhold dues pursuant to the *Keller* Dues Reduction, a member consents to the use of those funds for non-germane activities. *See Fleck*, 2019 WL 4126356, *4 (quoting *Fleck v. Wetch*, 868 F.3d 652, 656–57 (8th Cir. 2017)) ("If [a member] does not choose the Keller deduction, he "opts in" to subsidizing non-germane expenses by the affirmative act of writing a check for the greater amount.") Because Plaintiff does not allege that he took his *Keller* Dues Reduction, he has failed to allege that he did not consent to the use of his mandatory dues for non-germane activities. Therefore, Plaintiff has not sufficiently alleged injury-in-fact to his First Amendment rights.

Because Plaintiff has not alleged that mandatory dues funded the activities he challenges, he fails to meet the pleading standard for any as-applied challenge based on those activities and lacks Article III standing for his claims. For these reasons, his Complaint must be dismissed.

CONCLUSION

For the reasons stated above, the Court should dismiss the Complaint for failure to state a claim and for lack of subject-matter jurisdiction.

Dated: November 22, 2019

Respectfully submitted,

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