

STATE OF WISCONSIN  
IN SUPREME COURT

PETITION TO AMEND SCR 10.01(1) AND SCR 10.02 (1), AND TO REPEAL SCR 10.03(1),  
(2), (3), (4)(a), (5), AND (6) — TO CREATE A VOLUNTARY STATE BAR OF WISCONSIN  
AND MEMORANDUM IN SUPPORT OF PETITION

Petitioners Steven Glick, Daniel A. Graff, Daniel Hannula, Jon E. Kingstad, Robert  
Larsen, Steven Levine, Paul E. Nilsen, Jack Rakowski, Joseph Redding, John Riestler, Ryan D.  
Scherz, John Sobotik, James Thiel, and Daniel Waite hereby petition this Court to amend SCR  
10.01(1) and SCR 10.02(1), and to repeal SCR 10.03(1), (2), (3), (4)(a), (5), and (6) as follow:

Amend SCR 10.01(1) and SCR 10.02(1) as follow:

**SCR 10.01 State bar of Wisconsin.**

(1) There shall be an association to be known as the “state bar of Wisconsin” composed of persons licensed to practice law in this state who choose to join, ~~and membership in the association shall be a condition precedent to the right to practice law in Wisconsin.~~

**SCR 10.02 Organization of the state bar of Wisconsin.**

(1) Creation of Association. All persons licensed to practice law in this state who choose to join are organized as an association to be known as the “state bar of Wisconsin,” subject to the provisions of this chapter. The rules of this chapter, which are adopted in the exercise of the court's inherent authority over members of the legal profession as officers of the court, may be referred to as “state bar rules.” The state bar may, for the purpose of carrying out the purposes for which it is organized, sue and be sued, enter into contracts, acquire, hold, encumber and dispose of real and personal property.

Repeal SCR 10.03(1), (2), (3), (4)(a), (5), and (6).

Petitioners are all members of the State Bar of Wisconsin — former presidents, governors, nonresident, and resident members — in private and public practice. This petition is prompted by the United States Supreme Court decision in *Janus v. AFSCME*, 585 U.S. —, 138 S.Ct. 2448 (2018). In *Janus* the United States Supreme Court held that a statute requiring

mandatory payment of agency-shop union fees to a public employee labor union is unconstitutional, a violation of First Amendment freedoms of association and speech. Because the First Amendment principles relating to mandatory payments to public employee unions also apply to mandatory payments to integrated state bar associations — as determined in *Keller v. State Bar of California*, 496 U.S. 1, 16-17 (1990) — the legal principles set forth in *Janus* apply to this Court’s rules requiring mandatory dues payments to the State Bar of Wisconsin. Those principles are:

1. Exacting Scrutiny. In determining whether the requirement of membership in the State Bar of Wisconsin is constitutional, the First Amendment standard of “exacting scrutiny” is applicable, at a minimum.<sup>1</sup> Under that standard, if an alternative “significantly less restrictive of associational rights” — such as a voluntary state bar — would accomplish the same “compelling state interests” as the requirement of mandatory membership and the payment of dues, the mandatory state bar membership requirement is unconstitutional. *See Janus, supra*, 138 S.Ct. at 2464-2465. Under the exacting scrutiny test, government may restrict First Amendment freedoms only “if the regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.” *McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434, 1444 (2014). The burden to prove that a voluntary state bar could not accomplish the same objectives as a state bar in which membership is mandatory would be on the State. *United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878, 1888 (2000).

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<sup>1</sup> In *Janus* the United States Supreme Court stated that the even-higher standard of review of “strict scrutiny” might be applicable, but a decision on which standard of review was proper was unnecessary, because the mandatory membership requirement was unconstitutional even under the lower “exacting scrutiny” standard of review.

2. Arbitration procedure. A procedure in which alleged unconstitutional expenditures (by an association to which mandatory fees must be paid) is subject to arbitration is unconstitutional, because it places too great a burden on the First Amendment rights of the person disputing the constitutionality of the expenditures. SCR 10.03(5)(b)1-5 is such a procedure and is therefore unconstitutional. *Janus, supra*, 138 S.Ct. at 2482.

3. Less Intrusive Alternative. As stated above in paragraph 1, the burden is on the State to prove that a voluntary State Bar of Wisconsin could not accomplish the same purposes as the current State Bar, in which membership is mandatory. Those purposes are set forth in SCR 10.02(2):

(2) Purposes. The purposes of the association 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 the 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.<sup>2</sup>

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<sup>2</sup> Prior to its more recent decision in *Janus*, the United States Supreme Court had held that mandatory bar association membership is justified by the activity categories of “regulating the legal profession and improving the quality of legal services.” *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990).

