No. 16-1564

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD FLECK,

Plaintiff-Appellant,

v.

JOE WETCH, President of the
State Bar Association of North Dakota, et al.,

Defendants-Appellees.

On Remand from the United States Supreme Court

AMICI CURIAE BRIEF OF THE INTEGRATED STATE BARS OF ALASKA, ARIZONA, KENTUCKY, MICHIGAN, SOUTH DAKOTA, AND WYOMING IN SUPPORT OF APPELLEES AND AFFIRMANCE

John J. Bursch
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, Michigan 49316
Telephone: (616) 450-4235
Email: jbursch@burschlaw.com
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eighth Circuit Rule 26.1A, each amicus state bar association states that there is no publicly held corporation that holds 10% or more of its membership or ownership interests.

RULE 29(A)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the amici state bar associations certify that (a) no party's counsel authored the brief in whole or in part, (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (c) no person other than amici, their members, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

Dated: April 5, 2019

s/ John J. Bursch

John J. Bursch
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, Michigan 49316
Telephone: (616) 450-4235
Email: jbursch@burschlaw.com

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QUESTION PRESENTED

An integrated bar is a state governmental organization requiring membership and financial support of all attorneys admitted to practice in that jurisdiction. Most states have created integrated bars as an essential instrument to assist in regulating the legal profession, promoting lawyers' ethical obligations, developing the law, and administering justice. The question presented is:

Whether an integrated bar that does *not* purport to speak on behalf of its members' individual interests is subject to the same First Amendment restrictions that the Supreme Court recognized for compulsory-union agency fees in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a)—and with consent of all parties—amici curiae the integrated state bars of Alaska, Arizona, Kentucky, Michigan, South Dakota, and Wyoming file this brief in support of Defendants-Appellees The State Bar Association of North Dakota and Joe Wetch.

The U.S. Supreme Court remanded this case for reconsideration in light of *Janus*. Since *Janus* did not expressly overrule *Keller v. State Bar of California*, 496 U.S. 1 (1990)—leaving in place *Keller*'s conclusion that the integrated bar is not *per se* unconstitutional—the question is whether *Janus*'s reasoning concerning public-employee unions applies to the facts here.

But this Court's decision potentially affects many integrated state bars, and not all bars are created equal. Amici submit this brief to provide a fuller picture of the integrated bar in the United States. That picture demonstrates why *Keller* is still good law and why, at a bare minimum, this Court should not sweep into its ruling integrated state bars that do not purport to speak on behalf of their members' individual interests.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff argues that the Supreme Court's reasoning in *Janus* effectively overrules *Keller v. State Bar of California*, 496 U.S. 1 (1990), the most recent decision upholding the constitutionality of the integrated bar. Plaintiff's theory is that *Keller* relied in part on *Abood v. Detroit Federation of Teachers*, 431 U.S. 209 (1977), and *Janus* overruled *Abood*.

But *Keller* is not wholly a creature of *Abood*, and its holding that the integrated bar in California is constitutional is not dependent on *Abood*. What's more, *Keller* constructed critical guardrails on integrated bars' expressive activities: restricting the use of mandatory bar funds to activities reasonably related to regulating the legal profession and improving legal services. Integrated bars that follow those guardrails—like amici—are fundamentally different than public-employee unions.

Such bars, regardless of their substantial differences, are created by state governments to serve the public interest. They do not purport to speak for their members' individual interests, and their members have a full opportunity to participate in their integrated bar's speech and to speak in opposition to the bar's position, both in intra-bar

discussions and in public. No lawyer is prohibited from speaking against a position the bar takes.

In contrast, unions are private institutions created to advance the interests of their members. In the collective-bargaining context, unions not only can but must speak for their members. And their members have no opportunity to participate in that speech or to speak in opposition to it, since the union is the exclusive employee voice.

Due to the diverse practices of amici and other integrated state bars in the way they operate and serve the public, it would be a mistake to make any broad pronouncements about the validity of integrated bars in the United States after *Janus*. And even in the case of the State Bar Association of North Dakota, neither *Janus* nor the First Amendment requires the result for which Plaintiff advocates. The District Court should be affirmed.

