UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

As Plaintiffs have now made clear, this case is a facial First Amendment challenge to the Wisconsin Supreme Court's Rule 10.03, which requires lawyers in Wisconsin to join the State Bar and pay mandatory membership dues. Pls.' Resp. to Defs.' Mot. to Dismiss ("Resp. Br." Dkt. 25) 1–2, 24–25; Wisconsin Supreme Court Rule ("SCR") 10.03. In moving to dismiss Plaintiffs' Complaint, the State Bar—the entity tasked by the Wisconsin Supreme Court with implementing the Court's "policy" of "requir[ing] membership in the State Bar of Wisconsin and pay[ing] [ ] dues to it as a condition of practicing law," *State ex rel. Armstrong v. Bd. of Governors of State Bar*, 273 N.W.2d 356, 358 (Wis. 1979)—argued that *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), squarely forecloses Plaintiffs' challenge. Defs.' Br. in Support of Mot. to Dismiss ("Opening Br." Dkt. 16) 7–24.[1]

In their Response Brief, Plaintiffs *agree* with the State Bar that *Keller* requires the Court to dismiss their Complaint for failure to state a claim. While that concession would ordinarily resolve the case without need for further comment, Plaintiffs' Response Brief proceeds to make a number of arguments both as to the merits of their First Amendment claims and as to which Defendants enjoy the sovereign immunity protected by the Eleventh Amendment. Given Plaintiffs' express intent to pursue this case on appeal, the State Bar now responds to those arguments.

[1] As before, Defendants will be referred to collectively as the "State Bar," unless the context indicates otherwise.

ARGUMENT

I. *Keller* and its Progeny Defeat Plaintiffs' Facial First Amendment Claims, as Plaintiffs Concede.

Plaintiffs have conceded that this Court must grant the State Bar's motion to dismiss the First Amendment claims against Wisconsin Supreme Court Rule 10.03 because "this Court is bound to follow *Keller*." Resp. Br. 2, 10.[2] Plaintiffs' concession is well taken. *Keller* held that a State "may," consistent with the First Amendment, "require[ ]" "lawyers admitted to practice in the State" to "join and pay dues to the State Bar." 496 U.S. at 1, 4–5. And Wisconsin Supreme Court Rule 10.03 tracks *Keller* exactly, requiring "[e]very person who becomes licensed to practice law in [Wisconsin]" to "enroll in the state bar by registering" and to pay "annual membership dues." SCR 10.03(2), (5)(a); *compare Keller*, 496 U.S. at 4; *see also* Opening Br. 1, 7–24.[3]

Despite their concession, Plaintiffs then proceed to make a number of additional arguments in their Response Brief. Given Plaintiffs' intent to continue to pursue this case on appeal, the State Bar addresses these arguments in turn.

First, Plaintiffs chide the State Bar for "hardly even attempt[ing] to defend the underlying reasoning of *Keller* as being consistent with broader First Amendment doctrine." Resp. Br. 16. But the State Bar did defend *Keller* on First Amendment grounds. Opening Br. 9–10. Specifically,

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[2] Plaintiffs appear to misunderstand the Court's role at the motion-to-dismiss stage by asking it to "enter findings of fact" in addition to "conclusions of law." Resp. Br. 11. At this stage, the Court may only enter the latter, not the former. *Int'l Mktg., Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724, 730 (7th Cir. 1999) ("fact-finding has no part in resolving a Rule 12(b)(6) motion").

[3] Indeed, Plaintiffs' recognition that the Supreme Court must ultimately modify or overrule *Keller* in order to afford them any relief supports the Court continuing its limited stay of further proceedings in this case, should it decide not to grant the State Bar's motion to dismiss. *Fleck v. Wetch*, the case from the Eighth Circuit raising identical issues as the case here, will almost certainly reach the Supreme Court before this case, given that (a) the Supreme Court previously granted *certiorari* in that case before remanding it to the Eighth Circuit for further consideration, and (b) the Eighth Circuit has already heard post-remand oral argument. *Fleck v. Wetch*, Dkt. Entry 6-13-2019 (8th Cir. No. 16-1564); *see generally Fleck v. Wetch*, 868 F.3d 652, 653 (8th Cir. 2017), *cert. granted, judgment vacated*, 139 S. Ct. 590 (2018) (mem.). Should the Supreme Court wish to modify or overrule *Keller*, it will likely use *Fleck* to do so.