However, mandatory dues paid by attorneys to the State Bar of Wisconsin are not used to support either regulatory activities or continuing legal education programs designed to improve the quality of legal services offered by Wisconsin lawyers. The CLE programs offered by the State Bar are self-funded and not supported by member dues. See *Matter of State Bar of Wisconsin: SCR 10.01(1)* . . . , 169 Wis. 2d 21, 35-36, 485 N.W.2d 225, 231-232 (1992)(Abrahamson, J., dissenting).

As will be discussed below, voluntary state bar associations around the country — including those in our neighboring states of Illinois, Iowa, and Minnesota — have the same purposes and perform the same functions for the public and their members — as does the mandatory State Bar of Wisconsin.

## DISCUSSION

### I. THE WISHES OF WISCONSIN LAWYERS SHOULD BE CONSIDERED AND RESPECTED.

For many years the majority of lawyers of Wisconsin have indicated their disagreement with being forced to join and pay dues to support a state bar association that does not necessarily express or represent their individual views. Through litigation, referendums, petitions, and elections, the majority of Wisconsin lawyers have sought to vindicate their First Amendment freedoms of association and speech. In *Janus v. AFSCME*, 585 U.S. —, 138 S.Ct. 2448 (2018), the United States Supreme Court has set forth principles of law which indicate that the political position taken by the majority of Wisconsin lawyers is legally correct. The time has come for this Court to make membership in the State Bar of Wisconsin voluntary and to restore the freedoms of association and speech of all Wisconsin lawyers.

The history of litigation, referendums, petitions, and elections has indicated that a clear majority of Wisconsin lawyers want a voluntary State Bar of Wisconsin. In addition to litigation (See, e.g., *Lathrop*, *Levine*, *Crosetto*, *Thiel*, and *Kingstad* cases),<sup>3</sup> the majority of Wisconsin lawyers have voted for a voluntary bar whenever they had the chance. In a 1979 referendum,

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<sup>3</sup> *Lathrop v. Donohue*, 367 U.S. 820 (1961), *Levine v. Heffernan*, 864 F.2d 457 (7th Cir.1988), *Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993), *Thiel v. State Bar of Wisconsin*, 94 F.3d 399 (7th. Cir. 1996), *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010).

59+ percent of Wisconsin lawyers favored a voluntary bar.<sup>4</sup> In a 2008 survey conducted by the State Bar itself, 57+ percent of respondents favored a voluntary bar.<sup>5</sup> Over a period of almost thirty years, the percentage of lawyers favoring a voluntary bar has remained remarkably consistent.

Additionally, in State Bar elections for the position of president-elect in 2005, 2007, 2008, and 2010, candidates who ran on platforms including a voluntary bar were all elected.<sup>6</sup> Whenever they were given the choice, Wisconsin lawyers elected presidents who favored a voluntary bar. The time has come for this Court to honor the consistent, considered opinion of the majority of Wisconsin lawyers and make membership in the State Bar of Wisconsin voluntary.

## II. SCR 10.03(5)(b)1-5 IS UNCONSTITUTIONALLY BURDENSOME.

Wisconsin Supreme Court rule 10.03(5)(b)1-5 is an arbitration procedure which allows State Bar members to challenge Bar expenditures which they believe to be unconstitutional. The procedure was adopted in response to the requirement set forth in *Keller v. State Bar of California*, 496 U.S. 1, 16 (1990). That *Keller* arbitration requirement was in turn based on the arbitration requirement arising from *Abood v. Detroit Board of Education*, 431 U.S. 209 (1976) and *Chicago Teachers Union v. Hudson*, 475 U.S. 296 (1986). Like *Janus*, *Abood* and *Hudson*

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<sup>4</sup> See *Matter of Discontinuation of the Wisconsin State Bar*, 93 Wis. 2d 385, 286 N.W.2d 601 (1980).

<sup>5</sup> Copies of this 2008 survey have been provided to the Court in a previous rule-making proceeding.

<sup>6</sup> The successful candidates who favored a voluntary State Bar were Steven Levine (Dane County), Douglas Kammer (Columbia County), James Boll (Dane County), and Kevin Klein (Price County).

were cases involving mandatory payments to public employee unions. Therefore, the principles set forth in *Janus* with respect to a public employee union arbitration procedure also apply to a mandatory state bar association arbitration procedure, such as SCR 10.03(5)(b)1-5.

