Case No. 16-1564

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD FLECK,

Appellant,

v.

JOE WETCH, et al.,

Appellees.

BRIEF FOR *AMICUS CURIAE* THE STATE BAR OF CALIFORNIA IN SUPPORT OF APPELLEES

On Remand from the Supreme Court of the United States

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CERTIFICATION PURSUANT TO RULE 29(a)(4)(E)

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the State Bar of California certifies: (a) that no party's counsel authored this brief in whole or in part, (b) that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (c) that no person other than the State Bar of California contributed money that was intended to fund preparing or submitting this brief.

DATED: April 4, 2019

/s/ Brady R. Dewar

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), and with consent of all parties, the State Bar of California files this amicus curiae brief in support of Appellees Joe Wetch, Aubrey Fiebelkorn-Zuger, Tony Weiler, and Penny Miller.

The State Bar of California is the largest state bar in the country, with approximately 190,000 active licensees. Ass. Jud. Comm. Rep. SB 36 at 6 (July 17, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysis Client.xhtml?bill_id=201720180SB36# (last visited April 2, 2019).

Until recently, it was an integrated bar that required membership in and payment of dues to an association as a condition of practicing law in California. While an integrated bar, the State Bar of California was the respondent in *Keller v. State Bar of California*, 496 U.S. 1 (1990).

On January 1, 2018, the State Bar of California de-integrated by spinning off its associational and membership components into the California Lawyers Association, and became a regulatory agency. *See generally* California Senate Bill No. 36 §§ 21, 24, *available at* https://leginfo.legislature.ca.gov/faces/billText Client.xhtml?bill_id=201720180SB36 (last visited April 2, 2019).

The State Bar therefore has an interest in ensuring that, should this Court determine that *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), precludes states from requiring attorneys to join and pay dues to integrated bars, such decision be expressly limited to integrated bars.

Further, the State Bar of California assesses licensing fees by an annual statement that allows attorney licensees to deduct certain optional expenses from their total fee and to add other optional fees and contributions, which are procedures permissible under *Keller*. The State Bar has an interest in ensuring that *Keller*'s holding regarding the minimum procedures integrated bars must adopt to give attorneys the opportunity not to pay for non-germane expenses be upheld. While not directly applicable to the non-integrated State Bar of California, this holding supports the validity of its fee billing procedures.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's charge on remand is to consider whether *Janus* requires modification of its earlier decision that *Keller* permits both the compelled membership in and payment of dues to the State Bar Association of North Dakota ("SBAND"), as well as SBAND's procedures for allowing attorneys to decline to pay for non-germane expenses. *Janus* does no such thing; it was a case applying exacting scrutiny to mandatory agency fees in the public sector union context on

the basis of serious First Amendment concerns not present in the bar association context.

First, *Janus* does not overrule *Keller*'s holding that states may require membership in and payment of dues to integrated bars as a condition of practicing law, and this Court should not reverse its prior holding that *Keller* permits the compelled membership in and dues to SBAND. If, however, this Court does find that *Janus* affects the legality of SBAND's compelled membership and dues, it should make clear that its decision is limited to integrated bars—i.e., associations of attorneys in which membership is required—and does not apply to attorney regulatory agencies without members or associational aspects, such as the State Bar of California. The First Amendment concerns at issue in *Janus*—compelled association and compelled subsidization of the private, political speech of a union—do not exist for regulatory agencies without members or associational aspects. In fact, Appellant's argument against integrated bars depends on the availability and legality of agencies like the State Bar of California as a means of attorney regulation that Appellant contends is "significantly less restrictive of associational freedoms." *Janus*, 138 S. Ct. at 2465. For clarity and to avoid unjustified litigation regarding attorney regulatory agencies that are not integrated bars like SBAND, this Court should thus expressly limit its decision to integrated bars.

Second, the Court should not reverse its correct decision that SBAND's fee statement containing a provision allowing for attorneys to "opt out" of paying for non-germane expenses is permissible under *Keller*. *Janus*, which struck down mandatory agency fees entirely, does not purport to address the requirements for valid consent to paying non-germane fees in an attorney bar context, where some payments, but not others, may be compelled. But, even if this Court finds that *Janus* does apply, the procedures utilized by SBAND constitute clear and affirmative consent occur prior to the taking of any money. Thus, *Janus* in no way invalidates SBAND's fee statement procedures, which Appellant does not dispute are valid under *Keller*.