it explained that, in *Harris v. Quinn*—a predecessor to *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), the case Plaintiffs rely on almost exclusively—the Court held that *Keller* "fits comfortably within the [First Amendment] framework" that was ultimately applied in *Janus* itself. *Harris v. Quinn*, 573 U.S. 616, 655 (2014); *see Janus*, 138 S. Ct. at 2471–85 (discussing *Harris*). This language from *Harris* also featured prominently in *Gruber v. Oregon State Bar*, where the District Court of Oregon upheld that State's integrated bar against a post-*Janus* First Amendment challenge similar to that posed here. No. 3:18-cv-1591-JR, 2019 WL 2251826, at *8, *11–*12 (D. Or. Apr. 1, 2019), *report and recommendation adopted*, No. 3:18-cv-1591-JR, 2019 WL 2251282 (D. Or. May 24, 2019).[4] Notably, Plaintiffs cite *Harris* only for a proposition related to the commercial-speech doctrine, wholly failing to confront this crucial passage embracing *Keller*. *See* Resp. Br. 19.

In any event, the State Bar is not required to mount a "broader First Amendment" defense of *Keller* in order to prevail here. Resp. Br. 16. *Keller* conclusively resolves all First Amendment issues in the State Bar's favor—as even Plaintiffs concede—and this Court must, of course, follow this "directly control[ling]" Supreme Court precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). Not even the waiver rule requires more elaboration at this stage, given that "no rule [would] prohibit[ ]" the State Bar's "appellate amplification of [this] properly preserved issue." *Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015); *accord Spiegla v. Hull*, 481 F.3d 961, 964 (7th Cir. 2007) (describing change-in-law exception to waiver rule).

[4] In addition to *Gruber* in the District of Oregon and *Fleck* in the Eighth Circuit, other pending cases challenging integrated bars post-*Janus* include *McDonald v. Longley* in the Western District of Texas, in which a summary-judgment hearing is scheduled for August 1, 2019, No. 1:19-cv-00219, Dkt. 57 (W.D Tex. May 23, 2019), and *Schell v. Williams* in the Western District of Oklahoma, which is awaiting defendants' answer or response to the first amended complaint, No. 5:19-cv-00281-HE, Dkt. 37 (W.D. Okla. June 10, 2019).

Second, while Plaintiffs have clarified that they are not bringing an as-applied challenge to the 45 specific State Bar expenditures listed in their Complaint, they continue to erroneously (and repeatedly) claim that many of these expenditures were funded with mandatory dues. Resp. Br. 5–6. But, as the State Bar meticulously demonstrated with references to its *Keller* Dues Reduction Notices, a great number of these activities were funded with voluntary dues only, and thus do not even potentially raise a First Amendment problem. *See Janus*, 138 S. Ct. at 2486; Opening Br. 13–20.[5] Given that Plaintiffs have not objected to either the accuracy of these Dues Reduction Notices or to the Court's consideration of them at this stage, the Court must reject Plaintiffs' unsupported assertions that—contrary to the Dues Reduction Notices—nearly all of the challenged activities were funded with mandatory dues. Further, the State Bar also argued that the five expenditures Plaintiffs identified that actually were funded with mandatory dues (and that were timely challenged) were nevertheless germane under *Keller* and *Kingstad v. State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010). Opening Br. 20–22. Plaintiffs failed to respond to that argument and so have waived any objection on this front. *See, e.g., Cent. States, Se. & Sw. Areas Pension Fund v. Midwest Motor Exp., Inc.*, 181 F.3d 799, 808 (7th Cir. 1999) (waiver rule); *see also WNS Holdings, LLC v. United Parcel Serv., Inc.*, No. 08-cv-275-bbc, 2009 WL 2136961, at *12 (W.D. Wis. July