SCR 10.03(5)(b)1-5 is unconstitutional, because the United States Supreme Court has held that such a procedure places too great a burden on First Amendment freedoms of association and speech. *Janus, supra*, 138 S.Ct. at 2482. The arbitration procedure of SCR 10.03(5)(b)1-5 places a monumental burden on Wisconsin lawyers. The cost of hiring a law firm to represent an individual State Bar member greatly exceeds the amount at issue, and law firms may be reluctant to take a case contrary to the interests of the State Bar or this Court. The arbitration rule contains no provision for either attorneys fees or class-action status.<sup>7</sup> And an individual State Bar member who invokes the arbitration procedure risks the imposition of court costs if there is an appeal of an arbitration award. Individual attorneys who venture into the procedure without counsel experience a great burden in time, money, and stress. The United States Supreme Court's conclusion concerning the arbitration procedure involved in *Janus* also applies to SCR 10.03(5)(b)1-5: the State Bar arbitration rule is unconstitutionally burdensome — making the requirement of mandatory membership in the State Bar of Wisconsin unconstitutional.

### III. A LESS RESTRICTIVE ALTERNATIVE EXISTS - A VOLUNTARY STATE BAR.

In *Janus* the United States Supreme Court held that the “exacting scrutiny” standard of review is applicable to a mandatory membership requirement such as SCR 10.01(1). Under that standard, a mandatory membership requirement is unconstitutional if an alternative less

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<sup>7</sup> The unfairness of this procedure has been recognized by a member of this Court. *See Matter of State Bar of Wisconsin: SCR 10.01(1)* . . . , 169 Wis. 2d 21, 38, 485 N.W.2d 225, 232 (1992).

restrictive of First Amendment freedoms would accomplish the same objectives. In *Janus* the Court pointed out that public employee unions which did not charge agency fees were able to accomplish the same compelling interests as unions which did charge such a fee. *Id.*, at 2465-2466. The same is true for state bar associations, where voluntary bar associations present a less restrictive alternative to mandatory membership, yet achieve the same objectives.

In rule-making docket 17-04 — petition filed April 25, 2017 — Petitioner Steven Levine asked this Court to amend Supreme Court rules concerning the State Bar of Wisconsin to limit the State Bar to spending mandatory dues on certain enumerated regulatory or quasi-regulatory activities. The State Bar opposed the petition, arguing that if the petition were granted, the Bar would be unable to provide many essential services to the Court, the public, and the legal profession.

At pages 15-17 of its brief in that proceeding, the State Bar argued that a number of its important but non-regulatory activities and services would suffer or be eliminated if they are required to be supported by voluntary dues only. The Bar argued that without mandatory dues to support its activities, it might become a purely self-interested, economic-centered, professional association of lawyers. The Bar will be either unable or unwilling to provide to the profession, the public, and the courts the services it now provides — according to its argument in docket 17-04.

According to the State Bar, the valuable activities and services which are at risk include Fastcase, fee-dispute arbitration, Lawyer Referral and Information Service, lawyer hotline, consumer pamphlets and forms, law office management services, pro bono, the Bar's Lawyer to Lawyer Directory, the Wisconsin Law Foundation, and even the State Bar's website. (For a

complete list of threatened activities, see Bar brief at pages 15-17, docket 17-04.) The loss of these activities and services would be unfortunate, but objective evidence indicates that if Bar membership is made voluntary, that will not happen. The facts indicate that voluntary bars offer the same services which the State Bar of Wisconsin has argued would be threatened if the Bar is required to pay for them only with voluntary dues.

A look at the websites of the voluntary state bar associations of our three neighboring states indicate that they are able to offer the same services offered by the State Bar of Wisconsin. The Minnesota State Bar Association site indicates that it offers: Fastcase, CLE (including CLE on demand), annual bar conventions, sections and committees, diversity, bar foundation, access to justice, law practice tools, court opinions, lawyer directory, programs for new lawyers, pro bono, mock trial, publications, technology, find a lawyer, access to civil legal services, complaints against lawyers, and many more services and activities.

The websites of the Iowa and Illinois bar associations are similar, and we urge the Court to visit them, so the Court can reach its own conclusion. The activities and services offered by these and other voluntary bar associations indicate that if membership in the State Bar of Wisconsin is made voluntary, the Bar should do quite well in continuing to provide valuable programs and services to Wisconsin lawyers, the public, and the Court.

Twenty states currently have voluntary bar associations – with all of them successfully operating for decades:

- Arkansas Bar Association
- Colorado Bar Association
- Connecticut Bar Association
- Delaware State Bar Association
- Illinois State Bar Association
- Indiana State Bar Association
- Iowa State Bar Association



- Kansas Bar Association
- Maine State Bar Association
- Maryland State Bar Association
- Massachusetts Bar Association
- Minnesota State Bar Association
- New Jersey State Bar Association
- New York State Bar Association
- North Carolina Bar Association
- Ohio State Bar Association
- Pennsylvania Bar Association
- Tennessee Bar Association
- Vermont Bar Association
- Virginia Bar Association

As discussed above, three of Wisconsin's bordering states – Iowa, Minnesota, and Illinois - have voluntary bar associations. The Iowa State Bar Association's website states that it was formed in 1874. The website boasts that 90% of Iowa lawyers have voluntarily chosen to join that Bar – perhaps the highest percentage in the country. The Illinois State Bar Association was formed in 1877, while the Minnesota State Bar Association was formed in 1883. (Establishment dates listed on their websites.) These voluntary state bar associations have each attracted enough members to serve the profession, the public, and the courts for more than 135 years. If it becomes voluntary, the State Bar of Wisconsin should be able to do the same.

