SUPREME COURT OF WISCONSIN

In the Matter of the Amendment
of Supreme Court Rule 13.045

Rule Petition No. 24-05

COMMENT TO PETITION BY STATE BAR MEMBER

I, Lisa M. Lawless, a member of the State Bar of Wisconsin, file the following comment in response to Rule Petition 24-05, Attorney Assessments for Public Interest Legal Services (the "PILSF Petition"). I file this as an interested member of the State Bar, to provide the Court an analysis and conclusions concerning the constitutionality of the PILSF Assessment that has been charged to Wisconsin lawyers since 2006.

In this comment, I am speaking solely for myself as an individual Bar member, to provide this analysis and argument I have prepared. I file this in opposition to the PILSF Petition and to the PILSF Assessment as a whole, because, as shown below, the PILSF Assessment is unconstitutional because it is a tax upon lawyers. Under the separation of powers and considering the powers of the Supreme Court under the Wisconsin Constitution, the Supreme Court does not have the power to impose taxes. The PILSF Assessment is not a cost of practicing law, which the Supreme Court can properly impose on lawyers to pass on to lawyers the cost of practicing law. Rather, it is a fee imposed upon lawyers to provide

funds to legal services organizations to provide them funding to provide civil legal services to the indigent.

If it would assist the Court, I would be happy to appear at the hearing of the PILS Petition to briefly discuss these issues and answer any questions the Court may have arising from the following analysis and conclusions.

BACKGROUND

To provide personal background, I have been a member of the State Bar of Wisconsin since 1993. I am also a licensed member of the State Bars of Georgia and California. The Georgia and California Bars have lines on their annual bar dues statement providing for donations for civil legal services. Those are optional donations, giving attorneys the choice whether to donate and to determine the amount. For example, the Georgia Bar has a line for optional donation for the Georgia Legal Service Program, listing the donation as "Optional" and suggesting a donation of $100. *See* https://www.gabar.org/docs/default-source/membership/join/licensefeenoticeprorationschedule.pdf?sfvrsn=696438dc_4 As another example, the California Bar includes a line on the annual fee statement for "Access to Justice," for the Justice Gap Fund. It is listed as an "Optional Donation," with a recommended donation of $100.

Additionally, I am currently a member of the Board of Governors of the State Bar of Wisconsin representing District 2 (Milwaukee), serving since July 2022. In addition to the past two years, I also have served on the Board of Governors (BOG) in 2004-2008, 2011-2015, and 2017-2021. I was on BOG when the original petition was filed requesting the

WisTAF fee assessment on lawyers to fund civil legal services for the indigent. After the Court adopted the assessment in 2005, BOG discussed member concerns regarding the assessment and what action, if any, BOG would take concerning it.

Of course, the funding of legal services for the indigent in Wisconsin is a pressing public need and extremely important. The organizations that provide these civil legal services do incredibly important work which serves persons throughout our state. However, at the time of the original WisTAF assessment (2005-2006) and continuing to today, I had and have significant concerns about the constitutionality of a mandatory fee on lawyers to fund this public purpose. In 2006, I personally researched that issue and prepared a draft brief, which I circulated to BOG for discussion purposes. (It was not filed with the Court back then.). Much of that work product is contained in this comment.

The following analysis and conclusions are provided to assist the Court in deciding the PILS Petition. Under the oath we took to become Wisconsin attorneys, we swore to "support the constitution of the United States and the constitution of the State of Wisconsin." SCR 40.15. Thus, it is our duty as Wisconsin lawyers to support the federal and state constitutions and to speak up in the face of unconstitutional rules and initiatives.

For the reasons shown below, the Court should vacate the original PILSF Assessment and instead adopt a voluntary donation rule. Wisconsin attorneys should have the choice whether to make a donation to the PILSF, allowing them to

make it according to their own conscience and personal charitable priorities and considering their own financial circumstances.

Part I, below, discusses the constitutionality of the PILSF Assessment and provides analysis and authorities supporting the conclusion that it is unconstitutional. Part II addresses the specific issue of fees versus taxes and addresses certain case law that has been recently shared by supporters of the Petition for BOG's consideration of the discussion of what, if any, action to take on the PILSF Petition.

LEGAL ANALYSIS OF CONSTITUTIONALITY OF THE PILS ASSESSMENT

The PILSF Assessment is currently $50 annually and lawyers must pay it as a condition of practicing law, along with their State Bar dues and other assessments such as the assessments for the Officer of Lawyer Regulation ("OLR"), the Wisconsin Lawyers' Fund for Client Protection ("Client Protection Fund"), and the Board of Bar Examiners ("BBE"). The PILS Petition seeks to increase this assessment to $75 per year beginning July 1, 2025, and to $100 per year beginning July 1, 2027.