[5] Specifically, Plaintiffs incorrectly identify the following activities as funded with mandatory dues: "oppos[ition] [to] the death penalty," "opposition to . . . requir[ing] law enforcement to collect DNA specimen[s] from certain arrestees," "support for releasing certain 'older inmates'" and opposition to "'disparate and mass incarceration,'" "advoca[cy] for restoring felon's voting rights," "publish[ing] an article ostensibly on considerations for employers related to President Trump's executive order concerning national security and immigration," "advocacy on abortion coverage," "advocacy for criminalizing threats or harm to attorneys," "advocacy for elder law reform," "advocacy for family law legislation addressing child relocation," "advocacy for restoring legal services corporation (LSC) funding," "advocacy related to unemployment insurance fraud," "advocacy against amending child custody presumptions," "advocacy against confidentiality exception for school officials," "advocacy to eliminate spiritual exception to child abuse law," and "spe[ech] regarding the practice of law and the regulation of the practice of law." Resp. Br. 5–6 (citing Compl. ¶¶ 37(e)–(i), (k)–(p), 38(a), (a)(xii), (f), (i)); *compare* Opening Br. 13–15 (demonstrating that the previously listed activities were funded with voluntary dues).

14, 2009) (applying this waiver rule where plaintiff failed to develop argument "in its response brief").

Two additional misunderstandings of Plaintiffs with respect to the State Bar's funding of activities deserve particular correction. Plaintiffs claim that the State Bar's *Keller* Dues Reduction policies still allow the State Bar to use mandatory fees on "enterprise-wide" expenses that, in turn, "facilitate[ ] its lobbying." Resp. Br. 8. In fact, as explained in the State Bar's Opening Brief, when the State Bar determines that an activity may not be funded with mandatory dues, it includes "all appropriate indirect expense[s]" of that activity precisely to avoid the problem Plaintiffs identity. SCR 10.03(5)(b)2; *see* Opening Br. 4, 18. Plaintiffs also claim that the State Bar "maintains a dedicated lobbying effort" that is "also supported with compulsory membership dues." Resp. Br. 6. But, as the State Bar repeatedly stated in its Opening Brief, it prohibits the use of mandatory dues on "*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." Opening Br. 4, 15 n.8, 18 n.11, 20, 22 n.13 (quoting State Bar of Wisconsin, *Maintaining Your Membership* (2019)).[6]

These two policies show the gravity with which the State Bar takes its obligation to protect the First Amendment rights of its members. Its practice of funding all lobbying efforts with voluntary dues is more protective of First Amendment interests than *Keller* requires. The inclusion of the indirect expenses of a nonchargeable activity in the *Keller* Dues Reduction calculation ensures that objecting members do not lend even indirect support. And, taking it a step further, the State Bar rounds the value of the *Keller* Dues Reduction up from a "strict calculation," thus

[6] Available at 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).

"giv[ing] those who take the reduction the benefit of any error that may have been made in the calculation." *E.g.*, Ex. A, p. 1 (Notice from Fiscal Year 2020).

Third, Plaintiffs argue that the State Bar has "essentially gut[ted]" *Keller*'s effect on its budget by periodically relying on its Dues Stabilization Reserve Fund to fund germane activities. *See* Resp. Br. 8. That fund, which the State Bar created in 2007, is designed "to avoid or mitigate" large year-to-year increases in member dues. State Bar of Wisconsin, *Reserve Policy* 3 (June 8, 2011).[7] Plaintiffs' argument, however, misunderstands *Keller*'s role in the State Bar's budgeting process.

Keller prohibits the State Bar only from using mandatory dues to fund non-germane activities. 496 U.S. at 14; *accord Kingstad*, 622 F.3d at 718. Nothing in that decision prevents the State Bar from holding a portion of mandatory dues in reserve in order to fund future germane activities in the event of a budget shortfall. Such a practice does not "essentially gut" *Keller*, even when a shortfall is due to a larger-than-expected *Keller* Dues Reduction, since those reserve mandatory dues must still be used on germane activities. *See Keller*, 496 U.S. at 14; *accord Kingstad*, 622 F.3d at 718. In other words, in none of the years before, during, or after a budget shortfall would the State Bar have used the mandatory dues of objecting members on non-germane activities.