In her dissent in *Matter of State Bar of Wisconsin: SCR 10.01(1)* . . . , 169 Wis.2d 21, 38, 485 N.W.2d 225, 232 (1992) Justice Shirley Abrahamson wrote:

Numerous lawyers and scholars across the country have compared the virtues of unified and voluntary bars. Although many claims are made for a unified bar, no one has demonstrated that a unified bar has a better record for service to its members or the public than a voluntary bar. Neither the Bar's petition nor the court's per curiam opinion gives any reason for concluding that the Bar's operation has been hindered by its voluntary status for the past four years or that the Bar's operation would be significantly improved by a mandatory membership requirement.

The State Bar of Wisconsin has operated well during the four fiscal years since the court made membership voluntary in May 1988. Over 80 percent of lawyers licensed to practice in Wisconsin voluntarily joined the Bar during this period; out-of-state practitioners constitute the largest block of lawyers who did not join. When out-of-state lawyers are omitted from the statistics, the percentage

of Wisconsin practitioners who voluntarily joined the Bar rises to 90 percent. This large percentage of Wisconsin attorneys who have voluntarily joined the Bar is a forceful argument for leaving the voluntary status undisturbed.

Justice Abrahamson recognized that voluntary bar associations in general and a voluntary State Bar of Wisconsin are just as able as mandatory bars to serve the public, the profession, and the courts.<sup>8</sup> Because this is so, the “exacting scrutiny” test prohibits a mandatory bar membership requirement. A voluntary State Bar of Wisconsin would serve the interests of the public, the profession, and the courts while respecting Wisconsin lawyers’ First Amendment freedoms of association and speech. Membership in the State Bar should be made voluntary by this Court.

#### IV. CONCLUSION

The United States Supreme Court’s decision in the *Janus* case has indicated that this Court’s requirements of mandatory State Bar membership and mandatory payment of State Bar

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<sup>8</sup> The largest state bar association in the country is The New York State Bar Association — a voluntary bar association formed in 1876. As stated in Article II of its bylaws, its purposes are virtually identical to those of the State Bar of Wisconsin:

#### II. PURPOSES

The purposes of the Association are to cultivate the science of jurisprudence; to promote reform in the law; to facilitate the administration of justice; to elevate the standard of integrity, honor, professional skill and courtesy in the legal profession; to cherish and foster a spirit of collegiality among the members of the Association; to apply its knowledge and experience in the field of the law to promote the public good; to promote and correlate the same and similar objectives in and among the Bar organizations in the State of New York in the interest of the legal profession and of the public and to uphold and defend the Constitution of the United States and the Constitution of the State of New York.

dues are no longer constitutional.<sup>9</sup> The arbitration procedure of SCR 10.03(5)(b)1-5 is unconstitutionally burdensome, and the alternative of a voluntary State Bar of Wisconsin offers a “less restrictive alternative” under the “exacting scrutiny” test — an alternative which will accomplish the same public interest purposes as a mandatory bar association *and* respect the First Amendment freedoms of association and speech of all Wisconsin lawyers.

This is a rule-making proceeding, not litigation. By making State Bar membership voluntary in a rule-making proceeding, this Court retains control over the direction and timing of the process; and the time, expense, and other burdens of litigation are avoided. The Court might make Bar membership voluntary as of July 1, 2021, in order to smooth the transition and allow the State Bar to plan for the change in an orderly way.<sup>10</sup> The Court is respectfully requested to hold a public hearing on this petition before year’s end — perhaps in early autumn — and to grant the rule changes requested in this petition.

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<sup>9</sup> In *Janus*, 138 S. Ct. at 2466-67, the Supreme Court stated: “Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. “[P]rivate speech often furthers the interests of nonspeakers,” but “that does not alone empower the state to compel the speech to be paid for.” *Lehnert v. Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (Scalia, J., concurring in judgment in part and dissenting in part). In simple terms, the First Amendment does not permit the government to compel a person to pay for another party’s speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.” If you substitute the word “lawyers” for “doctors” in this quotation, you have Wisconsin’s mandatory State Bar membership requirement — unconstitutional.

<sup>10</sup> The rule amendments proposed in this petition are a simple and direct method of complying with the requirements of the *Janus* decision while at the same time retaining the current structure of the State Bar and the relationship between the Court and the Bar. This petition presents a method for a relatively seamless transition from mandatory to voluntary State Bar.

Respectfully submitted,

/s/ Steven Levine



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