III. ARGUMENT

A. This Court Should Distinguish Non-Integrated Bars Like the State Bar of California Because *Janus* Does Not Question the Legality of Such Agencies

The Supreme Court remanded this matter to this Court for a limited purpose: "further consideration in light of *Janus v. State, County, and Municipal Employees*, 585 U.S. ——, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018)." *Fleck v. Wetch*, 139 S. Ct. 590 (Mem. 2018). Nothing in *Janus* disturbs the Supreme Court's precedent upholding the constitutionality of mandatory membership and dues for attorneys in integrated bar associations, or the rationale for those holdings.

Nor can *Janus* be read to question the legality of mandatory licensure by *non-integrated bars* like the State Bar of California—an attorney regulatory agency with no membership or associational aspects. Such agencies do not raise the First Amendment concerns underlying *Janus*. Thus, any decision by this Court regarding integrated bars like SBAND should be limited to integrated bars as defined by *Keller*: "***association[s]*** of attorneys in which ***membership*** and dues are required as a condition of practicing law in a State[.]" *Keller*, 496 U.S. at 5 (emphasis added).

1. The State Bar of California is a Non-Integrated Bar—An Attorney Regulatory Agency Without Members or Other Associational Aspects

The State Bar of California illustrates why precision in the language of any holding by this Court regarding the legality of SBAND's mandatory membership and dues is important. The State Bar of California is a public corporation, established by California's Legislature, Cal. Bus. & Prof. Code § 6001, and is the "administrative arm of [the Supreme Court of California] for the purpose of assisting in matters of admission and discipline of attorneys." *In re Rose*, 22 Cal. 4th 430, 438 (2000) (quotations omitted). It does not, unlike SBAND, have any trade associational mission. Rather, pursuant to statute:

> Protection of the public, which includes support for greater access to, and inclusion in, the legal system, shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.

Cal. Bus. & Prof. Code § 6001.1. The State Bar of California regulates attorneys as licensees, and is not a compelled association of attorneys.

As part of this public protection mission, the State Bar of California engages in licensing, regulation, and discipline, including related activities such as inclusion initiatives and administering California's IOLTA program and the Lawyer Assistance Program for attorneys with substance abuse issues affecting competence. *See, e.g.*, Cal. Bus. & Prof. Code §§ 6060 – 6069.5 (admissions/licensing), 6075 – 6088 (discipline), 6076 (establishing ethics rules), 6210 – 6228 (IOLTA), 6230 – 6238 (Lawyer Assistance Program). The State Bar of California does not have "members;" it regulates attorney "licensees." *See* Cal. Bus. & Prof. Code § 6002. Thus, the State Bar of California is not an integrated bar like SBAND or as defined in *Keller*. Until recently, however, the State Bar of California was an integrated bar—indeed, it was a party in *Keller*. That is, to practice law in California, attorneys were once required to become members of the State Bar of California, which had trade associational components and was run by a Board of Governors that included individuals elected by the membership. In 2017, legislation was enacted to de-integrate the State Bar of California, effective

January 1, 2018, including by spinning off the associational components of the State Bar of California—the educational Sections and the California Young Lawyers Association—into a separate, private voluntary non-profit entity called the California Lawyers Association,[1] leaving the State Bar of California a purely regulatory agency.[2] California Senate Bill No. 36 §§ 21, 24, *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB36 (last visited April 2, 2019). The legislation also changed the makeup of the State Bar of California's governing body, the Board of Trustees, transitioning it from a body containing a number of individuals elected by members of the State Bar of California, to a body made up solely of individuals appointed by other democratically accountable government officials—the California Supreme Court,

[1] According to its website, the California Lawyers Association is "a member-driven, mission-focused organization dedicated to the professional advancement of attorneys practicing in the state of California." California Lawyers Association – About CLA, *available at* https://calawyers.org/About-CLA (last visited April 2, 2019).