With this proper understanding of *Keller*, Plaintiffs' reference to "one-time events" in Fiscal Year 2018 that caused a larger-than-expected *Keller* Dues Reduction is irrelevant. Resp. Br. 8. The State Bar classified these one-time events as nonchargeable, which means that it did

[7] Available at https://www.wisbar.org/formembers/groups/leadership/FinanceCommittee/Pages/FileCabinet.aspx?CurrentPath=Policies%2f&download=42048a1c-6794-4a37-840c-9408b6bd3650 (State Bar credentials required).

not use mandatory dues to fund them. *See* Ex. A, pp. 2–3 (expenses for Non-Resident Lawyers Division Meeting, Young Lawyers Division Meeting, and WISLAP Award); *see also* Paul Marshall, *FY20 Proposed Budget—DRAFT* 4 (Jan. 30, 2019).[8] To the extent these activities caused a budget shortfall, the State Bar adheres to *Keller*'s requirements by ensuring that no mandatory dues (whether from current Fiscal Year collections or from the Dues Stabilization Reserve Fund) fund non-germane activities.[9] This is all *Keller* requires. *See Keller*, 496 U.S. at 14; *accord Kingstad*, 622 F.3d at 718.

Fourth, Plaintiffs claim that the State Bar's *Keller* Dues Reduction procedure is an "opt-out" procedure—that is, they claim that the default dues payment for State Bar members includes the dues for nonchargeable activities, requiring those wishing to take the *Keller* Dues Reduction to affirmatively choose to claim it. Resp. Br. 7–8. Plaintiffs raise this argument presumably because true opt-out procedures raise additional First Amendment concerns in the union context. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 312–14 (2012).

However, Plaintiffs' characterization of the State Bar's procedure as an "opt-out" procedure is inaccurate. In *Knox*, the Supreme Court confronted a true opt-out regime. There, a union "extracted" all dues from employee "paychecks," and that extraction by default included dues for chargeable and nonchargeable expenses. *See Knox v. Cal. State Emps. Ass'n, Local 1000*,

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[8] Available at https://www.wisbar.org/formembers/groups/leadership/FinanceCommittee/Pages/FileCabinet.aspx?CurrentPath=Financial+Reports%2fFiscal+Year+2020%2f&download=20940cb0-1a55-4011-8258-2ba6196f274f (State Bar credentials required).

[9] The reference to the State Bar's Chief Financial Officer's comment that Fiscal Year 2019's *Keller* Dues Reduction should be "worked into" the Fiscal Year 2019 budget is likewise unalarming. *See* Resp. Br. 8 (quoting Paul Marshall, *FY19 Proposed Budget—FINAL DRAFT* 1 (Apr. 20, 2018), https://www.wisbar.org/formembers/groups/leadership/FinanceCommittee/Pages/FileCabinet.aspx?CurrentPath=Financial+Reports%2fFiscal+Year+2019%2f&download=2771f7ea-3b0d-4b13-afc3-b7ce244ded31 (State Bar credentials required)). This comment is wholly consistent with *Keller*, since it simply refers to the State Bar streamlining its budget as much as possible in an effort to reduce any budget deficit. Marshall, *FY19 Proposed Budget*, *supra*, at 1–5 (discussing changes to budget).

Serv. Emps. Int'l Union, AFL-CIO-CLC, 628 F.3d 1115, 1128 (9th Cir. 2010), *rev'd and remanded*, 567 U.S. 298 (2012); *see Knox*, 567 U.S. at 304. Therefore, employees wishing to "object[ ]" to the payment of dues for nonchargeable expenses had to specifically communicate that "objection" to the union; without that communication, the union would automatically collect the full dues from those employees' paychecks. *See Knox*, 567 U.S. at 304.

