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 PETITION TO REVIEW STATE BAR BYLAWS

Pursuant to SCR 10.13(2) and Article IX, State Bar Bylaws, the undersigned 25+ active members of the State Bar of Wisconsin petition the Supreme Court to review and reject Article II, Section 7(b) and Article III, Section 10(b) of the State Bar Bylaws, which were adopted by the Board of Governors June 12, 2013 and published at pages 54-55 of the *Wisconsin Lawyer* in July, 2013 (received by mail July 27, 2013, copy attached.). The bylaws respectively read as follows:

7(b) Removal by Board of Governors. An officer shall be removed if the officer is unable or unwilling to fulfill his or her duties, or if the officer's conduct while in office is contrary to the best interest of the State Bar as determined by an affirmative vote of 75 percent of the total membership of the Board of Governors (including the officer subject to the motion to remove). Before any vote on the motion, notice of the motion to remove and of the grounds alleged against the officer, and an opportunity to be heard by the Board must be given to the officer.

10(b) Removal by Board of Governors. A governor shall be removed if the governor is unable or unwilling to fulfill his or her duties, or if the governor engages in conduct which is contrary to the best interest of the State Bar as determined by an affirmative vote of 75 percent of the total membership of the Board (including the officer subject to the motion to remove). Before any vote on the motion to remove the governor, notice of the motion and of the grounds alleged against the governor, and an opportunity to be heard by the Board must be given to the governor.

(If the Court rejects these provisions, the words "or by removal of an officer pursuant to section 7" and "or by removal of a governor pursuant to section 10" should also be removed from State Bar Bylaws Article II, Section 5 and Article III, Section 9, respectively.) A brief in opposition to the bylaws follows this petition. Petitioners respectfully request a hearing.

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Submitted by:

*/s/ Steven Levine*

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BRIEF IN OPPOSITION TO STATE BAR BYLAWS, ARTICLE II, SECTION 7(b)  
AND ARTICLE III, SECTION 10(b)

FACTS

On June 12, 2013, the State Bar Board of Governors adopted State Bar Bylaws Article II, Section 7(b) and Article III, Section 10(b) (hereafter referred to as “the challenged bylaws”) which read as follow:

7(b) Removal by Board of Governors. An officer shall be removed if the officer is unable or unwilling to fulfill his or her duties, or if the officer’s conduct while in office is contrary to the best interest of the State Bar as determined by an affirmative vote of 75 percent of the total membership of the Board of Governors (including the officer subject to the motion to remove). Before any vote on the motion, notice of the motion to remove and of the grounds alleged against the officer, and an opportunity to be heard by the Board must be given to the officer.

10(b) Removal by Board of Governors. A governor shall be removed if the governor is unable or unwilling to fulfill his or her duties, or if the governor engages in conduct which is contrary to the best interest of the State Bar as determined by an affirmative vote of 75 percent of the total membership of the Board (including the officer subject to the motion to remove). Before any vote on the motion to remove the governor, notice of the motion and of the grounds alleged against the governor, and an opportunity to be heard by the Board must be given to the governor.

An amendment offered by Governor Steven Levine proposed to amend these bylaws with the following language:

“Conduct . . . which is contrary to the best interest of the State Bar’ does not include speech, association, activity, or advocacy which is protected by the First Amendment to the United States Constitution or the Free Speech Clause of the Wisconsin Constitution.”

This proposed amendment was overwhelmingly defeated, and the challenged bylaws were adopted as proposed.

#### ARGUMENT

THE CHALLENGED BYLAWS ARE INCONSISTENT WITH SCR 10.05(3) AND 10.04(1).

The challenged bylaws are inconsistent with SCR 10.05(3) and SCR 10.04(1) and are therefore void.

SCR 10.05(3) provides:

**(3)** Term; qualifications; nomination and election. The term of office of each elected member of the board of governors is 2 years, commencing on July 1 next following his or her election. No person is eligible to vote in a district for governor or to serve on the board of governors from a district unless he or she is an active member of the association and maintains in the district his or her principal office for the practice of law. No person is eligible for election to the board of governors for more than 2 consecutive terms. The eligibility of any person to serve as a member of the board of governors from any state bar district ceases upon removal of the person's principal office for the practice of law from the district. Nominations and elections of members of the board of governors shall be conducted in accordance with the provisions of the bylaws.

SCR 10.04(1) provides:

**SCR 10.04 Officers.** (1) Titles; Nomination and Election. The officers of the state bar include a president, a president- elect, an immediate past-president, a chairperson of the board of governors, a secretary and a treasurer, who shall be nominated and elected in the manner provided by the bylaws. Only active members of the state bar residing and practicing law in Wisconsin are eligible to serve as president or president-elect of the association. The term of office of the president, president- elect, immediate past-president and chairperson of the board of governors is one year. The term of the secretary and the treasurer is 2 years, with the secretary elected in even- numbered years and the treasurer elected in odd- numbered years. The term of each officer runs until the qualification of a successor.