ARGUMENT

Integrated bars do not purport to speak for their members' individual interests. Indeed, when integrated bars take public-policy positions, they are limited to positions that are reasonably related to the shared ethical obligations of all lawyers, roughly defined by *Keller* and refined by state courts and legislatures. Integrated bars speak to advance the shared ethical obligations of all lawyers, as officers of the court, to improve the quality of legal services and regulate the profession, not to advance the interests of members. This is in sharp contrast to unions, whose primary purpose is advocating better employment terms for members.

Also unlike unions, bar members are always free to speak. When members disagree with their bar's position, they may publicly advocate against it. Members of the bar can—and often do—advocate before state legislatures and supreme courts against any position developed by the integrated bar. And to the extent that members believe that the integrated bar has exceeded its authority in taking public positions, they may challenge that authority, too. A brief review of amici's public-policy practices illustrates these principles.

I. Any holding in this case should be narrow and limited to the State Bar of North Dakota.

A. Variation among integrated bars precludes a general determination regarding *Janus*'s impact here.

Keller's limitations on integrated bar activity have been internalized in the integrated-bar states in a variety of diverse ways. Many bars do so with bylaws and written policies. In other states, state supreme courts impose the limits. Some states, self-described as "*Keller*-pure," prohibit the use of member fees outside the subject matter *Keller* authorized, relying on prophylactic measures rather than the remedial accounting mechanisms that *Abood* required of unions. Others consider themselves "*Keller*-pure" but have adopted some features of *Abood*'s accounting mechanisms. Still others rely on those mechanisms to the exclusion of prophylactic measures. The variation among amici is illustrative:

1. Alaska

The State Bar of Alaska was created by statute in 1955. Under the Alaska Rules of Court, the bar has regulatory responsibility for all admissions and discipline functions, as well as licensing and compliance, and operates a client-protection fund and fee-dispute-resolution

program. It provides formal ethics guidance and is the primary source of CLE. Its public-policy activity is focused on improvements in the rules of professional conduct and court rules, and access to justice activity including lawyer referral, *pro bono*, coordination of legal-aid services, and equal-access initiatives.

For the past three decades, the Bar has not taken a political position or lobbied on any issue, except for its own sunset which comes before the Legislature periodically. The last sunset granted an eight-year extension to the Board of Governors.

The Alaska Bar Rules provide a procedure by which a Bar member may petition the Board of Governors or the annual convention of the Alaska Bar Association for consideration of the adoption, amendment, or repeal of a Bar rule, bylaw, or regulation. The Bar's bylaws provide for challenge and reimbursement of any expenditure of bar fees that is not considered "chargeable" within the meaning of *Keller*. No Bar member has filed a petition in the past three decades.

2. *Arizona*

The State Bar of Arizona was created by statute in 1933 and later reconstituted by Arizona Supreme Court Rule 32 as a corporate organization under the Arizona Supreme Court's direction and control. Pursuant to court rules, the Bar provides the investigative and prosecutorial functions for attorney discipline and unauthorized practice of law enforcement and oversees membership assistance programs, trust account training, the client protection fund, a conservatorship program, fee arbitration, and mandatory CLE compliance. *E.g.*, Ariz. Sup. Ct. R. 32, 45(h), 49, 66, 77.

The Bar's public policy activities include proposing and commenting on changes to court rules and advising the legislature on legislation concerning improvements in the law, the administration of justice, and professional regulation. The Arizona Supreme Court has supervisory authority over Bar activities. Ariz. Sup. Ct. R. 32(a)(2). To ensure transparency, the Bar's Board of Governors must take actions in public meetings. Ariz. Sup. Ct. Admin. Order 2017-34. Bar members and the public may speak at Governing Board meetings, and minutes are kept and published. *Id.*

Arizona is "*Keller*-pure." Arizona Supreme Court rules limit the Bar to only Keller activities. Even though the Bar is "*Keller*-pure," it gives members an opportunity to request a pro rata fee refund if they object to a Bar action. Ariz. Sup. Ct. R. 32(a)(2) (describing scope of Bar authority), (c)(8) (*Keller* compliance and reimbursement process).