The State Bar's dues-collection procedures are not like the union's procedures in *Knox*. To begin, the State Bar cannot automatically collect any amount of dues from its members; rather, all members—whether claiming the *Keller* Dues Reduction or not—must send the correct dues payment along to the State Bar themselves. Further, the State Bar does not impose a "default" dues payment like the union in *Knox*. As can be seen on the State Bar's Dues Statements, the State Bar offers members a variety of dues amounts to pay, which means members must make an affirmative selection in all instances. *See* Second Decl. of Paul Marshall dated June 19, 2019 ("Marshall Second Decl.") ¶ 2 & Exs. 1a & 1b (Fiscal Year 2018 Dues Statements for Plaintiffs Dean and Jarchow). The amount of dues begins with a baseline amount, found in Box 7 of the Dues Statement. Marshall Second Decl. Ex. 1a p. 1, Ex. 1b p. 1. From that baseline, members may add optional payments to a Section of the State Bar (Box 8) or to the Wisconsin Law Foundation (Box 9), or they may subtract voluntary dues by claiming the *Keller* Dues Reduction (Box 11). Marshall Second Decl. Ex. 1a p. 1, Ex. 1b p. 1 (Boxes 8–11 listed under "Optional Fees" header). No matter the amount the member chooses, the member must calculate the correct amount (Box 12) and then, as noted, send that payment to the State Bar. Marshall Second Decl. Ex. 1a p. 1, Ex. 1b p. 1.

Finally, Plaintiffs claim that the "Wisconsin Bar does not engage in any speech that even arguably confers a direct financial or material benefit on Wisconsin attorneys." Resp. Br. 12. Yet,

the State Bar's speech—coming from diverse sources like in-person seminars, print and online publications, and social media like Twitter—"elevat[es] the educational . . . standards of the Bar." *Keller*, 496 U.S. at 8 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 842–43 (1961) (plurality op.)); *accord Thiel v. State Bar of Wis.*, 94 F.3d 399, 405 (7th Cir. 1996), *overruled on other grounds by Kingstad*, 622 F.3d at 717. This allows State Bar members to, for example, remain apprised of cutting-edge legal developments and learn new areas of the law—to the benefit of themselves, their clients, and the Wisconsin legal community at large. *See generally* Opening Br. 21–23 (discussing the educational benefits of multiple State Bar activities identified by Plaintiffs).

The State Bar benefits its members in ways beyond its speech as well. For example, it provides legal research services, law-practice management resources, client-training resources, fee-arbitration programs, and many other programs and services to its members. *See* Wisconsin Supreme Commissioner Julie Ann Rich, *Memorandum on Rule Petition 11-04, Petition for Voluntary Bar* 26–28 (October 25, 2011).[10] Indeed, the State Bar's robust offerings to its members and the entire Wisconsin legal community explain why the Wisconsin Supreme Court has recognized the State Bar as "a powerful force to further[ing] the improvement of the legal system, its laws, its courts and its practitioners." *Matter of State Bar of Wis.: Membership-SCR 10.01(1) & 10.03(4)*, 485 N.W.2d 225, 226 (Wis. 1992) (per curiam); *accord* SCR 10.02(2) (providing the Wisconsin Supreme Court's purpose for the creation of the State Bar).

II. Plaintiffs Have Failed to Show that the Board of Governors and Officer Defendants Kastner, Ohiku, and Swanson are Proper Defendants Under the Eleventh Amendment

Plaintiffs' arguments that the Board of Governors and Officer Defendants Kastner, Ohiku, and Swanson are all proper defendants, notwithstanding the Eleventh Amendment, are also

[10] Available at https://www.wicourts.gov/supreme/docs/1104commissionermemo.pdf.

unpersuasive. *See* Resp. Br. 25–26; *see generally Doe v. Holcomb*, 883 F.3d 971, 976 (7th Cir. 2018) (plaintiffs bear the burden of overcoming the Eleventh Amendment).[11]

Beginning with the Board of Governors, it is indistinguishable from the State Bar itself, which is immune under the Eleventh Amendment—as *Thiel* held and Plaintiffs' concede. Opening Br. 25–26; Resp. Br. 25. According to *Thiel*, the State Bar itself enjoys sovereign immunity because "the Bar's role is completely defined by" the Wisconsin Supreme Court. 94 F.3d at 402–03 (citations omitted). Among other things, "Wisconsin Supreme Court rules establish the manner in which the Bar conducts its daily business, establishes the Bar's governing bodies and offices, and defines their respective powers, functions, and duties." *Id.* (citing SCR 10.04–.08). The Board of Governors is identical: as with the State Bar, Wisconsin Supreme Court Rules "establish" the Board of Governors and how it is to "conduct[ ] its daily business," *id.* at 402; *e.g.*, SCR 10.05(1)–(4) ("the board of governors shall meet at least 4 times each year"); the Rules establish the Board's "governing bodies and offices," *Thiel*, 94 F.3d at 402; *e.g.*, SCR 10.05(1) ("6 officers" and "not fewer than 34 members"); and they establish the Board's "powers, functions, and duties," *Thiel*, 94 F.3d at 402; *e.g.*, SCR 10.05(4) ("establish and maintain standing committees"). In short, "the Wisconsin Supreme Court exercises a great deal of control" over the Board of Governors, no less than the State Bar itself, and so too has Eleventh Amendment immunity. *Thiel*, 94 F.3d at 402.

