No. 16-1564

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD FLECK,

Appellant,

v.

JOE WETCH, et al.,

Appellees,

SUPPLEMENTAL BRIEF OF APPELLEES JOE WETCH, PRESIDENT OF THE STATE BAR ASSOCIATION OF NORTH DAKOTA; AUBREY FIEBELKORN-ZUGER, SECRETARY AND TREASURER OF THE STATE BAR ASSOCIATION OF NORTH DAKOTA; AND TONY WEILER, EXECUTIVE DIRECTOR OF THE STATE BAR ASSOCIATION OF NORTH DAKOTA, IN THEIR OFFICIAL CAPACITIES

On Remand from the Supreme Court of the United States

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INTRODUCTION AND SUMMARY OF ARGUMENT

On December 3, 2018, the Supreme Court vacated this Court's judgment dismissing Appellant Arnold Fleck's claims, and remanded the matter for further consideration in light of the Supreme Court's decision in *Janus v. American Federal of State, County & Municipal Employees*, 138 S. Ct. 2448 (2018). As discussed below, the District Court's grant of summary judgment in favor of Defendants/Appellees, and dismissing Fleck's claims, should once again be affirmed.

As a preliminary matter, Fleck previously correctly conceded to the District Court and this Court that his challenge to the constitutionality of mandatory membership in, and funding of, State Bar Association of North Dakota (SBAND) is foreclosed by binding precedent in *Keller v. State Bar of California,* 496 U.S. 1 (1990) and *Lathrop v. Donahue,* 367 U.S. 820 (1961). *See* Doc. 43-1 at p. 3; Appellant's Opening Brief at i, fn.1. On remand, Fleck now argues for the first time his challenge to the constitutionality of mandatory membership in, and funding of SBAND is not actually foreclosed by *Keller* and *Lathrop*, which is not true. Fleck should be bound by his concessions and precluded from now arguing these claims are not foreclosed by *Keller* and *Lathrop* under the principles of judicial estoppel and waiver.

Janus did not overrule *Keller* or *Lathrop* which held that a State may require membership in an integrated bar as a condition of practicing law and may require payment of dues to such a bar for expenditures germane to the State's interests in regulating the legal profession and improving the quality of the legal services available to the citizens of the State. In *Janus*, the Supreme Court held states violate the First Amendment to the extent they allow public-sector unions to charge nonmembers for activities with which the nonmembers disagree - not at issue in the present case. The only reference to integrated bars in *Janus* was in Justice Kagan's dissent (joined by Justices Ginsburg, Breyer and Sotomayor), in which it was noted the Supreme Court's decision in *Janus* does not question compelled speech subsidies outside the labor sphere, citing *Keller*. In addition, the Supreme Court in *Harris v. Quinn*, 134 S. Ct. 2618, 2643-44 (2014) distinguished integrated bars from other forms of association as lawyers are subject to detailed ethics rules and the State's strong interest in regulating the legal profession and improving the quality of legal services. Compelled association and funding of these interests by lawyers is justified, the Court reasoned, in furtherance of this regulatory scheme. *Id.*

Even assuming, arguendo, Fleck's challenge to mandatory membership in, and funding of SBAND is not barred by estoppel or waiver, the constitutionality of integrated bars and compelled funding of expenditures germane to the State's

interests in regulating the practice of law and improving the quality of legal services available to the citizens of the State was established in *Lathrop* and *Keller* - cases directly on point to Fleck's claims. This Court is therefore bound by those decisions under *Agostini v. Felton*, 521 U.S. 203, 237 (1997) and *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018) and the District Court's dismissal of these claims must be affirmed.

In the alternative, even assuming mandatory membership in, and funding of, SBAND is subject to exacting scrutiny, which is denied, SBAND meets exacting scrutiny. Members of SBAND have the obligation to pay annual fees for expenditures germane to the State's compelling interests in regulating the legal profession and improving the quality of legal services available to the citizens of the State. These goals cannot be achieved through means "significantly" less restrictive than through mandatory membership in SBAND. North Dakota need not implement the "least" restrictive means to achieve its goals. The Supreme Court in *Lathrop* determined such limited compelled association does not violate the First Amendment. 367 U.S. at 827-28.