[2] In 2002, the State Bar of California spun off its Conference of Delegates, another associational component. The Conference of Delegates became a separate non-profit entity called the California Conference of Bar Associations. *See generally* California Senate Bill No. 1897, *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200120020SB1897&search_keywords=%22State+Bar%22 (last visited April 2, 2019); Conference of California Bar Associations – What We Do, *available at* http://calconference.org/about-2/ (last visited April 2, 2019). The Conference of Delegates had been the body of the State Bar of California that made the non-germane political and ideological statements challenged in *Keller*. *Keller*, 496 U.S. at 15.

the Governor, and the Legislature. *Id.* at §§ 6-16.[3] This separation of the associational aspects of the State Bar of California was enacted in order to "ensure that the State Bar of California will focus on its mission to protect the public …." S. Jud. Comm. Rep. SB 36 at 8 (May 8, 2017), *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB36# (last visited April 2, 2019). The next year, legislation was enacted to adjust nomenclature to reflect the fact that the State Bar of California no longer has any members—all attorneys licensed by the State Bar of California are "licensees," rather than "members," and they now pay "fees," rather than "dues." California Assembly Bill 3249 §§ 6, 93, *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB3249 (last visited April 2, 2019).

The fact that the State Bar of California is still known as a state "bar" is irrelevant to the question whether the First Amendment permits the State Bar of California to require attorneys to pay fees in order to practice law in California. The State Bar of California's lack of membership or associational characteristics is dispositive on this question. Nonetheless, a decision that *Janus* affects the legality of SBAND's mandatory membership and dues could lead to confusion and baseless litigation if the decision does not make clear that its holding does not affect non-integrated bars such as the State Bar of California. To avoid this result,

[3] Two member-elected Trustees remain on the Board of Trustees until completion of their terms in September 2019.

and for the reasons discussed below, this Court should make clear that any decision it makes regarding the applicability of *Janus* to integrated bars does not apply to non-integrated bars such as the State Bar of California and other agencies like it.

2. *Janus* Does Not Apply to Non-Integrated Bars, Which Lack Members or Other Associational Aspects

In *Janus*, the Supreme Court held that Illinois law forcing public employees to subsidize a union, "even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities . . . violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Janus*, 138 S. Ct. at 2459-60. *Janus* overruled *Abood v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977), which permitted compelled payment by non-union members of agency fees, or the portion of union dues "germane to [a union's] duties as collective-bargaining representative." *Id.* at 235. In overruling *Abood*, the Supreme Court applied "exacting scrutiny," and determined that, under this standard, the government interests *Abood* found to justify compelled agency fees—maintaining labor peace and avoiding free riders—could, in the case of labor peace, "readily be achieved through means significantly less restrictive of associational freedoms than the assessment of agency fees." *Janus*, 138 S. Ct. at 2466 (quotations omitted). In the case of avoiding free riders, the Supreme Court held that avoiding free riders is not a compelling interest as required under the exacting scrutiny test. *Id.* at 2466-69.

The State Bar of California agrees with Appellees that *Janus* does not overrule *Keller*. The rationale cited in *Janus* for applying exacting scrutiny to strike down mandatory agency fees previously upheld by *Abood* does not apply to the mandatory bar membership and dues the Supreme Court permitted in *Keller*. In *Janus*, the Court was concerned with the "significant impingement of First Amendment rights [that] occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences." *Janus,* 138 S. Ct. at 2464 (quotations omitted). Mandatory dues paid to an integrated bar for germane activities—which *Keller* limits to expenses supporting the state's "interest in regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13—do not support political activity analogous to collective bargaining, and thus do not result in any such "significant impingement of First Amendment rights."

The concerns underlying *Janus* have even less—indeed, no—connection to *non-integrated* bars. Integrated bars such as SBAND require membership in an association, which is the Constitutional harm complained of by Appellant. North Dakota attorneys must ***join*** SBAND as dues-paying members as a condition of practicing law. Appellant's Opening Brief ("App. Op. Br.") at 1. SBAND's mission includes such trade associational components as "serv[ing] the . . . lawyers

. . . of North Dakota" and "encourag [ing] cordial relations among members …." State Bar Association of North Dakota Constitution (amended June 2009) Art. 2, *available at* https://cdn.ymaws.com/www.sband.org/resource/resmgr/docs /about_sband/bylaws2009.pdf (last visited April 2, 2019). SBAND is managed by a Board of Governors that consists not of government appointees, but almost entirely of attorneys elected by the SBAND's members. *Id.* at Art. 4, 5; State Bar Association of North Dakota Bylaws § 3, *available at* https://cdn.ymaws.com/ www.sband.org/resource/resmgr/docs/about_sband/bylaws2009.pdf (last visited April 2, 2019). Non-integrated bars such as the State Bar of California, which are regulatory agencies rather than associations, lack these characteristics.