Plaintiffs' argument that the "Board exercises authority over 'the affairs and activities of the association'" and so is not immune simply supports the State Bar's position. Resp. Br. 25

[11] While Plaintiffs' concession that their Complaint should be dismissed would ordinarily moot questions of whether a defendant is a proper party, the State Bar respectfully requests that this Court nevertheless address these issues since Plaintiffs intend to pursue this matter in the appellate courts. *See* Resp. Br. 2. Accordingly, the Board of Governors and Officer Defendants Kastner, Ohiku, and Swanson will still be unnecessarily subjected to burdensome litigation unless this Court orders their dismissal at this stage.

(quoting SCR 10.05(4)). That the Board possesses such authority is a *hallmark* of its immunity—not a strike against it—since that authority comes directly from the Wisconsin Supreme Court. *See Thiel*, 94 F.3d at 402 (holding State Bar immune because "Wisconsin Supreme Court rules establish . . . [its] respective powers, functions, and duties").[12]

Plaintiffs' only other argument on this score is that the Seventh Circuit held in *Lee v. Bd. of Regents of State Colls.* that state boards do not enjoy sovereign immunity. Resp. Br. 25; 441 F.2d 1257, 1260 (7th Cir. 1971). This argument likewise fails. *Lee* omits any discussion of the specifics of the state board at issue there, and, as *Thiel* makes plain, those specifics heavily influence the question of Eleventh Amendment immunity. *See* 94 F.3d at 401–03. Given that *Thiel* meticulously examined the nature of the State Bar and that the Board of Governors possesses the same nature, *Thiel* controls the question here, not *Lee*.

In any event, the conclusion in *Lee* is dicta. The board there was a co-defendant with individual state officials who plainly did not enjoy sovereign immunity, *Lee v. Bd. of Regents of State Colls.*, 306 F. Supp. 1097, 1098 (W.D. Wis. 1969) (listing defendants in *Lee*), thus the Court's Eleventh Amendment analysis was not necessary to the ultimate result, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67, (1996); *see generally Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 390–91 (1998) (sovereign immunity as to one part of a case does not destroy the court's jurisdiction over the others). Further, *Lee*'s sovereign-immunity analysis comprises one short paragraph on the tails of a more-extensive merits holding. *See* 441 F.2d at 1259–60. It is no surprise, therefore, that subsequent sovereign-immunity decisions like *Thiel* and *Carmody v. Bd.*

[12] In arguing that the Board of Governors is not immune, Plaintiffs appear to conflate the Board's sovereign immunity with the immunity of its members. Resp. Br. 25 ("The Board exercises authority . . . and therefore *its members* clearly fit within the doctrine of *Ex Parte Young*." (Emphasis added)). But the immunity of the Board and the immunity of the Board's members are distinct inquires. Regardless, both the Board and the relevant members discussed below are immune.

of Trs. of Univ. of Ill., 893 F.3d 397 (7th Cir. 2018)—the contrary authority that Plaintiffs have candidly cited—reached their holdings with no discussion of, or citation to, *Lee*. So, while Plaintiffs are generally correct that earlier Seventh Circuit holdings control over later conflicting holdings not explicitly overruled, *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002), there is no such conflict here.