3. Kentucky

The Kentucky Bar Association was created by statute in 1935 and incorporated in the state constitution in 1975 as an independent agency of the Supreme Court of Kentucky. The Kentucky Supreme Court regulates the Bar through rules. The Bar's purpose is to maintain member discipline, to ensure professional competence, and to promote the efficiency and improvement of the judiciary. Primary regulatory functions include attorney-licensing database management, disciplinary administrative support, all compliance administration functions, and *pro hac vice* admissions administration. The Bar also performs ancillary services, including a client-security fund, a lawyer and judge assistance program focused on mental health and substance dependency, ethics guidance, *pro bono* coordination, new lawyer mentoring, CLE (including free court-mandated programs, member-compliance tracking, and

provider accreditation), *pro bono* support, and unauthorized-practice-of-law regulation.

Member fees cannot be used for political or ideological activities that could reasonably be construed to impinge on the First Amendment rights of members who disagree. Objecting members are entitled to a pro-rata refund.

4. Michigan

The State Bar of Michigan was created by statute in 1935 as a public body corporate subject to the Michigan Supreme Court's control. Its primary regulatory activities include attorney-licensing-database management, character and fitness recommendations, administrative support for the discipline process, compliance administration functions, *pro hac vice* admissions administration, and unauthorized-practice-of-law investigation and prosecution. The Bar performs ancillary services, including a client-protection fund, the lawyers and judges assistance program focused on mental health and substance-abuse dependency, ethics guidance, *pro bono* activities coordination, attorney-succession assistance activities, lawyer referral, coordination of legal aid services, and equal access.

After *Keller*, the Michigan Supreme Court adopted an administrative order directing how the Bar develops and expresses policy positions, consistent with the "*Keller*-pure" approach. The current order governs the Bar's activities intended to influence legislation and to amicus briefs of the Bar and its sections. ADM File No. 2003-15 Administrative Order No. 2004-01 State Bar of Michigan Activities. The order authorizes the Bar to use fees to analyze pending legislation and provide content-neutral technical assistance to legislators under certain conditions. The Bar may also use fees for activities reasonably related to: (a) the regulation and discipline of attorneys; (b) the improvement of the functioning of the courts; (c) the availability of legal services to society; (d) the regulation of attorney trust accounts; and (e) the regulation of the legal profession, including the education, ethics, competency, and integrity of the profession. The Bar must notify members of these restrictions and provide advance notice of any activity undertaken. Any activity in support of or opposition to legislation must be approved by a two-thirds vote of the governing body. Dissent must be recorded.

A member who believes the Bar has violated these rules may file a written challenge and seek revocation of the offending position and reimbursement of the activity's cost. The challenger may also seek Michigan Supreme Court review, though since the administrative order's adoption, there has been only a single member challenge. Dissenting members have the right to express their opinions on all public-policy positions the Bar takes.

5. Wyoming

The Wyoming State Bar was created by the Wyoming Legislature in 1939 when it passed the Integrated Bar Act, directing the Wyoming Supreme Court to organize a bar association as an administrative agency of the court to enforce rules the court would promulgate. In 2016, the Wyoming Supreme Court approved amendments to the Bar's bylaws implementing a formal *Keller* policy. These bylaws prohibit the Bar from using member-licensing fees to fund activities of a political or ideological nature that are not reasonably related to certain "core functions," specifically (1) the regulation and discipline of attorneys; (2) matters relating to the improvement of the functioning of the justice system; (3) increasing the availability of legal services to the public; and

(4) the education, ethics, competence, integrity, and regulation of the legal profession.

The Bar's *Keller* policy provides an objection and pro-rata refund procedure. Since the policy was implemented in 2016, no Bar member has submitted an objection. The Bar considers itself "*Keller*-pure" and does not take any position on a legislative or public-policy matter that does not fit within the Bar's core functions.