In addition, this Court's prior determination SBAND members affirmatively "opt-in" (i.e. consent) to payment of expenditures which are not germane to the State's interests in regulating the practice of law and improving the quality of legal services available to the State was consistent with *Janus*. SBAND members pay

their annual license fee themselves, if they "do not choose the Keller deduction, they 'opt-in' to subsidizing non-germane expenditures by the affirmative act of writing a check for the greater amount." *Fleck v. Wetch,* 868 F.3d 652, 656 (8th Cir. 2017) *vacated by* 139 S. Ct. 590 (2018) (mem.). By affirmatively consenting to payment of non-germane expenditures through member calculation and payment for non-germane expenditures, SBAND members waive their First Amendment rights in relation thereto. *See Janus*, 138 S. Ct. at 2486 (by agreeing to pay, a person waives their First Amendment rights in relation to such payment). As previously noted by this Court, "Fleck admits the revised license fee Statement adequately discloses a member's option not to fund non-germane expenditures, the issue resolved by the settlement and dismissal of his first claim." *Fleck v. Wetch*, 868 F.3d at 656. SBAND members clearly and affirmatively consent to payment for non-germane expenditures. No court has adopted Fleck's position that a member calculation of fees must involve an addition for non-germane expenditures, as opposed to a subtraction for non-germane expenditures as utilized by SBAND.

The District Court's dismissal of Fleck's claims should be affirmed.

ARGUMENT

I. FLECK CORRECTLY CONCEDED THAT *KELLER* AND *LATHROP* GOVERN THIS APPEAL, AND HE IS BOUND BY THAT CONCESSION

Fleck challenges the constitutionality of mandatory membership in SBAND and funding of SBAND as a condition to the practice of law in North Dakota under the First Amendment's guarantees of freedom of association and speech. As discussed below, Fleck previously conceded to both the District Court and this Court that *Keller* and *Lathrop* constitute binding precedent foreclosing such claims. Fleck should therefore be judicially estopped from now asserting, on remand, such claims are not foreclosed by *Keller* and *Lathrop*.

"The doctrine of judicial estoppel prevents a party who 'assumes a certain position in a legal proceeding, and succeeds in maintaining that position,' from later 'assum[ing] a contrary position.'" *Scudder v. Dolgencorp, LLC*, 900 F.3d 1000, 1006 (8th Cir. 2018) (alteration in original) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). "Three considerations 'typically inform the decision whether to apply the doctrine in a particular case:' 1) 'a party's later position must be clearly inconsistent with its earlier position,' 2) whether the party 'succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled,' and 3) 'whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" *Baouch v. Werner Enterprises, Inc.*, 908 F.3d 1107, 1113 (8th Cir. 2018) (quoting

New Hampshire v. Maine, 532 U.S. at 750-51 (quotations omitted)). Judicial estoppel applies in this case as Fleck's current position is exactly opposite of what he argued previously, both the District Court and this Court accepted Fleck's prior concessions, and Fleck's current change in position would result in an unfair detriment to SBAND.

In briefing to the District Court, Fleck argued, in relevant part, as follows:

> Alternatively, Plaintiff should not be required to surrender his First Amendment rights to practice law through conditioning the practice on mandatory membership in and support of SBAND. Coerced association is permissible only in the rare instances when a compelling government interest cannot be achieved through less restrictive means. . . .
>
> **However, Plaintiff acknowledges that his particular claim challenging the constitutionality of conditioning the practice of law upon SBAND membership and payment of SBAND dues is presently foreclosed by Keller, 496 U.S. 1 and Lathrop, 367 U.S. at 843.** Plaintiff presents this argument here so as to reserve the issue to present in the proper forum. **Accordingly, Plaintiff acknowledges that this Court must deny his motion for summary judgment as it relates to this claim.**

Doc. 43-1 at p. 3 (bold added). As stated by the District Court in dismissing Fleck's challenge to mandatory membership in SBAND and payment of SBAND fees:

> Although Fleck has conceded his third claim for relief is foreclosed by Supreme Court precedent, he asserts this long-standing precedent should be over-turned by the Supreme Court on a future appeal on the basis that Keller and Lathrop are irreconcilable with basic First Amendment principles and subsequent decisions and, in particular, the United States Supreme Court decision in Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277 (2012). **As Fleck has conceded his legal arguments are contrary to United States Supreme Court precedent directly on point, the Court will grant**

> **summary judgment in favor of the Defendants on the third claim for relief** [i.e. constitutionality of North Dakota's integrated bar and compulsory fees].