Appellant, in arguing that *Janus* requires finding compelled membership in SBAND impermissible, repeatedly makes clear that the purported First Amendment harm he is suffering is *mandatory membership* in an *association* and compelled payment of dues to that association. *See, e.g.*, Brief of Appellant on Remand from the Supreme Court of the United States ("App. Rem. Br.") at 1 ("*Janus* makes clear that compelling Fleck to be a member of the State Bar Association of North Dakota (SBAND) as a condition of practicing law in North Dakota is an unjustifiable intrusion on his First Amendment rights."), 2 ("This Court should declare SBAND's mandatory bar membership and its billing practices to be unconstitutional . . ."), 3 ("Being forced to join SBAND as a

condition of practicing law infringes that right, just as being forced to join a union would violate the rights of government employees.").[4] Nowhere does Appellant argue that being required to pay licensing fees to a regulatory agency such as the non-integrated State Bar of California would violate his First Amendment rights.

In fact, Appellant's main argument—that mandatory membership in an integrated bar is subject to exacting scrutiny and fails that test—depends on the availability of regulatory agencies such as the State Bar of California. Appellant references states like California that "regulate the practice of law without requiring membership in a state bar association" as evidence that the state's interest in regulating attorneys can be achieved "'through means significantly less restrictive of associational freedoms.'" App. Rem. Br. at 8 (quoting *Janus*, 138 S. Ct. at 2466). The State Bar of California agrees that states with such non-integrated bars do not implicate First Amendment issues.

Moreover, nothing in *Janus* suggests that requiring attorneys to be licensed by state regulatory bodies with no associational aspects or membership, and to pay for such regulation through fees, raises any First Amendment concerns. *Janus* was

[4] The Petition for Writ of Certiorari filed by Appellant in the Supreme Court also makes clear that Appellant raises no Constitutional concerns with attorney regulatory bodies that do not include associational components. There, Appellant characterized the question presented as: "Should *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961), be overruled insofar as they permit the state to force Petitioner to join a trade association he opposes as a condition of earning a living in his chosen profession?" Petition for a Writ of Certiorari at i, *Fleck v. Wetch*, No. 17-886 (U.S. Dec. 15, 2017).

concerned with "[c]ompelling a person to *subsidize* the speech of other private speakers" in the context of public sector unions, where the Court noted that a "significant impingement of First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences." *Janus*, 138 S. Ct. at 2464 (emphasis in original). Due to these First Amendment concerns, the Court applied exacting scrutiny, which allows compelled subsidies only if they "serve a compelling state interest that cannot be achieved through means significantly less restrictive of *associational* freedoms." *Id.* at 2465 (emphasis added).

These concerns do not arise for a regulatory body, like the State Bar of California, that is run by the state and lacks members. Indeed, given that the State Bar of California lacks members or any associational component and is managed by Trustees appointed by democratically accountable state officials, requiring payment of licensing fees to the State Bar of California for attorney regulation cannot be characterized as compelling subsidization of "private speakers" at all, unlike agency fees paid by non-members to a union run by its members.[5] *Janus*'s

[5] The speech of attorney regulatory bodies such as the State Bar of California that are controlled by democratically accountable state officials may in fact be entirely exempt from First Amendment scrutiny as government speech. *See Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 559-61 (2005) (holding that advertising funded by assessment of beef producers was "government speech" and not

reasoning cannot be stretched to suggest that attorney regulatory bodies such as the State Bar of California "seriously impinge[] on First Amendment rights" such that exacting scrutiny should be applied. And, even if *Janus*'s exacting scrutiny test were applied, non-integrated bars like the State Bar of California would pass that test: Given that such attorney regulatory agencies lack members and associational aspects, the state's interests in "regulating the legal profession and improving the quality of legal services" and "allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices," *Harris v. Quinn*, 573 U.S. 655-56 (1990) (quotations omitted), could not be achieved through means significantly less restrictive of associational freedoms. Indeed, as discussed above, Appellant's argument against integrated bars depends on their availability as an alternative that Appellant contends is significantly less restrictive of associational freedoms.

Because *Janus* has no applicability to attorney regulation without compelled membership in an association (i.e., attorney regulation without an integrated bar), any decision by this Court applying *Janus* to SBAND's mandatory membership and dues should make clear that it is limited to integrated bars—the only type of

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susceptible to First Amendment compelled-subsidy challenge where the government "effectively controlled" the speech). This issue is not before this Court.

bar at issue[6]—and that the decision does not affect non-integrated bars.