* * *

Before *Keller*, many integrated bars were unclear about limitations on their expressive activity. Today, integrated bars undertake their public-policy work under a variety of limitations that distinguish them from unions, voluntary bars, and other professional associations, and such limitations protect members' free-speech rights. Given the broad variation among integrated bars in the scope of their expressive activity and the prophylactic measures they take to protect members' free-speech rights, any individual case would be a poor vehicle for imposing limitations on all integrated bars.

B. Determining what constitutes government speech is also highly fact-specific.

Determining whether an entity is the government and whether an entity's speech is government speech are highly fact-specific endeavors. Even in cases involving similar entities and speech, courts have declined to extend their holdings beyond the specific facts presented. *E.g., Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) (fact-specific analysis whether generic marketing campaign related to beef constituted government speech); *Delano Farms Co. v. California Table Grape Comm'n*, 586 F.3d 1219, 1228–29 (9th Cir. 2009) (same as applied to table grape marketing); *Paramount Land Co. v. California Pistachio Comm'n*, 491 F.3d 1003 (9th Cir. 2007) (pistachio marketing).

Likewise here, the substantial variation of amici's speech counsels strongly in favor of a narrow, limited ruling. The Court should eschew any broad rule that would impact integrated bars that did not participate as parties in this case as it was litigated in the District Court.

II. Integrated bars operate under restrictions that protect their members' free speech.

Regulation of the legal profession is not like regulation of other professions because lawyers play a governmental role as officers of the court. Doctors are not sworn in as public-health officers, nor are they ethically obligated to offer the state advice on how to carry out its public-health functions. Engineers and plumbers are not obligated to advise on the state's physical infrastructure. Lawyers alone have ethical obligations for an essential government function: the finding of truth in both civil and criminal matters. That difference underlies why many states integrate their bars, promoting objectives that cannot otherwise be achieved.

Most of an integrated bar's expressive activity is directed *within* state government—to the state supreme court or legislature. The ethical obligation of every lawyer to participate in the maintenance of and improvements in the rule of law is enshrined in every state's code of professional conduct. Integrated-bar states "have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring attorneys adhere to ethical practices." *Harris v. Quinn*, 134 S. Ct. 2618, 2643–44 (2014).

A key reason is the unique capacity of integration to increase lawyers' involvement in their ongoing ethical obligation to maintain and improve the profession's regulation, the quality of legal services, and the administration of justice. States that rely on voluntary bars run the risk of failing to capture the attention and voices of the profession's full spectrum, a risk that grows as voluntary-bar membership declines. *See, e.g.*, ABA Division of Bar Services, https://bit.ly/2V3pk9x.

Integrated bars assist lawyers in fulfilling their ethical obligation to improve the law through a variety of processes that enhance, rather than restrict, member speech. Assembling lawyer viewpoints from across the spectrum of practices, geography, and ideology, the integrated bar serves as a free-speech forum that produces valuable, broad-based input on legal-practice issues for state decisionmakers. Most integrated bars carry out systematic outreach to all lawyers to inform them of pending court rule changes and legislation affecting the practice of law, and they have developed sophisticated processes for gathering input, such as tools for members to easily post public comments, including dissent, online. Many integrated bars are subject to extensive transparency requirements.

In contrast, public employees are excluded from the bargaining table at which the public employee union is authorized exclusively to represent their interest. They may not express their dissent by themselves, and they cannot be represented by another agent of their choice. Bar members, however, are free to advocate within the bar and publicly. They may join other voluntary bars and special-interest groups that present views contrary to their bar's. The frequency of lawyers presenting contrary views before state supreme courts and legislatures is proof that the integrated bar does not speak for the institution nor for everyone licensed to practice in the state. And it is not uncommon that the dissenting lawyer has been made aware of the public-policy issue from the integrated bar's information efforts.