JA.371 (bold added).

Fleck also conceded as follows to this Court in his opening brief on the original appeal:

> Alternatively, Fleck contends that forcing him to join and fund SBAND in order to practice law is unconstitutional because regulating the practice of law can be achieved through means less restrictive of associational freedoms.
>
> ***
>
> **Fleck acknowledges that binding precedent forecloses this Court from granting relief on this alternative claim** and presents this issue here to preserve it for the proper forum. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990).

Appellant's Opening Brief at i, fn 1 (bold added). Recognizing Fleck's concession, this Court stated as follows:

> Second, Fleck alleged that an integrated bar violates his freedoms not to associate and to avoid subsidizing speech with which he disagrees. The district court dismissed this claim as barred by *Keller*. **Fleck concedes we are bound by *Keller*, so we need not further address this issue.**

868 F.3d at 653 (bold added).

As a result of Fleck's concession that his challenge to mandatory bar membership in, and funding of SBAND was foreclosed by *Keller* and *Lathrop*, it was not necessary for SBAND, the District Court, or this Court to analyze this issue further. Now, following a remand from the Supreme Court, Fleck

mischaracterizes the dismissal of these claims by falsely asserting the District Court and this Court "held" or "concluded" his claims were foreclosed by *Keller* and *Lathrop*, arguing as follows:

> In its previous decision, this Court concluded that this argument was foreclosed by *Keller v. State Bar*, 496 U.S. 1 (1990), ...
>
> ***
>
> In its previous decision, this Court held that the question of compulsory bar membership was settled by *Keller*, 496 U.S. 1.

Brief of Appellant at pp. 1, 3. In other words, Fleck is now arguing this Court and the District Court made an error of law in dismissing these claims, when in fact Fleck simply conceded such claims are foreclosed by *Keller* and *Lathrop*.

Fleck also changes his argument to now assert his claims are not foreclosed by *Keller* and *Lathrop* – the exact opposite of what Fleck argued previously. Fleck now argues for the first time "*Keller* never actually decided the constitutionality of mandatory bar association membership, and is therefore not directly controlling on this question . . . ." Brief of Appellant at p. 3. Fleck also now argues for the first time "*Lathrop* did not actually resolve the mandatory-membership question, either." *Id.* at p. 4. Fleck argues further in footnote 1 that because *Keller* and *Lathrop* are not controlling, this Court must conduct an *Agostini* analysis on remand:

> It is true, of course, that this Court is required to follow a Supreme Court precedent "which directly controls," even if that precedent appears to

> have been indirectly overruled. *Agostini v. Felton*, 521 U.S. 203, 207 (1997). **But because *Keller* does not directly control on the question of whether mandatory bar membership is constitutional under the First Amendment,** that rule does not apply here.

Id. at fn. 1 (bold added).

Fleck is trying to have it both ways. First, Fleck conceded the legal issue to speed his action along to the Supreme Court. Both this Court and the District Court accepted Fleck's concession, which shaped the course this action has taken. Fleck's prior concessions prevented SBAND from developing a record on the merits relevant to these claims, and prevented Fleck's current arguments from being analyzed prior to Fleck's appeal to the Supreme Court. Now, on remand, Fleck seeks to change his position for the first time and falsely argue the District Court and this Court erroneously applied the law. The Court should preclude Fleck from arguing his challenge to the constitutionality of mandatory membership in, and funding of SBAND are not foreclosed by *Keller* and *Lathrop* under the principles of judicial estoppel and waiver. *See Kramer v. Kemna*, 21 F.3d 305, 308 (8th Cir. 1994) ("Failure to give the district court a first opportunity to decid[e] the merits of an argument constitutes a waiver of that argument."). Any challenge to the constitutionality of mandatory membership in, and funding of SBAND must thus fail in this Court unless and until those vital precedents are overruled by the Supreme Court.