I. The PILSF Assessment Violates the Separation of Powers Because it is a Tax Imposed by the Judiciary and not a Cost of Regulating Attorneys.

"The doctrine of separation of powers is implicitly found in the tripartite division of government between the judicial, legislative and executive branches. Each branch has exclusive core constitutional powers, in which the other branches may not intrude." *Flynn v. Dept. of Admin.*, 216

Wis. 2d 521, 545, ¶ 38, 576 N.W.2d 245 (Wis. 1998). There are also areas of shared power between the branches of government.

To determine whether the PILSF Assessment unconstitutionally infringes the legislative power, the Court must first determine whether the subject matter of the statute falls within powers constitutionally granted to the judiciary. *See Flynn*, 216 Wis. 2d at 546, ¶ 39 (citing *State ex rel. Friedrich v. Dane Cnty Cir. Ct.*, 192 Wis. 2d 1, 14, 531 N.W.2d 32 (Wis. 1995)). The Court also must determine whether the subject matter of the assessment falls within the legislature's constitutional powers. If the subject matter of the rule is within the legislature's constitutional powers but neither the judiciary's nor executive's powers, it is within the legislature's "core zone of exclusive power and any exercise of authority by another branch of government is unconstitutional." *Flynn*, 216 Wis. 2d at 546, ¶ 39.

A. The Judiciary has the Inherent Power to Supervise and Administer the Court System and to Regulate the Admission and Discipline of Lawyers.

"The Wisconsin Constitution grants three separate and distinct branches of jurisdiction to this Court: (1) appellate jurisdiction; (2) general superintending control over inferior courts; and (3) original jurisdiction at certain proceedings at law and in equity." *Arneson v. Jezwinski*, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (Wis. 1996). Specifically, Article VII, Section 3 of the Wisconsin Constitution provides: "The supreme court shall have superintending and administrative authority over all courts." This authority establishes "a duty

of the supreme court to exercise . . . administrative authority to promote the efficient and effective operation of the state's court system." *In re Jerrell*, 2005 WI 105, ¶ 41, 283 Wis. 2d 145, 699 N.W.2d 110 (internal quotations & citation omitted). Although this supervisory authority is "unquestionably broad and flexible," such authority "***will not be invoked lightly***." *Id.* (emphasis added); *see also Arneson*, 206 Wis. 2d at 226 ("However, we do not use such power lightly.").

The Court only exercises its superintending authority hesitantly, and only when it is "absolutely essential" to the administration of justice. *See In re Hon. Charles E. Kading* 70 Wis. 2d 508, 518, 235 N.W.2d 409 (1975). "This court will not exercise its superintending power where there is another adequate remedy . . . ." *Arneson*, 206 Wis. 2d at 226.

The Wisconsin Constitution "expressly confers upon this court superintending and administrative authority over the lower state courts." *State v. Jennings*, 2002 WI 44, ¶ 13, 252 Wis. 2d 228, 647 N.W.2 d142. This establishes a duty to exercise " 'administrative authority to promote the efficient and effective operation of the state's court system.' " *Id.* ¶ 14 (quoting *In re Grady*, 118 Wis. 2d 762, 783, 348 N.W.2d 559 (1984)). Superintending powers contemplate ongoing, continuing supervision of the lower courts in response to changing needs and circumstances. *Flynn*, 216 Wis. 2d at 548, ¶ 44.

1. **The Court May Not Impose Fees On Lawyers For Costs Unrelated to the Regulation of Lawyers.**

"[T]he authorities are well-nigh unanimous that the power to admit attorneys to the practice of law is a judicial function." *State v. Cannon*, 206 Wis. 374, 240 N.W.2 441, 451 (1932). "The court has exercised its inherent authority to regulate members of the bench and bar." *Flynn*, 216 Wis. 2d at 549, ¶ 47. The Court's inherent power under its superintending authority includes regulation of attorneys, regulation of the courts, and regulation of judges. *Jerrell*, 2005 WI 105, ¶¶ 87, 88 (Abrahamson, C.J., concurring) ("Using inherent, implied, or superintending power, or a combination thereof, the court has…exercised its power over courts, judges, and attorneys to protect the state, the public, the litigants, and the due administration of justice."; examples include establishment of the integrated bar and compelled payment of fees, and promulgation of the code of judicial ethics).

As held by this Court and courts throughout the United States, the regulation of lawyers includes admission requirements, discipline, and the requirement that attorneys contribute to a client protection fund, to compensate victims of attorney misfeasance or malfeasance. The inherent authority of the judiciary to regulate the practice of law includes the authority to impose fees necessary to carry out the court's responsibilities in this area. *In re Attorney Discipline System*, 79 Cal. Rptr. 2d 836, 842 (Cal. 1998).