The rules and procedures that have evolved post-*Keller* have been effective in safeguarding members' free-speech rights. For example, pre-*Keller*, the State Bar of Michigan had been subject to ongoing litigation for years. But since the Michigan Supreme Court order providing explicit guidance on advocacy, the Bar has had only one member challenge since 1994 and no lawsuits.

III. Construing *Janus* to muzzle integrated state bars would impair state regulation of the legal profession.

The reliance interests of the 31 integrated bars are not identical. But in every case, they are more extensive and complex than that of public-employee unions. Over its many decades of existence, the U.S. integrated-bar model has been a critical component of the legal profession's regulation and the framework for the administration of justice in most states. The infrastructure of attorney regulation and compliance in almost every integrated-bar state resides, in whole or in part, within the bar. Disentangling them would be difficult and costly.

As noted in Section I.A., the activities involved in regulation of the legal profession are numerous and complex. Undoing the integration of the bar across the country would present logistical challenges and raise novel legal questions. Would the integrated bar become voluntary, or a more explicit state agency? How? Who would own the bar's assets, including intellectual-property rights? The process would shift the costs of services from the bar to the state, or worse, deprive the state of the benefit of the services altogether, degrading the quality of regulation and therefore the profession.

Such upheaval is unnecessary. Integrated bars have demonstrated since *Keller* that they can adapt their operations to protect the free-speech rights of their members consistent with their governmental mission.

IV. *Janus* did not overrule *Keller*.

It is inappropriate to assume that *Janus* silently overruled *Keller*. *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) ("[W]here a precedent . . . has direct application in a case, we should follow it, even if a later decision arguably undermines some of its reasoning."). It would also be wrong to do so.

A. The analogy of integrated bars to unions is inappropriate.

Notwithstanding wide variations among integrated bars, all such bars differ from unions in four, fundamental ways: origin and purpose, composition, who they serve, and how they function.

1. Different origins and purposes

States create integrated bars to carry out a public purpose: to regulate the legal profession and support the justice system. Labor unions are created by workers to advance the workers' own interests, no one else's.

2. *Composition*

An integrated state bar is comprised of all lawyers admitted to practice in a state, not public employees with varying duties. Lawyers automatically become members of their state's bar upon admission to practice, and lawyers are obligated in every state to pay a regulatory licensing fee. Integrated-bar memberships also provide opportunities for direct involvement in whatever governmental responsibilities the state has assigned to the bar.

Critically, lawyers are not state employees but officers of the court, sharing ethical obligations to promote advancements in the law and the administration of justice. It is a unique status and dual role the U.S. Supreme Court has recognized: while lawyers are "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Cohen v. Hurley*, 366 U. S. 117, 124 (1961). When the bar is integrated, it provides a critical platform for carrying out the ethical obligation to assist the court—as advocates for improvements in the law that benefit the state by enriching the public dialogue regarding the practice of law and legal-services quality.

3. *Who they serve*

Public-employee unions primarily serve public employees, and secondarily the government. Integrated bars are the exact opposite. They primarily serve the public, and secondarily bar members.

4. *How they function*

Public-employee unions perform one discrete activity in support of a governmental purpose: representing members at the bargaining table. In contrast, integrated bars carry out a spectrum of ongoing governmental activities; they serve as a conduit between the judicial branch and its officers of the court. Unlike public-employee unions, any material benefits the integrated bar provides to lawyers are only incidental to the bar's operations for the public's benefit.

The U.S. Supreme Court "free rider" cases focus on the concern that a state entity may cease to effectively perform that activity without compelled fees. In the context of integrated bars, the free-rider problem does not exist. Government has complete authority over the organization of the persons it chooses to license as officers of the court, the obligations it imposes on them, and the well-being—indeed the very

existence—of the integrated bar. If an integrated bar falls critically short of a state's expectations, it can reform or eliminate it.

In sum, the analogy of integrated bars to unions is poor. Public employees are inside the government but have their economic interests advanced by an external entity. Attorneys are overwhelmingly outside government but operate within the courts, and their common entity advances the public interest, not primarily that of bar members.