Beyond procedural estoppel and waiver, Fleck's concession that *Keller* and *Lathrop* control the outcome of this appeal is obviously correct. *Keller* and *Lathrop* are directly on point to Fleck's challenge to mandatory membership in, and funding of germane expenditures of, SBAND, and they remain good law.[1]

In *Lathrop v. Donohue*, the Supreme Court rejected the argument Wisconsin's integrated bar ran afoul of the First Amendment's guarantee of free association on the basis that (1) the only "compelled association" was the payment of dues, which was insufficient on its own to comprise a constitutional violation,

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[1] In accordance with *Agostini v. Felton*, 521 U.S. 203, 237 (1997) and *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), this Court must apply *Keller* and *Lathrop* and find SBAND's integrated bar and compelled funding of its germane expenditures to be constitutional, even if the Court doubts the correctness of *Keller* and *Lathrop*. As recently explained by this Court in *Bierman, Janus* cannot be read to have done more than it did:

> Recent holdings in *Janus v. AFSCME, Council 31*, [], 138 S. Ct. 2448, [] (2018), and *Harris v. Quinn*, [] 134 S. Ct. 2618, 189 L.Ed.2d 620 (2014), do not supersede *Knight*. Under those decisions, a State cannot compel public employees and homecare providers, respectively, to pay fees to a union of which they are not members, but the providers here do not challenge a mandatory fee. *Janus* did characterize a State's requirement that a union serve as an exclusive bargaining agent for its employees as "a significant impingement on associational freedoms that would not be tolerated in other contexts," 138 S. Ct. at 2478, but the decision never mentioned *Knight*, and the constitutionality of exclusive representation standing alone was not at issue. Of course, where a precedent like *Knight* has direct application in a case, we should follow it, even if a later decision arguably undermines some of its reasoning. *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997).

900 F.3d at 574.

and (2) the purpose of integrating the bar was to "promote high standards of practice and the economical and speedy enforcement of legal rights." 367 U.S. at 827-28. In *Lathrop*, the Supreme Court established a state may constitutionally require a lawyer to be a member of a mandatory or unified bar to which compulsory dues are paid. *Id.* at 842-43. The State may "constitutionally require the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." *Id.* at 843. In a concurring opinion, Justice Harlan stated the Court's precedent left no doubt that States "may constitutionally condition the right to practice law upon membership in an integrated bar association." *Id.* at 849 (Harlan, J., concurring in judgment).

The Supreme Court reaffirmed *Lathrop*, and determined California's integrated bar did not violate the right to free speech in *Keller*, stating "[w]e agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, ..." *Keller*, 496 U.S. at 4. "[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* at 13-14.

Under *Keller* and *Lathrop*, conditioning the practice of law upon compulsory bar membership and payment of reasonable annual dues for expenditures germane to the State's interest in regulating the practice of law and improving the quality of legal services available to the citizens of the State does not violate the First Amendment. As discussed in *Keller*, "it is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Keller*, 496 U.S. at 12. The Supreme Court in *Keller* separately analyzed whether adequate procedures were in place to afford attorneys who did not agree with the bar association's political or ideological speech to "opt-out" of paying for such speech. As discussed in Section IV below, Fleck has conceded SBAND's revised fee procedures comply with the requirements established in *Keller*.

II. *JANUS* DID NOT OVERRULE *KELLER* AND *LATHROP*

Neither *Keller* nor *Lathrop* were overruled by *Janus*. On the contrary, the Supreme Court's agency-fee precedents have explicitly reaffirmed *Keller* and *Lathrop* as good law.

The Supreme Court in *Janus* examined the constitutionality of the compelled taking of agency fees by a public sector union from nonmember paychecks to support the union's collective bargaining activities without the nonmember's

affirmative consent. *Janus* determined such practice violated the First Amendment because the asserted governmental interests in "labor peace" "eliminating free riders," and "bargaining with an adequately funded exclusive bargaining agent" were not sufficient to justify the First Amendment burden imposed by agency fee requirements, or, even if sufficient, those interests could be "achieved through means significantly less restrictive[.]" *Janus*, 138 S. Ct. at 2465-66, 2477 (internal quotation marks omitted). *Janus* overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which had reached the opposite conclusion regarding agency fees.