The only fees this Court may charge attorneys, however, are those necessary for the regulation of attorneys, including for admission,[1] discipline, and continuing education requirements. *See In re Attorney Discipline System*, 79 Cal. Rptr. 2d 836, 843 (Cal. 1998) ("Bar membership fees used to fund attorney discipline are not taxes or appropriations, however. '[F]ees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes.'") (internal quotations omitted) (quoting *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 876 (1997)).[2]

Members of the State Bar may be charged fees that are necessary for the regulation of the legal profession and the improvement of the quality of legal services. *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990). In considering what fees

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[1] *Petition of Rhode Island Bar Ass'n*, 374 A.2d 802, 803 (R.I. 1977) (bar membership fees are a licensing fee not a tax, exacted for regulation only, without which the integrated bar would be impossible; "We concur with the view that the requirement that anyone admitted to practice law in the state be a member of the unified bar and pay dues thereto constitutes proper regulation of those engaged in the practice of law.").

[2] *See also Cantor v. Supreme Court of Pa.*, 353 F. Supp. 1307 (E.D. Pa. 1973) (denying constitutional challenge to court rule assessing attorneys to defray administrative and enforcement costs for attorney discipline program); *State ex rel. Ralston v. Turner* , 4 N.W.2d 302, 309 (Neb. 1942) (The inherent power of the judiciary "has been invoked in the admission, suspension, discipline and disbarment of attorneys and in these no legislative permission is considered requisite . . . ."); *In re Attorney Discipline System*, 79 Cal. Rptr. 2d 836, 841, 849 (Cal. 1998) (California Supreme Court has an "inherent responsibility and authority over the core functions of admission and discipline of attorneys"; collecting cases from throughout the United States holding similarly).

may be permissibly charged members of a mandatory bar under the First Amendment, the U.S. Supreme Court has explained: "the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.' " *Id.*

Client protection funds, for example, are routinely held to be a cost of attorney regulation. The regulation of the bar includes the power to require lawyers to bear a share of the costs for a client protection fund, to compensate clients who have been damaged by conduct of their attorneys.[3] The legal profession depends upon its reputation for honesty and integrity. Individual members of the bar must bear the cost of maintaining that reputation and contribute to the cost of client protection funds. Client protection funds are much like malpractice insurance, under which the costs of paying claims are distributed among all insureds in the form of premiums.

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[3] *In re Proposed Public Protection Fund Rule*, 707 A.2d 125, 126 (N.H. 1998) (Power of the court to supervise and discipline attorneys includes the power to require attorneys to contribute to a client protection fund to reimburse clients for losses caused by the dishonest conduct of New Hampshire lawyers, much like the rules on lawyer trust accounts, trust account certifications, and continuing legal education requirements.); *Beard v. N.C. State Bar*, 357 S.E.2d 694, 696 (N.C. 1987) (Annual assessment for client protection fund was held constitutional because it was a cost of regulation, "promulgated under the inherent power of the court to establish, control, and sustain the standards of the bar."); *Hagopian v. Justices of Supreme Judicial Court*, 429 F. Supp. 367 (D. Mass. 1977) (dismissing constitutional challenge to client protection fund rules); *In re Member of Bar of Supreme Court of Delaware*, 257 A.2d 382, 385 (Del. 1969) (Imposition of a client protection fund "is a valid exercise of our inherent power to maintain the standards required of the Bar, and to uphold its reputation by the imposition of collective responsibility for the conduct of its members.").

The funds are a cost of the attorney regulatory scheme, just like the costs of the disciplinary and enforcement program.

In granting the PILSF Assessment, the Court compared it to an assessment for client protection funds or for lawyer discipline. *In re Petition of WisTAF for a Rule Assessing Member of the State Bar of Wisconsin for an Annual Sum to Support Organizations that Provide Civil Legal Services to the Indigent of this State* ("PILSF Order"), 2005 WI 35, at 6 (3/24/2005).

In fact, the PILSF Assessment is distinguishable from those other fees in several very important ways. First, the PILSF Assessment does not represent the approximation of a cost that lawyers have created. It is not an estimation of cost at all, but rather an arbitrary figure that that the Court has determined that lawyers should reasonably donate for civil legal services for the poor. Second, the PILSF Assessment is not a fee for the cost of regulating lawyers -- it is not part of a shared cost of the disciplinary system or the cost of compensating clients for the failures of lawyers. Nor is it a cost of admission, education, or administration of the State Bar. Instead, it is a forced contribution to a fund that is used to serve society as a whole, which has been imposed to fill gaps that are caused by lack of government funding and lack of private donations generally. It would be no different than a forced contribution by the Court upon attorneys to help fund pay raises for court staff or construction of new courtrooms or courthouses in the midst of a funding crisis.

