IN THE SUPREME COURT OF WISCONSIN
Rules Petition 17-04

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)

IN SUPPORT OF PETITION
FROM WISCONSIN INSTITUTE FOR LAW & LIBERTY

I am President and General Counsel of the Wisconsin Institute for Law & Liberty, a public interest law and policy center based in Milwaukee. WILL is dedicated to individual liberty and, in particular, the freedom of speech and association. These comments are submitted in support of the petition or any modified version of the petition that frees Wisconsin lawyers from involuntary support of the bar association. I further request the opportunity to testify at the hearing on the petition.

Two overarching points should be made at the outset. First, this rule petition is not about whether the bar association is a worthwhile organization or does "good" things. The association undoubtedly does some good things for its members and the public and can be a worthwhile vehicle for service for many of its members. But that an organization "ought" to exist or is worthy of voluntary support does not mean that others should be compelled to join it. Many organizations – the Red Cross, the NAACP, and

even the Wisconsin Institute for Law & Liberty – do good things. But these worthwhile activities ought to be the basis to persuade others to provide support and not a justification that others be forced to do so.

Second, this petition protects core constitutional values of free speech and association. A mandatory bar compels lawyers to associate with an organization that they may not wish to associate with and support messages with which they may disagree or not wish to communicate. Although mandatory dues assessment has not been held to be unconstitutional, the fact that something is permitted tells us nothing about whether it's a good idea and, regardless of whether a state can have a mandatory bar, constitutional values remain at stake.

The circumstances under which the state can compel association and the support of speech are the subject of substantial controversy. In the context of public unions, the United States Supreme Court, while recognizing grave constitutional concerns, has thus far permitted agency fee arrangements, subject to the ability of employees to decline membership and to support only those union activities relating to collective bargaining, contract administration, and grievance procedures, and not "ideological or political uses." *Abood v. Detroit Board of Education*, 431 U.S. 209, 97

S.Ct. 1782, 52 L.Ed.2d 261 (1977). But *Abood* has recently been called into question, with a majority of the Court noting that its analysis was "questionable" and that its deficiencies have "become more evident and troubling over the years." *Harris v. Quinn*, 134 S.Ct. 2618 189 L.Ed.2d 620 (2014); *see Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (Mem), 194 L.Ed.2d 255 (2016) (Court equally divided in case seeking reconsideration of *Abood*).

The balance between speech and associational rights and the ability of the government to compel association and group speech is in the process of re-examination.[1] However these constitutional issues sort themselves out in the public employee context (and whatever implications that might have for a mandatory bar), the concerns that make compelled association and speech troubling from a constitutional and policy perspective are even more salient here. Putting aside the need to fund admission to the bar and lawyer regulation (something the petition would not change), there is no "free rider" problem justifying compelled membership and financial support. Unlike a union, the state bar does not negotiate compensation for lawyers, defend them in disputes with their employers or clients, or provide any

[1] And, of course, this Court is free to recognize that the Wisconsin Constitution provides greater protection for speech and associational rights than the First Amendment.

other direct benefit to all lawyers for which they ought to pay. Unlike a union that may be legally compelled to represent non-members, a bar association does not have to make its services available to lawyers who choose not to support it. It can operate like any number of other professional organizations.

Supporters of a mandatory bar might argue that all lawyers benefit from "improving the quality of legal services" and therefore have an obligation to financially support efforts to do so. But that diffuse and minimal interest is vastly outweighed by lawyers' individual interests in not being forced to associate with an organization they do not wish to join, or support activities and ideas with which they do not agree. Even accepting that lawyers might have some greater interest in or responsibility for the operation of the legal system which somehow extends beyond the obligations imposed upon them by the rules of professional responsibility, this does not impose an obligation on them to band together as one (like it or not) and promote a common view of what would best serve the legal system (agree or not).

The argument that lawyers' associational and speech interests can be overridden because we need a bar association with an undeveloped mandate

to "do something good" about the legal system proves too much. It amounts to no limitation at all on the coercion imposed upon lawyers to support what they do not wish to support. There are myriad – often conflicting – ways that might be claimed to improve the quality of legal services about which reasonable lawyers may differ. This is why the "exception" for "ideological" or "political" activities required by *Keller v. State Bar of California*, 496 U.S. 1 (1990) or the requirement of "germaneness" emphasized by the divided panel in *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708 (2010), are inadequate as a matter of policy if not constitutional law.

Just about anything can be characterized as "germane" to a goal as broad as improving the quality of legal services, as the *Kingstad* majority's treatment of a public relations campaign to improve the image – and business – of lawyers illustrates. The arbitral award in the Grievance of Levine, et al. further illustrates this. Does it improve or diminish the quality of legal services or operation of the justice system to lengthen the terms of members of this Court to sixteen years and limit justices to one term? Is substitution of judges a device to inspire confidence in the judicial system or a vehicle for forum shopping? Given the reality of limited resources, is

the state best served by allocating more resources to courts and lawyers, or might they be better deployed for another purpose? These are all points on which there is no one "lawyers'" point of view or any single perspective which all agree improves the quality of the justice system.

Recasting these differences of opinion as non-ideological does absolutely no analytic work at all. Whether or not the differences among lawyers on these matters can be traced to their disposition toward political candidates or parties or to some larger ideological or political philosophy does not diminish the fact that there are differences of opinion and a system of mandatory dues forces dissenters to associate with and support views and activities with which they disagree.

The question for supporters of a mandatory bar – one they cannot answer – is why it is imperative that lawyers be compelled to band together and have a single or, for that matter, any position on these matters. To be sure, a mandatory bar will have an easier time raising money than a voluntary one. It is always easier to demand than it is to ask, and to compel rather than persuade. But the freedom of lawyers to associate with whom they like and to support only that speech they wish to support is not

measured by the desire of those lawyers who wish to engage in bar activities to spend money. There is no doubt that active members of the bar association believe that what they do is worthwhile – and they will often be right – but that does not mean that others must be made to go along.

It is also possible that a voluntary bar will be more responsive to its members and less to some rarefied idea of the public interest. But the latter is nothing more than the view of those lawyers who wish to devote their time and effort to bar association activities. They should be free to advance their view of the public interest and to persuade others to join them. But there is no reason to suppose that they are entitled to the support of every lawyer in the state.

The American Bar Association is a voluntary organization. It has approximately 400,000 members and an operating budget of almost ninety million dollars. It employs between 800 and 900 people. The State Bar Association will not wither away if it can no longer compel lawyers to join it. It will have to convince them that its activities are worthwhile. It ought not be afraid to accept that challenge.

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Respectfully Submitted,
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