However, *Janus* neither expressly or impliedly overruled *Keller* or *Lathrop*. The Supreme Court's determination in *Janus* that the state's interests were not sufficient to justify "agency fees" in the public employee union context does not mean North Dakota's interests in regulating the legal profession and improving the quality of legal services are not sufficient to justify mandatory membership in, and funding of germane expenditures of, SBAND. The majority in *Janus* did not reference *Keller, Lathrop* or bar associations. The dissent in *Janus* expressly noted the *Janus* decision does not question the appropriateness of compelled speech subsidies as at issue in *Keller* and other cases outside the labor sphere. *Janus*, at 2498 (Kagan, J., dissenting). Although *Janus* overruled *Abood*, the Supreme Court in *Harris v. Quinn*, rejected an argument that *Keller* should be called into question.

The Supreme Court in *Harris* distinguished integrated bars from other forms of compelled association as "[l]icensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme[]" which served the State's strong interest in regulating the legal profession and improving the quality of legal services, and in allocating the expenses associated therewith to attorneys as opposed to the general public. 134 S. Ct. 2618, 2643-44 (2014). The integrated bar cases of *Keller* and *Lathrop* stand on their own solid footing, independent from compulsory labor union fee cases.

Lawyers in North Dakota are officers of the court. *State v. Carlson*, 258 N.W.2d 253, 258 (N.D. 1977). As such, they have a special role and responsibility in administering justice which supports the State's compelling interests in regulating their profession and improving the quality of their services. This fact alone materially distinguishes the State's compelling interest at issue in this case from those state interests examined in *Janus* and other public union labor cases.

The Supreme Court has repeatedly recognized states' interests in regulating lawyers. For example, in a case upholding Ohio's restrictions on attorney advertising, the Supreme Court noted:

> In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. *The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts.* . . While lawyers act in

> part as 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.

Ohralik v. Ohio State Bar Association, 436 U.S 447, 459-60 (1978) (italics added); *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."); *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to regulation of certain trades and callings, particularly those which closely concern public health.").

As with Wisconsin in *Lathrop* and California in *Keller*, the State of North Dakota has a compelling interest in requiring membership in, and funding of, SBAND to further its compelling interests in regulating the legal profession and improving the quality of legal services available to the citizens of the State. The North Dakota Supreme Court in *Menz v. Coyle* recognized that SBAND served the important interests of the State of North Dakota, in part, as follows:

> The law creating the North Dakota Bar Association had for its purpose the regulation of the practice of the law in this State, in order to protect the public by eliminating from the practice those persons who are unfit to assume this privilege and those persons lacking proper training and qualifications necessary to perform the services of an attorney in the best interests of the public. In other words, the purpose of the Legislature in creating the State Bar Association was to protect the public interests. The

> Act creating the State Bar Association is based on the premise that the practice of law is a matter of vital interest to the general public, and that lawyers are engaged in the preservation and the protection of the fundamental liberties and rights of the people and in the administration of justice. Thus attorneys are constantly engaged in carrying out fundamental aims and purposes of any good government, and are a necessary aid to any good government in protecting the rights of its citizens.

117 N.W.2d 290, 296-97 (N.D. 1962) (citation omitted). As noted by the North Dakota Supreme Court, the public's interest in maintaining an active bar association is without question.

Keller and *Lathrop* are directly on point to Fleck's challenge to mandatory membership in, and funding of, SBAND, and they remain good law. Therefore, this Court must apply *Keller* and *Lathrop* and affirm the District Court's determination that SBAND's integrated bar and compelled funding of its germane expenditures to be constitutional.

III. EVEN ASSUMING EXACTING SCRUTINY APPLIES IN THE CONTEXT OF INTEGRATED BAR ASSOCIATIONS, SBAND MEETS SUCH LEVEL OF SCRUTINY

Even if Fleck's attempt to apply a standard beyond that enunciated in *Keller* and *Lathrop* were not waived or judicially estopped, affirmance would be required because SBAND's mandatory membership satisfies exacting scrutiny.