The Court's power over the practice of law relates to the admission, licensing, education, and discipline of Bar

members. It does not provide the Court the power to dictate how lawyers structure their practice or how they invest their resources or time. In establishing a mandatory bar association for this state, the Court explained that it has the power to ensure competency and diligence among attorneys, to control the quality of the legal system:

> We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice. Members of the legal profession by their admission to the bar become an important part of that process and this relationship is characterized by the statement that members of the bar are officers of the court. ***An independent, active, and intelligent bar is necessary to the efficient administration of justice by the courts. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the bar.*** The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this court should continue to exercise its supervisory control of the practice of the law.
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> The integration of the bar is no more undemocratic than the requirement of learning and good

> moral character of all who seek the privilege of practicing law. All members had the same opportunity and have freely chosen a profession subject traditionally to discipline and control by the courts. It is not undemocratic to require those who are privileged to practice law and are intrusted with the duty to secure or protect the property, rights, and liberties of others to become bound together in a united effort to increase their own capabilities, to maintain the high standards of the group, and to increase the effectiveness of their service to the public.

In re Integration of the Bar, 5 Wis. 2d 618, 622, 93 N.W.2d 601 (1958) (emphasis added).

The Court has broad disciplinary power over attorneys both in and out of court:

> The power of the court is not restricted in matters of discipline to misconduct connected only with cases pending in this court. The disciplinary power of the court extends to the entire field of the practice of the law by members who have been admitted to practice by this court. When a member of the bar is suspended or disbarred it is from the practice of the law, not only from appearing in court.

Id. at 626.

Moreover, the Court has made clear that other matters relating to the organization and administration of the bar are

left to the State Bar itself, to promote the purposes for which the bar was organized:

> The integrated State Bar of Wisconsin is independent and free to conduct its activities within the framework of such rules and by-laws. Within their confines this court expects the bar to act freely and independently on all matters which promote the purposes for which the bar was integrated subject to the general supervisory power of the court.

Id. at 626-27.

2. **The Power to Supervise and Administer the Court System Does not Include Imposing Taxes on Lawyers for a Program Benefiting the Public at Large.**

The PILSF Assessment does not fall within the Court's power to regulate the practice of law and shift the costs of that regulation to attorneys. The 2005 PILSF Order is clear that the assessment was not imposed as a cost of regulating lawyers.[4] Indeed, the Court praised the efforts of attorneys in providing pro bono legal services to needy persons and in providing donations to legal services organizations that

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[4] This is in contrast to cases upholding imposing costs upon lawyers for disciplinary programs. "[O]ur imposition of a fee upon practicing attorneys in order to fund a disciplinary system for attorneys not only is within our power, but also is necessary to fulfill our fundamental responsibilities concerning the regulation of the practice of law in our state." *In re Attorney Discipline System*, 79 Cal. Rptr. 2d 836, 859-60 (Cal. 1998); *see also Bd. of Overseers of the Bar v. Lee*, 422 A.2d 998, 1004 (Me. 1980) (Holding that the Maine rule requiring registration fees not a "tax." "It imposes upon attorneys a registration fee, which . . . is to be used to defray the costs of attorney registration, disciplinary investigation, hearing and enforcement, expenses of fee arbitrations . . . .").

provide such services. Rather, the assessment was imposed to help reduce the societal need for more of such services. Current funding and services are insufficient to meet all of society's needs for civil legal representation for the needy. Lawyers must address this societal need, the Court has determined, by making a mandatory donation to WisTAF, a grant-making organization.

Because the PILSF Assessment falls outside the Court's power to regulate attorneys, it falls outside the Court's authority entirely. The Court's superintending and administrative authority over ***the courts*** does not empower it to raise revenues from lawyers (or from any citizen) to fund the court system. That authority provides the Court the inherent power to keep the legal system operating and to provide due process. Descriptions of this authority make clear that is authority over the system and participants in it, which is funded by appropriations by the legislature.

The inherent power of the Court to supervise and administer the courts has been described as follows:

> "It is considered well established that a court has the inherent power to resort to a dismissal of an action in the orderly administration of justice. The general control of the judicial business before it is essential to the court if it is to function. 'Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.' 14

> Am.Jur., Courts, p. 371, sec. 171, Inherent Powers of Courts, 1963 Supp., p. 77."