SCR 10.05(4)(a)8 authorizes the Board of Governors to “adopt bylaws and regulations, not inconsistent with this chapter, for the orderly administration of the

association's affairs and activities.”

State Bar Bylaw Article III, Section 10(b) is inconsistent with SCR 10.05(3), which sets the term for a governor at 2 years. SCR 10.05(3) does not set a governor's term at “not more than 2 years,” or “a maximum of 2 years,” or “2 years, unless shortened by the Board of Governors,” or “2 years unless lengthened by the Board of Governors.” The length of a governor's term is set for the definite period of 2 years. According to this Supreme Court rule, the only way that a governor's 2-year term can be cut short is if the governor moves his or her office from the district he or she represents. No other qualification on the 2-year term is mentioned or allowed. Nor does SCR 10.05(3) authorize the Board of Governors to either reduce or lengthen that very specific 2-year term. State Bar Bylaw Article III, Section 10(b) in effect amends SCR 10.05(3) as follows: “The term of office of each elected member of the board of governors is 2 years, commencing on July 1 next following his or her election, unless the governor is earlier removed by the board of governors.”

State Bar Bylaw Article III, Section 10(b) is not merely “administrative” in nature, as authorized by SCR 10.05(4)(a)8. It doesn't merely govern the conduct of elections or some other administrative matter, such as whether the election shall be conducted via paper ballot or electronically. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-36 (1995). It makes a significant substantive qualification to the term of a Governor by limiting a Governor's term, as underlined above.

The Board of Governors has no authority to reduce the term of a governor by means of adopting a bylaw. Nor does the Board of Governors have the authority to

extend the term of a governor, such as by adopting a bylaw authorizing the board to lengthen the 2-year term of a governor who has performed “outstandingly,” as determined by a 75 percent vote of the Board of Governors. Such substantive changes must be accomplished by amendment of SCR 10.05(3), or they are inconsistent with that rule. If the Board of Governors is to be given the authority to remove a governor who has been elected by the membership prior to the end of the governor’s 2 year term, that authority must be contained in Supreme Court rules. Otherwise, that authority, contained in State Bar Bylaw, Article III, Section 10(b), is inconsistent with SCR 10.05(3).

The Board of Governors should have followed correct procedure and petitioned this Court to amend Supreme Court rules to provide the Bar with authorization prior to adopting the challenged bylaws. Instead, the State Bar adopted the challenged bylaws without any authority to do so contained in SCR Ch. 10, then filed a petition with the Court (Docket 13-07) to give the State Bar the authority to adopt the challenged bylaws. Exactly backward! The fact that the Bar filed the petition in Docket 13-07 indicates that it was aware it had no authority to adopt the challenged bylaws on June 12, 2013. Thus, the challenged bylaws were void when adopted. The Court cannot retroactively grant the State Bar the authority to adopt the challenged bylaws – authority which did not exist on June 12, 2013.

SCR 10.05(3) sets the term of a member of the Board of Governors at 2 years. Under that rule, a governor who continues to have an office in the district which he or she represents has an absolute right to continue to represent the constituents who elected him or her by serving on the board for that entire 2-year period. State

Bar Bylaw Article III, Section 10(b) conflicts with SCR 10.05(3) by allowing the Board of Governors to remove a member prior to the 2-year period set forth in that Supreme Court rule. Thus, State Bar Bylaw Article III, Section 10(b) is directly inconsistent with the language of SCR 10.05(3), and it can and should be voided on that ground alone.

Without repeating the arguments stated directly above, the same reasoning applies to State Bar Bylaw Article II, Section 7(b), which is inconsistent with SCR 10.04(1). SCR 10.04(1) sets the terms for such State Bar officers as President and Board Chair at 1 year, Secretary and Treasurer at 2 years. SCR 10.04(1) contains no restrictions on those definite terms and no authorization for the Board of Governors to either reduce or lengthen those terms. Thus, State Bar Bylaw Article II, Section 7(b) is inconsistent with SCR 10.04(1) and should also be voided by the Court.

If the Court chooses to void the challenged bylaws because they are inconsistent with SCR 10.05(3) and SCR 10.04(1), the remaining arguments need not be considered.