B. *Janus* Provides No Basis for Reversing This Court's Earlier Decision That the *Keller* Deduction Choice Provided to North Dakota Attorneys Complies with Applicable Procedural Requirements

It is not disputed that SBAND's revised annual fee statement—which contains a "*Keller* deduction" allowing an attorney to deduct from the licensing fee the amount spent on non-germane expenses—meets the procedural requirements for allowing attorneys to decline to pay the non-germane portion of their bar dues set forth in *Keller*, 496 U.S. at 14, and *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 310 (1986). Rather, Appellant argues that *Janus* somehow overrules these standards for consenting to payment of non-germane expenses. *Janus* does no such thing.

When this case was first before this Court, Appellant argued that SBAND's procedure, which Appellant argued required him to "opt out" of paying for non-germane expenses by subtracting them from his fees before paying, was made impermissible by subsequent Supreme Court authority in *Knox v. Service*

[6] Because the issue of First Amendment restrictions on non-integrated bars is not before the Court, under principles of judicial restraint this Court should make clear that its decision does not affect non-integrated bars. "'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" *Xiong v. Lynch*, 836 F.3d 948, 950 (8th Cir. 2016) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)).

Employees International Union, Local 100, 567 U.S. 298 (2012). In *Knox*, the Court questioned, but did not decide, whether "opt out" notices are sufficient to protect the rights of non-union members not to pay for a union's non-germane political or ideological activities. *Id.* at 312. This Court correctly rejected that argument, recognizing that the type of "opt out" questioned by *Knox* is "simply not implicated" by a *Keller* deduction for non-germane expenses on bar association fee statements. *Fleck*, 868 F.3d at 657.

In a public sector union case such as *Knox*, this Court correctly noted, an employer automatically transfers money earned by the employee to the union, unless and until an employee "opts out" by objecting. *Id.* This sort of "opt out" procedure is nothing like what Appellant argues is an impermissible procedure here, where "North Dakota attorneys pay the annual license fee themselves," have the opportunity to select a *Keller* deduction before sending any payment to SBAND in response to the annual fee statement, and then, if they wish to support SBAND's non-germane activities, effectively "opt in" to subsidizing those activities by not selecting the *Keller* deduction and writing and remitting a check for the greater amount. *Id.* at 656-57.

Nothing in *Janus* calls into question this Court's earlier decision on this issue. Appellant contends that *Janus* "addressed the question of whether a public-sector union could charge workers first and give them the option of objecting and

seeking a refund of funds used for political or ideological speech." App. Rem. Br. at 10 (citing *Janus*, 138 S. Ct. at 2464). *Janus* does *not* address this question. In the portion of *Janus* Appellant cites, the Court holds that agency fees may not be taken from nonconsenting employees ***at all.*** *Janus*, 138 S. Ct. at 2464. The Court then briefly discusses what consent to such agency fees must entail, concluding that "[u]nless employees clearly and affirmatively consent before any money is taken from them, this standard [of freely given consent shown by clear and compelling evidence] cannot be met." *Id.*

This brief portion of *Janus* merely makes clear that public sector workers cannot be required to pay agency fees, but rather must give clear and affirmative consent to paying them (as opposed to having them deducted from their paychecks with no consent). It does not purport to describe what type of consent is required when, as permitted under *Keller*, a state bar provides its licensees the choice of paying or not paying the portion of their licensing fees attributable to non-germane expenses.

Regardless, SBAND's challenged practice of sending a fee statement with language instructing attorneys to deduct an amount for non-germane expenses if they choose not to support them meets the standards for consent set forth in *Janus*—it entails "clear[] and affirmative[] consent before any money is taken from them." *Janus*, 138 S. Ct. at 2486. The consent required by SBAND is "clear"

because the fee statement expressly instructs attorneys that they may deduct a set amount from their fees for a "'Keller deduction relating to non-chargeable activities'" and provides "a blank allowing the member to write in an amount to be deducted from the license fees due." *Fleck*, 868 F.3d at 654. The consent is "affirmative" because the licensee must take action in order to pay for the non-germane expenses: totaling his fee, including any deductions and optional fees, and then remitting payment to SBAND. *Id.* Finally, this consent occurs "before any money is taken" from attorneys, because the fee statement is received, the attorney's choice made, and the fee calculated by the attorney before the attorney submits payment to SBAND.