Jacobson v. Avestruz, 81 Wis. 2d 240, 245-46, 260 N.W.2d 240 (1977). The Court also has described the features of its inherent power to supervise and administer the court system as follows:

> Based upon these decisions, it is clear that this court has characterized the inherent power of courts as possessing two primary features: (1) the power must be such that it is related to the existence of the court and to the orderly and efficient exercise of its jurisdiction; and (2) the power must not extend the jurisdiction of the court nor abridge or negate those constitutional rights reserved to individuals. See 20 Am. Jur. 2d, Courts, sec. 78 (1965).

Id. at 247. In another case, this Court explained its inherent power as that necessary to "carry out judicial functions delegated to" the courts:

> Inherent judicial power has been explained by this court in the following terms: ". . . when the people by means of the constitution established courts, they became endowed with all judicial powers essential to carry out the judicial functions delegated to them. But the constitution makes no attempt to catalogue the powers granted. . . . These powers are known as incidental, implied, or inherent

> powers, all of which terms are used to describe those powers which must necessarily be used by the various departments of government in order that they may efficiently perform the functions imposed upon them by' the people."

In re Hon. Charles E. Kading, 70 Wis. 2d 508, 517, 238 N.W.2d 409 (1975) (footnote omitted).

This Court has a "general superintending control over all inferior courts," which "is as broad and flexible as necessary to insure the due administration of justice in the courts of this state." *Id.* at 519-20. "Judicial power extends beyond the power to adjudicate a particular controversy and encompasses the power to regulate matters related to adjudication. . . . In the past, in the exercise of its judicial power this court has regulated the court's budget, court administration, the bar, and practice and procedure, has appointed counsel at public expense, has created a judicial code of ethics and has disciplined judges." *State v. Holmes*, 106 Wis. 2d 31, 44, 45, 315 N.W.2d 703 (1982).

Thus, this Court's inherent power includes that which is "necessarily related to the existence of the courts and to the orderly and efficient exercise of its jurisdiction." *Id.* at 247. Such powers include, for example, the authority to assess the costs of impaneling a jury. *Id.* They also include the power to prescribe the requirements for the waiver of counsel in a plea colloquy with the court. *State v. Ernst*, 2005 WI 107, 283 Wis. 2d 300, 699 N.W.2d 92. "Superintending and administrative authority allows courts to formulate

'procedural rules not specifically required by the Constitution or the [Legislature].' " *Ernst*, 2005 WI 107, ¶ 19 (quoting *U.S. v. Hasting*, 461 U.S. 499 (1983)). The Court's inherent power also includes the power of courts to appoint their own bailiffs, to convene proceedings *ex parte* to determine whether air-conditioning of its courtroom is necessary for the efficient functioning of the court, and to order an air conditioner if necessary. *State ex rel Moran v. Dept. of Admin.*, 103 Wis. 2d 311, 317, 307 N.W.2d 658 (1981) (court had power to order Department of Administration to issue payment to purchase Lexis computerized research software, spending monies from the Court's budget).

The Court held that it was empowered to impose the PILSF Assessment upon attorneys under its superintending authority to ensure the "due administration of justice." If that were true, there would be no limit upon the power of the judiciary to raise funds for the justice system by taxing lawyers (or any citizen). If legislative funding were inadequate to serve all needs of the court system, the Court could, under this reasoning, impose a fee upon attorneys to help defray any budgetary shortfall. That is not the law.

As shown above, the superintending authority to ensure the due administration of justice is the authority over the lower courts, to ensure the proper functioning of the legal system. Through this power, the Court imposes procedural requirements to ensure due process, enacts rules of judicial and attorney ethics, and the like – mandates on the functioning of the system. The inherent powers of the judiciary are "those necessary for the judiciary to 'accomplish

its constitutionally or legislatively mandated functions.'" *Flynn*, 216 Wis. 2d at 548, ¶ 42.

Regarding the funds necessary to operate the judicial system, the Court has the power to draw up its budget and to spend appropriated monies accordingly. Included in the constitutional administrative authority is the "power to formulate and carry into effect the budget for the court system . . . ." *State ex rel Moran v. Dept. of Admin.*, 103 Wis. 2d 311, 317, 307 N.W.2d 658 (1981). Thus, "Wis. Const. art. VII, § 3 gives this court authority to formulate and carry into effect its budget—***funds appropriated by the legislature for the court's use***." *Flynn*, 216 Wis. 2d at 549, ¶ 45 (emphasis added). "One of the powers and responsibilities of an autonomous administrative body is to consider and approve a budget governing the use of funds by those subject to its control." *Moran*, 103 Wis. 2d at 317.