Moving to Officer Defendants Kastner, Ohiku, and Swanson, they fall outside of the *Ex Parte Young* exception to sovereign immunity and so too are immune under the Eleventh Amendment. Opening Br. 26–27. For the *Ex Parte Young* exception to apply, the state official must be "sufficiently connected" by "virtue of his office" "with the duty of enforcement" of the statute at issue. *Ex Parte Young*, 209 U.S. 123, 161 (1908). That is, the official must "play[ ] some role in enforcing the [state] statute" challenged. *Doe*, 883 F.3d at 976. The role cannot be a "general duty," but rather must be a "specifically charged [ ] duty to enforce the [state] statute." *Id.* (holding Governor immune because, though he had "a general duty to enforce state laws" he "was not specifically charged with a duty to enforce the [state] statute" at issue); *accord Shell Oil Co. v. Noel*, 608 F.2d 208, 211–12 (1st Cir. 1979) ("sufficiently intimate connection"); *Air Evac EMS, Inc. v. Texas, Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 519 (5th Cir. 2017) ("requisite connection"); *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 828 (10th Cir. 2007) ("particular duty"); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341–42 (11th Cir. 1999) ("some responsibility to enforce the statute [ ] at issue"). Allowing Plaintiffs to name an officer unconnected to the enforcement of the statute is no different than "mak[ing] the state a party"—flatly impermissible under the Eleventh Amendment—since such an officer would be named only as "a representative of the state." *Ex Parte Young*, 209 U.S. at 157.

Plaintiffs have failed to show that Officer Defendants Kastner, Ohiku, and Swanson have a "specifically charged [ ] duty" to enforce SCR 10.03's requirement that Wisconsin attorneys join the State Bar and pay appropriate membership dues. *Doe*, 883 F.3d at 976. While Plaintiffs do state that these officials have "specific statutorily delegated duties," a review of those specific duties shows a lack of authority to enforce *any* Wisconsin Supreme Court Rule.[13] Plaintiffs' further statements that these officers are "required to 'perform such other duties as the board of governors may prescribe,'" must "sit[ ] on the executive committee," and must be "officers of the State Bar" likewise get them nowhere. Resp. Br. 26–27 (quoting SCR 10.06). Those are "general dut[ies]" that do not themselves encompass enforcement of any Wisconsin Supreme Court Rule, and Plaintiffs have not shown that either the Wisconsin Supreme Court or the State Bar delegated any enforcement authority to any of these officers. *Doe*, 883 F.3d at 976 (plaintiffs bear the burden).

Plaintiffs' final argument based on *Thiel* does not salvage their position. Resp. Br. 26. While *Thiel* did allow claims against individual officers of the State Bar to proceed under *Ex Parte Young*, including claims against "members of the Bar's Board of Governors," nowhere did the Court address the arguments that the State Bar has presented here. *See* 94 F.3d at 400, 403. Further, the Court's silence on these matters alone cannot support Plaintiffs' position, given that a court need not raise the issue of sovereign immunity *sua sponte*. *Schacht*, 524 U.S. at 389. Finally, the Executive Director of the State Bar was also a defendant in *Thiel*. 94 F.3d at 399; *Thiel v. State*

[13] As the State Bar stated in its Opening Brief, the specific statutorily delegated duties of the President-Elect (Kastner) and the Immediate Past-President (Swanson) are to "be a member-at-large of the board of governors and the executive committee" and to "perform all other duties assigned to [him or her] by the president or board of governors." SCR 10.04(2)(b). The specific duties of the Chairperson of the Board of Governors (Ohiku) are to "be a member-at-large of the board of governors," to "be a member of the executive committee ex officio," and to "preside at all meetings of the board of governors." SCR 10.04(2)(c). *See* Opening Br. 26–27.

Bar of Wis., No. 95-C-0103-S, Memorandum and Order on Summary Judgment at 2 (W.D. Wis. Sep. 5, 1995). He clearly satisfied the *Ex Parte Young* exception, given that his duties include collecting "the association's funds" and maintaining "membership lists and individual member files." SCR 10.11(2)–(3); *compare Doe*, 883 F.3d at 976. Therefore, the Court's conclusion as to the members of the State Bar's Board of Governors is dicta, since it is ultimately not "necessary" to its "result," *Seminole*, 517 U.S. at 67, and the claims against the members of the Board of Governors should be dismissed.

CONCLUSION

For these reasons, the reasons given in the State Bar's Opening Brief, and in light of Plaintiffs' concessions, the Court should dismiss the Complaint for failure to state a claim.

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Respectfully submitted,

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