B. Integrated-bar speech is not private speech.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). That is why the Supreme Court's "compelled-subsidy cases have consistently respected the principle that '[c]ompelled support of a private association is fundamentally different from compelled support of government.'" *Johanns*, 544 U.S. at 559 (quoting *Abood,* 431 U.S. at 259 n.13). Yet, post-*Keller*, integrated bars go to great lengths to ensure they do not engage in private, member-based speech, but rather speak as a governmental entity, consistent with their formation and purpose.

One reason the *Keller* Court may have resisted the argument that the State Bar of California's speech was government speech is that the decisions under review had framed the distinction as an all-or-nothing proposition: if the speech was government speech, the bar's positions on matters extraneous to its existence (*e.g.*, saving the whales and nuclear disarmament) were insulated from challenge. The unanimous *Keller* Court was intent on two outcomes: giving states the option to maintain the integrated bar, and preventing extracurricular public-policy excursions. But *Keller*'s cabining of integrated-bar speech to the matters integral to the bar's public purpose has resulted in a very different integrated-bar environment today, one that looks far more like true government speech than the speech at issue in *Janus*.

Post-*Keller*, the Supreme Court has held that member-funded speech can constitute government speech if there are sufficient political safeguards in place. *E.g.*, *Johanns*, 544 U.S. at 560. The same can be true when the government creates entities, like integrated bars, that lack public membership but over which the government retains permanent authority. *E.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) (Amtrak).

There is no question that integrated bars, regardless of their broad variations in formation, regulation, and practice, carry far more indicia of governmental status than a quasi-public passenger rail service such as Amtrak, or a privately created livestock marketing association. All integrated state bars are directly subject to the control and command of their state supreme courts and, in some cases, the legislature. Indeed, most integrated bars perform services essential to their state's regulatory system, playing a role very unlike that of public-sector unions.

CONCLUSION AND REQUESTED RELIEF

The integrated bars that do not purport to speak on behalf of their members and have developed mechanisms to protect their free-speech rights should not be subject to the same First Amendment restrictions that the Supreme Court recognized for public-employee unions in *Janus*. The law does not demand upending the regulatory framework of any one integrated state bar, much less all of them, everywhere. This Court should decline Plaintiff's invitation to do so.

The District Court should be affirmed.

Dated: April 5, 2019

s/ John J. Bursch

John J. Bursch
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, Michigan 49316
Telephone: (616) 450-4235
Email: jbursch@burschlaw.com
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B) of 5,000 words, i.e., one-half of the 10,000 words the Court allocated to the parties for their supplemental briefs on remand. The foregoing brief contains 4,099 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The foregoing brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6). It has been prepared in Century Schoolbook 14-point proportional spaced typeface using Microsoft Office 365.

Dated: April 5, 2019

s/ John J. Bursch

John J. Bursch
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, Michigan 49316
Telephone: (616) 450-4235
Email: jbursch@burschlaw.com
Counsel for Amici Curiae

CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned certifies that he has filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief in non-scanned PDF format, and that the file has been scanned for viruses and it is virus-free.

Dated: April 5, 2019

s/ John J. Bursch

John J. Bursch
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, Michigan 49316
Telephone: (616) 450-4235
Email: jbursch@burschlaw.com
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

This certifies that on April 5, 2019, Amici Curiae's Brief was filed with the Clerk of the United States Court of Appeals for the Eight Circuit by using the CM/ECF system. The following participants in the case are registered CM/ECF users, and service of the brief will be accomplished by the CM/ECF system: Timothy Sandefur, Randall J. Bakke, Shawn A. Grinolds, Bradley Neurman Wiederholt, Douglas Alan Bahr, James E. Nicolai, Matthew A. Sagsveen, Jason M. Panzer, Lauren Ross, and Deborah J. La Fetra.

Dated: April 5, 2019

s/ John J. Bursch

John J. Bursch
Bursch Law PLLC
9339 Cherry Valley Ave. SE, #78
Caledonia, Michigan 49316
Telephone: (616) 450-4235
Email: jbursch@burschlaw.com
Counsel for Amici Curiae