The Court has only the power to formulate and implement its budget – it does not have the power to raise funds by imposing fees on lawyers for the operation of the court system. The Court's budget is funded by appropriations from the legislature. The Court is not empowered to raise funds for the operation of court system apart from appropriations of the legislature. There is no authority or precedent allowing this Court (or, indeed, any court) to visit costs of the judicial system upon lawyers.[5] Indeed, the

[5] Most modern-day constitutional court provisions "give state supreme courts extensive superintending, supervisory, and administrative authority over the day-to-day operations of courts in the state, including, in some cases, a unified judicial budget." Buenger, "Of Money & Judicial Independence: Can Inherent Powers Protect State

Constitution bars courts from requiring lawyers to provide legal representation to needy persons without compensation. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. 1985) (Missouri courts had no inherent power to appoint counsel or to compel attorneys to serve in civil actions without compensation.); *In Interest of D.B.*, 385 So. 2d 83 (Fla. 1980) (bar should not bear the entire fiscal burden of the state's responsibility to provide counsel in juvenile dependency proceedings); *Green Lake Cnty v. Waupaca Cnty*, 113 Wis. 425, 89 N.W. 549, 552 (1902) (Lawyers have an ethical obligation to perform legal services for those who cannot afford to pay for them; noting that at times lawyers may be compensated less than their full fee for representing indigent persons, and that they should represent indigent persons for reduced feeds "cheerfully, taking the small fee given by the law, without complaining.").

It is true that attorneys have an ethical obligation to provide pro bono services for persons of limited means. Funding for legal representation for low-income persons is a public policy falling within the realm of legislative priorities, however – it is not an obligation of the legal profession alone. *State ex rel. Stephan v. Smith*, 747 P.2d 816, 835-36 (Kan. 1987) ("The obligation to provide counsel for indigent

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Courts in Tough Fiscal Times?," 92 KY. L.J. 979, 1017 (2003). Examples of the inherent power of the courts to ensure "the efficient functioning and prompt and just disposition of litigation and business of the court" include, for example: "controlling courtroom behavior, ensuring that a court has adequate facilities for conducting court, hiring sufficient personnel to carry out the business of the court, managing dockets, controlling discovery, appointing and paying for court experts, and compelling payment of witness fees." *Id.* at 1023-24 (2003) (footnotes & citations omitted).

[criminal] defendants is that of the State, not of the individual attorney."). "The emerging view is that the responsibility to provide the Sixth Amendment right to counsel is a public responsibility that is not to be borne *entirely* by the private bar." *State ex rel. Stephan v. Smith*, 747 P.2d 816, 841 (Kan. 1987).

Courts throughout the country are under extreme difficulties in meeting basic funding needs, and they are beholden to the legislature, a separate but co-equal branch of government, to fund their existence. Buenger, *supra* p.18 n.5, at pp. 979-82 (courts are forced to curtail hours, lay off employees, close courtrooms and courthouses, and terminate programs). When faced with funding crises so severe as to threaten the operation of the court system and to place justice in peril, supreme courts will on occasion find it necessary to take matters into their own hands and exercise their power to compel *the legislative branch* to fund vital court functions. There is no precedent or authority, however, to allow a court to compel lawyers to fund court functions or to bear a societal cost associated with legal services provided to the public.

Court orders compelling legislative funding are typically a last resort, exercised sparingly. "[T]he judiciary commits a separation of powers violation if it exercises a legislative power. We run the risk of doing just that when we order the legislature to fund the judiciary. After all, the spending power resides exclusively with the legislature, and the only time the judiciary acquires the power to compel funding is when it cannot independently and adequately administer justice because the legislature has not provided it

with the funds to do so." *Snyder v. Snyder*, 620 A.2d 1133, 1137 (Pa. 1993).[6]

As Justice Prosser points out in dissent, the PILSF Assessment sets a dangerous precedent "because there is no clear stopping point." PILSF Order at 12 (Prosser, J., dissenting); *see also Jerrell*, 2005 WI 105, ¶ 155 (Prosser, J., concurring in part & dissenting in part) ("If the majority opinion represents a proper use of the court's 'superintending . . . authority,' then, logically, there is no practical reason why the court could not dictate any aspect of police investigative procedure that is designed to secure evidence for use at trial. The people of Wisconsin have never bestowed this kind of power on the Wisconsin Supreme Court.").