Appellant contends that this consent is not clear because the express opportunity given to take a *Keller* deduction could be missed by a "hasty reader." App. Rem. Br. at 11. But *Janus*, if applicable, requires only that the consent be clear. That requirement is met here, where SBAND explains in plain language that attorneys, whom we may assume are trained in and capable of carefully reading documents, may take a *Keller* deduction. Appellant does not suggest that the language used is misleading, and it is not apparent how SBAND could be meaningfully clearer. *Janus* does not purport to force SBAND to vouch that attorneys who receive a fee statement—the entire point of which is to allow them to determine and pay their annual licensing fee correctly—actually perform the

basic task of reading that fee statement. As in other areas of the law, the court can presume that attorneys who receive and complete the fee statement read it. *See, e.g., Faber v. Menard, Inc.*, 367 F.3d 1048, 1053 (8th Cir. 2004) (employee who signed employment contract containing arbitration agreement presumed to have read it).

With regard to the affirmative nature of the consent, Appellant argues, without authority, that the fact that the *Keller* deduction, if taken, must be subtracted from the fee, somehow negates the affirmative steps an attorney takes in calculating his fee and remitting payment, with or without the *Keller* deduction, to SBAND. App. Rem. Br. at 12-13. *Janus* does not speak to this situation, as it was concerned with an employer automatically deducting agency fees from an employee's paycheck with no consent at all. Here, the calculation of the fee and remittance of payment to SBAND constitute affirmative consent.

Finally, Appellant argues that the consent obtained by SBAND to charge attorneys for non-germane expenditures is not "*prior* to the attempt to collect the money, since the recipient is presented simultaneously with the bill and the opportunity to affirmatively deduct the Keller amount . . ." App. Rem Br. at 13. But *Janus* held only that consent must occur "before any money is taken . . ."

Janus, 138 S. Ct. at 2486.[7] This requirement is met by SBAND's fee procedures, in which an attorney calculates and remits fees after receiving the fee statement.

Because this Court's charge on remand is only to reconsider its prior decision in light of *Janus*, and because *Janus* does not disturb or even question this Court's prior decision that SBAND's fee statement satisfies applicable requirements for providing bar members the opportunity not to pay for non-chargeable expenses, this Court should not change its prior holding.

IV. CONCLUSION

For the reasons discussed above and as set forth by Appellees, *Janus* does not support reversing any aspect of this Court's prior decision. In the event this Court does decide that *Janus* requires revising its prior decision with respect to compelled membership in and dues to integrated bars, to avoid confusion and unjustified impact on state bar attorney regulatory bodies not implicated at all by

[7] Earlier, in the specific context of its holding that agency fees may not be taken at all from nonconsenting employees, the Court stated: "Neither an agency fee nor any other payment to the union may be deducted from a nonmember's wages, *nor may any other attempt be made to collect such a payment*, unless the employee affirmatively consents to pay." *Janus*, 138 S. Ct. at 2486 (emphasis added). This specific language cannot be applied, as Appellant attempts without basis to do, to bar the use of an opt-out option in the licensing fee context. If an "attempt to collect payment" includes the mere sending of a fee statement that provides the choice of paying or not, consent would be *impossible* to obtain, as requesting consent would itself be an "attempt made to collect such a payment." While *Janus* does not explain what constitutes an "attempt to collect" payment, it cannot include sending a fee statement with instructions on how to take or not take a *Keller* deduction.

Janus, it should expressly limit its revised decision to integrated bars, as that term is defined by *Keller*.

DATED: April 4, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because this brief is proportionally spaced, has a typeface of 14 points, and contains 4,828 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

Pursuant to 8th Cir. R. 28A(h), this brief has been scanned for viruses and is virus-free.

DATED: April 4, 2019

/s/ Brady R. Dewar
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Brief for Amicus Curiae The State Bar of California in Support of Appellees with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on April 4, 2019.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California this 4th day of April, 2019.

/s/ Joan Randolph
Joan Randolph

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April 05, 2019

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RE: 16-1564 Arnold Fleck v. Joe Wetch, et al

Dear Counsel:

The amicus curiae brief of the State Bar of California has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

MDS

Enclosure(s)

cc: Mr. Douglas Alan Bahr
Mr. Randall J. Bakke
Mr. John J. Bursch
Mr. Shawn A. Grinolds
Ms. Deborah J. La Fetra
Mr. James E. Nicolai
Mr. Jason M. Panzer
Ms. Lauren Ross
Mr. Matthew A Sagsveen
Mr. Timothy Sandefur
Mr. Bradley Neuman Wiederholt

District Court/Agency Case Number(s): 1:15-cv-00013-DLH