## II. THE BYLAWS ARE UNACCEPTABLY VAGUE.

The challenged State Bar Bylaws allow the Board of Governors to remove an Officer or Governor for engaging in conduct which is “contrary to the best interest of the State Bar.” This language of the challenged bylaws is breathtakingly vague – so vague as to be meaningless. It includes no standards whatsoever and no examples of the kind of conduct it is aimed at. It violates the basic tenet that the purpose of a law is to forewarn a person of the type of prohibited conduct. By containing no standards or examples of prohibited conduct, the bylaws essentially authorize 75

percent of the Board of Governors to remove a member for any reason they choose – or for no reason at all. This vagueness provides no guidance to a Governor as to what conduct to avoid, and it should be rejected for that reason. It is the height of granting complete and arbitrary power to the Board of Governors to remove a Governor, as the challenged bylaws contain no appeal process. The vagueness of the bylaws also unacceptably chills a governor's or officer's exercise of his or her First Amendment rights.

### III. THE BYLAWS THREATEN GOVERNORS' FIRST AMENDMENT RIGHTS.

The challenged bylaws would allow the Board of Governors (a governmental or quasi-governmental entity) to remove an officer or Governor for the exercise of his or her rights of free speech, association, or advocacy under the First Amendment to the United States Constitution or Free Speech Clause of the Wisconsin Constitution. As noted above, the Board of Governors rejected the following proposed amendment to the challenged bylaws:

"Conduct . . . which is contrary to the best interest of the State Bar' does not include speech, association, activity, or advocacy which is protected by the First Amendment to the United States Constitution or the Free Speech Clause of the Wisconsin Constitution."

Thus, a governor or officer may be removed under the challenged bylaws for conduct protected by the First Amendment: advocating a voluntary bar; opposing a State Bar position before this Court; supporting legislation opposed by the State Bar; being a member of a group – political or otherwise – which is distasteful to the Board of Governors, pointing out wasteful or inappropriate State Bar spending to the membership, etc.

This Court should not allow the Board of Governors to remove a governor or

officer for the exercise of his or her First Amendment rights, which the challenged bylaws allow. The bylaws should be voided because they threaten the First Amendment rights of State Bar officers and Governors.

#### IV. THE CHALLENGED BYLAWS ARE UNDEMOCRATIC.

The challenged bylaws also conflict with SCR 10.05(3) and SCR 10.04(1), because they are undemocratic. They transfer the authority to determine the membership of the Board of Governors and State Bar officers from the lawyers of Wisconsin to the Board itself. SCR 10.05(3) and SCR 10.04(1) set forth the basic framework that members of the Board of Governors and officers are elected for specific terms – either 1 or 2 years --by the membership of each district. The challenged bylaws are undemocratic in allowing the Board of Governors to remove a governor or officer that the membership has elected for a specific term, if the board feels for any reason that a governor or officer has acted contrary to the best interest of the State Bar. The phrase “best interest of the State Bar” is so vague as to be meaningless – and the removal is not appealable.

If someone believes that a governor or officer has acted inappropriately or contrary to the best interest of the State Bar, the remedy is through the democratic process. A bar member can run against that governor or officer, and the membership can determine the matter through the democratic process. The membership should determine the matter by voting – not the Board of Governors. The Court should reject the challenged State Bar bylaws as vague, violating the First Amendment, contrary to Supreme Court rules (10.05(3) and 10.04(1)), and undemocratic.

## V. THE CHALLENGED BYLAWS ARE UNNECESSARY.

The challenged bylaws adopted by the State Bar are both unnecessary and dangerous. First, in docket 13-07, the Bar argues that it needs the ability to remove governors or officers whose licenses have been revoked or suspended or who are guilty of “misconduct,” which is undefined. No examples of either “misconduct” or conduct “contrary to the best interest of the State Bar” (the language of the bylaws adopted by the Board of Governors on June 12, 2013) are provided to the Court. These undefined categories offered by the State Bar are merely stalking horses and post hoc rationalizations, as – to my knowledge -- no State Bar officer or governor has had his or her law license revoked or suspended in the entire history of the Bar. Nor have officers or governors committed such acts as stealing State Bar money or physically assaulting officers or governors during heated arguments at board meetings. These are some theoretical examples posited in pre-June 12 meeting discussions to justify the challenged bylaws.

A final justification for the challenged bylaws was stated by a governor at the June 12 meeting: A member of the Nazi party might be elected to the Board of Governors, and the Board should not have to tolerate such a person as one of its members, First Amendment notwithstanding. In short, the challenged bylaws adopted by the State Bar at its June 12 meeting and the removal authority requested of this Court after-the-fact in docket 13-07 are a solution in search of problems which have never happened and which are highly unlikely to happen. The harms purportedly sought to be prevented have never occurred and may be merely a pretext to allow the State Bar to squash divergence of thought and action.

For 50 years the State Bar has existed quite well without the authority to remove officers or governors contained in the challenged bylaws, which create much more serious problems than the nonexistent problems they are purported to solve. The Court should void these dangerous bylaws.

Respectfully submitted,

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