B. The PILSF Assessment is a Tax Within the Exclusive Power of the Legislature.

It is undisputed that the PILSF Assessment is not a cost of regulating attorneys[7] and it is described by the Court in the PILSF Order as one small measure to reduce the gap in funding for civil legal services for low-income persons. The assessment will not completely close the gap in such funding,

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[6] "The use of inherent power to compel funds can be viewed as antidemocratic . . . ." Buenger, *supra* p.18 n.5, at p. 1040. The exercise of inherent power to compel funding "must take place only under the most egregious of circumstances, and even then only after all reasonable efforts have been made to secure funding through traditional channels." *Id.*

[7] "License fees imposed by this court to fund an attorney disciplinary system . . . would be charged in connection with regulatory activities that do not exceed the reasonable cost of disciplining attorneys. Therefore, the imposition of such fees would not invade the Legislature's exclusive power over taxation and appropriation." *In re Attorney Discipline System*, 79 Cal. Rptr. 2d 836, 844 (Cal. 1998).

and nor should attorneys bear complete responsibility to do so. By definition, therefore, the PILSF Assessment is a "tax."

"A tax is one whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation." *State v. Jackman*, 60 Wis. 2d 700, 707, 211 N.W.2d 480 (1973) (emphasis added) (citing *State ex rel. Attorney General v. Wis. Constructors, Inc.*, 222 Wis. 279, 268 N.W. 238 (1936)). The assessment is not a license fee, because it does not represent the cost of regulating attorneys -- there are no supervisory or regulatory costs created by lawyers that it is intended to cover. It is rather an effort to fund-raise by imposing a mandatory $50 donation upon attorneys, solely to increase the monies available to WisTAF – its primary purpose is to generate revenue for WisTAF.

Extending the assessment to other expenses associated with the court system helps demonstrate that it is a tax and not a fee "to cover the cost and the expense of supervision or regulation" of attorneys. *Jackman*, 60 Wis. 2d at 707. For example, if the Court were to impose a $25 fee on all attorneys to help defray the budgetary crisis faced by the state circuit courts, that cost would not be to "cover the cost and the expense of supervision or regulation" of attorneys, but rather to raise revenues for the court system. Similarly, a $30 cost for court facilities would not be a cost of regulation or supervision of attorneys, but rather a measure to generate revenues from attorneys. Likewise, the mandatory donation to WisTAF is not a cost to supervise or regulate lawyers but

an effort to generate revenues to increase WisTAF's grant pool. All of these impositions would be taxes, and not license fees under *Jackman*.

"The Wisconsin Constitution gives the legislature the exclusive power to levy taxes." PILSF Order at 9 (Prosser, J, dissenting). Wis. Const. art. XIII. The taxation power is a power conferred on the legislative branch upon which the judiciary "absolutely may not intrude." *See Demmith v. Wis. Judicial Conf.*, 166 Wis. 2d 649, 663, 480 N.W.2d 502 (1992). The Constitution "empower[s] the legislature, not the judiciary, to make policy decisions regarding taxing and spending." *Flynn*, 216 Wis. 2d at 540, ¶ 25; *see also Bryant v. Robbins*, 70 Wis. 258, 271, 35 N.W. 545 (1887) ("the laying of taxes is properly the exercise of a legislative, as distinguished from a judicial, function."); *State ex rel. Thomson v. Giessel*, 265 Wis. 207, 213, 60 N.W.2d 763 (1953). The proper function of the court is to apply tax law set out by the legislature. *Marina Fontana v. Village of Fontana-on-Geneva Lake*, 107 Wis. 2d 226, 240, 319 N.W.2d 900 (Ct. App. 1982).

Although the judiciary has the authority to formulate and implement its budget, "the legislature . . . has clear constitutional authority to appropriate scarce resources." *Flynn*, 216 Wis. 2d at 552, ¶ 50. The legislature may not delegate a taxing power to the judiciary. PILSF Order at 10 (Prosser, J., dissenting). Nor has it done so here.

Because it is a tax and it falls squarely outside this Court's inherent authority to administer the courts, the PILSF Assessment "is within the legislature's core zone of exclusive

power" and thus the exercise of authority by the judiciary is unconstitutional as a violation of the separation of powers. *See Flynn*, 216 Wis. 2d at 546, ¶ 39; *see also In re Grady*, 118 Wis. 2d 762, 776, 348 N.W.2d 559 (1984) ("There are zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, the unreasonable burden or substantial interference test does not apply; *any* exercise of authority by another branch of government is unconstitutional.").

The PILSF Assessment is unconstitutional as a violation of the separation of powers. It therefore must be repealed.

II. The PILSF Assessment is a Tax and Not a Fee.

In its consideration of the current PILSF Petition, BOG was provided with a memorandum discussing whether the PILSF Assessment is a permissible fee within the Supreme Court's powers or an unconstitutional tax. Advocates of the PILSF Petition cited case law to argue that it is a fee, not a tax. However, as shown below, the PILSF Assessment does not constitute a fee charged by a government body or municipality for the costs of services it provides to citizens, for the services those persons receive. Rather, it is a tax.