Under an exacting level of scrutiny, "measures burdening the freedom of speech or association must not be significantly broader than necessary to serve" a state's compelling interest. *Knox v. Service Employees Intern. Union, Local 1000,*

567 U.S. 298, 313-14 (2012); *see also Janus*, 138 S. Ct. at 2465 ("Under 'exacting scrutiny', . . . a compelled subsidy must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." (citation omitted). As noted in *Lathrop*, the First Amendment right of association is not violated where the only condition upon mandatory membership in an integrated bar is the payment of reasonable annual dues. 367 U.S. at 843. As in *Lathrop*, the only "compelled association" upon members of SBAND is the payment of fees to fund expenditures germane to the State's compelling interests in regulating the legal profession and improving the quality of legal services available to the citizens of the State. Compelled association for such limited purpose does not violate the First Amendment.

Compulsory fees are not utilized by SBAND to fund ideological or political activities. All such expenditures are categorized by SBAND as "non-chargeable" and SBAND member's voluntarily consent to paying such expenditures, as discussed in Section IV below. SBAND has established procedures which govern member challenges to SBAND's categorization of expenditures. These procedures are explained to members pursuant to SBAND's Notice Concerning State Bar Dues Deduction and Mediation Process (JA.351-JA.352), provided to members with SBAND's Statement of Annual License Fees Due (JA.348). Fleck concedes the SBAND procedures which govern member challenges to the categorization of

expenditures as chargeable versus non-chargeable meet the constitutional requirements established under *Keller* and *Hudson*, *infra*. also discussed in Section IV below.

In addition, the vast majority of SBAND's activities are regulatory and/or educational and do not involve speech, including the following[2]:

- SBAND's regulatory functions relating to lawyer discipline (i.e. financial contributions to Disciplinary Board and Judicial Conduct Commission, administration of disciplinary Inquiry Committees to investigate complaints against lawyers, and operation of disciplinary diversion through Lawyer Assistance Program). *See, e.g.* N.D.C.C. ch. 27-14 (providing for SBAND involvement in lawyer discipline); N.D.C.C. ch. 27-23 (providing for SBAND involvement in Judicial Conduct Commission); N.D. R. Lawyer Discipl. 2.1, 2.2 and 2.4 (providing for SBAND involvement in The Disciplinary Board and Operations Committee).
- Continuing legal education accreditation and compliance administration. *See generally* N.D. Rules of Continuing Legal Education (providing for SBAND involvement in implementing and administering continuing legal education program).

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[2] In opposing SBAND's motion requesting leave to supplement the record on remand, Fleck conceded the Court may take judicial notice SBAND engages in the activities described above. *See* Appellant Arnold Fleck's Opposition to Appellee's Motion to Supplement Record and Extend Briefing Schedule at p. 3.

- Lawyer ethics including the issuance of ethics opinions and administration and funding of a Client Protection Fund ($16 from each annual license fee goes into the Client Protection Fund). *See* N.D. R. Lawyer Discipl. 1.2 ("A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of [SBAND] is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter."); N.D. R. Lawyer Discipl. 1.3 (providing as one form of discipline for attorney misconduct reimbursement of the client protection fund).
- Facilitation of access to justice programs such as the Lawyer Referral Program and Volunteer Lawyer Program (including Pro Bono and Reduced Fee program in coordination with Legal Services of North Dakota).
- SBAND's implementation of numerous committees.
- SBAND's involvement with numerous joint committees pursuant to Court Rule and/or State Statute. *See e.g.* N.D.C.C. ch. 27-15 (providing for SBAND involvement in Judicial Conference; N.D.C.C. ch. 27-25 (providing for SBAND involvement in Judicial Nominating Committee); N.D.C.C. ch. 27-05.2 (providing for SBAND involvement in Court Facilities Improvement Advisory Committee); N.D.C.C. ch. 27-15 (providing for SBAND involvement in Judicial Conference); N.D. R. Proc. R. 8 (providing

for SBAND involvement in Joint Procedure Committee, Judiciary Standards Committee, and Court Services Administration Committee); N.D. Sup. Ct. Admin. Order 21 (providing for SBAND involvement in Minority Justice Implementation Committee); N.D. Sup. Ct. Admin. R. 22 (providing for SBAND involvement on the North Dakota Administrative Council); Trial Court Policy 510 (providing for SBAND involvement on Committee for Caseflow Management).