As the Seventh Circuit has explained, exactions imposed upon citizens by the government may be divided into three categories: fines, fees, and taxes. A fine is designed to punish, and fees "compensate for a service that the state provides to the person or firms on whom ... the exaction falls . . ." *Empress Casino Joliet Corp. v. Balmoral Racing Club,*

Inc., 651 F.3d 722, 728 (7th Cir. 2011). " 'If the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.' " *Empress Casino*, 651 F.3d at 728-729 (quoting *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1399 (7th Cir.1992).)

As the court explained in *Empress Casino*, a tax is "an example of a state's taking money from one group of firms and giving it to another group..." 651 F.3d at 730.

The Court considered the distinction between fees and taxes in *Kathrein v. City of Evanston, Ill.*, 752 F.3d 680, 686–87 (7th Cir. 2014), to consider whether a demolition permit charge was a permissible fee or an unauthorized tax. In that case, the City of Evanston charged demolition companies a fee for a permit to demolish structures. The court reasoned that the fee was not charged for services provided by the city. Rather, it was charged to the persons "who perform the demolitions themselves, without utilizing any of the City's resources. The ordinance therefore imposes a tax." *Id.* at 687. The revenue from the demolition permits was used to support poor homeowners in the City and to slow the rate of demolitions. *Id.* at 686-687.

The purpose, not the name, determines whether a government charge constitutes a tax. *Bentivenga v. City of*

Delavan, 2014 WI App 118, ¶¶ 6-7, 358 Wis. 2d 610, 856 N.W.2d 546.

The PILSF Assessment is not a fee because it is not a cost imposed upon lawyers for services provided to them by the Supreme Court or its agencies. It is distinct from the assessments for OLR, the Client Protection Fund, and BBE. All of those assessments are passing on to lawyers the cost of practicing law, and the charge represents services provided by these Supreme Court agencies to lawyers.

In support of the PILSF Petition, Petitioners cite *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021) to argue that the PILSF Assessment is a fee and not a tax. *McDonald* is a case involving a challenge to Texas state bar fees under the First Amendment. *McDonald* is not pertinent to the constitutional questions implicated by the PILSF Petition because *McDonald* does not involve a separation of powers challenge to the constitutional authority to charge the fee assessment. In *McDonald*, the court considered whether certain Texas bar assessments were a fee or a tax. The action sought injunctive relief against the fees. If they were a tax, then the action would be barred by the Anti-injunction Act. Therefore, the court considered whether the challenged Texas bar fees were a fee or tax for purpose of the Anti-injunction Act. For that purpose, the court held that they are fees. One of the fees was a legal services fee to fund civil legal services to the indigent. Notably, the legal services fee is imposed directly by the Texas legislature and not the Texas Supreme Court. *Id.* at 243.

The cases provided to BOG for consideration of the PILSF Petition all show that the PILSF Assessment is a tax, not a fee. They are consistent with the well-established principles discussed in *Empress Casino* and *Kathrein*: a fee is a charge imposed by the government for services the government provides to the person who is required to pay the fee. Fees are to cover the governmental body's expense of providing the service to the party paying the fee. Here, the PILSF Assessment is not a fee because it is not a charge imposed by the Supreme Court for services the Court provides to lawyers. (This is in contrast to the OLR, BBE, and Client Protection Fund fees, which are charges for services provided by Supreme Court agencies to lawyers.)

All the following cases cited in supported of the PILSF Petition show that fees are imposed to defray the government's cost of providing the service to the person receiving the service:

Case	**Fee**
Town of Hoard v. Clark Cnty., 2015 WI App 100, 366 Wis. 2d 239, 873 N.W.2d 241	Annual charge by Town on all property owners for cost of fire protection provided by the Town to property owners in the town. The charge covers the expense of providing the service of fire protection within the Town.
Rusk v. City of Milwaukee, 2007 WI App 7, 298 Wis. 2d 407, 414, 727 N.W.2d 358.	Reinspection fees charged to property owners for the service providing inspection services by the City to the property owner.
City of River Falls v. St. Bridget's Cath. Church of River Falls, 182 Wis. 2d 436, 438, 513 N.W.2d	The City charged a fee to property owners for its expense of making water available. It was a charge to cover the public

673 (Ct. App. 1994)	utility's expense of making water available, storing it, and ensuring delivery.
State v. Jackman, 60 Wis. 2d 700, 211 N.W.2d 480 (1973)	A boat registration fee was charged to cover the cost and expense of supervision or regulation of the party that has to pay the fee.

Dated this 13th day of December, 2024.

Respectfully submitted,

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