- SBAND's role in monitoring the unauthorized practice of law in North Dakota.
- SBAND's role in providing counsel to the Office of Administrative Hearings. *See* N.D.C.C. § 54-57-08 (establishing a state advisory council comprised of a committee or subcommittee of SBAND, and appointed by the president of SBAND).
- SBAND's administration of a lawyer mentorship program.
- SBAND's support of numerous law-related public education programs.
- SBAND's facilitation of the integration of legal education and the legal profession in North Dakota.

These activities are content neutral and do not espouse positions on political or ideological matters. As further explained in Section IV below, compulsory fees paid by SBAND members are not utilized to fund political or ideological

expenditures, and compulsory fees should therefore not be subjected to First Amendment scrutiny. The allocation of these costs to members of the legal profession has also long been deemed justifiable and appropriate. *See Lathrop* at 842-43 (plurality opinion) ("We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity.").

Another significant distinction between *Janus* and the present case is the absence of any restriction on member speech. In *Janus*, the public sector union acted as exclusive bargaining agent, and the organization acted as the exclusive speaker on behalf of all affected employees in labor negotiations. SBAND does not do so. SBAND does not negotiate on behalf of its members and does not restrict the speech of its members. If SBAND takes a position on any political or ideological issue, it only does so on its own behalf – it does not purport to speak for the member attorneys themselves who are at all times free to express their own opinions.

Fleck argues an integrated bar is not necessary to achieve the State's interests, and points to other states which do not have integrated bars. However,

North Dakota is not required to implement the "least restrictive means" of achieving its compelling interests in regulating the legal profession and improving the quality of legal services available to its citizens. Instead, under an exacting level of scrutiny, the means utilized to achieve a compelling state interest "must not be *significantly broader* than necessary to serve that interest." *Knox,* 567 U.S. at 313-14 (emphasis added).

For example, in *Tabbaa v. Chertoff*, United States citizens searched at the national border by Bureau of Customs and Border Protection officials argued their associational freedoms were infringed as the government could have allegedly implemented less restrictive means of searching and questioning them upon their return from an Islamic conference. 509 F.3d 89, 105 (2d Cir. 2007). Specifically, the citizens argued the government could have implemented a graduated process of inspection whereby only individuals about whom the government had individualized suspicion of a terrorist link or other criminal activity would have been subject to fingerprinting and photographing. *Id.* at 104. In applying exacting scrutiny to the associational claims, the United States Court of Appeals for the Second Circuit determined the government had a compelling interest in preventing terrorism, and noted the First Amendment, "does not require the government to exhaust every possible means of furthering its interest; rather, the government must show only that its interest 'cannot be achieved through means *significantly less*

restrictive of associational freedoms.'" 509 F.3d 89, 105 (2d Cir. 2007) (emphasis in *Tabbaa*) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). The appellate court in *Tabbaa* concluded "[w]e do not believe the extra hassle of being fingerprinted and photographed – for the sole purpose of having their identities verified is a 'significant[]' additional burden that turns an otherwise constitutional policy into one that is unconstitutional." *Id.* Similarly, considering the only requirement upon members of SBAND is to pay a reasonable annual fee to be applied toward expenditures germane to the State's compelling interests in regulating the legal profession and improving the quality of legal services available to the citizens of North Dakota, it cannot genuinely be determined mandatory membership in SBAND constitutes a significant additional burden which transforms an otherwise constitutional policy into one that is unconstitutional. *See Lathrop*, 367 U.S. at 843 (where the only condition upon mandatory membership in an integrated bar is the payment of reasonable annual dues, the First Amendment right of association is not violated).

IV. SBAND'S PROCEDURE FOR COLLECTION OF FUNDS FOR PAYMENT OF NON-GERMANE EXPENDITURES IS CONSTITUTIONAL

For the same reason Fleck's challenge to the constitutionality of SBAND's integrated bar is foreclosed by United States Supreme Court precedent, Fleck's challenge to SBAND's procedure for collection of funds for non-germane

expenditures is also foreclosed by Supreme Court precedent. Specifically, the Supreme Court held in the context of an integrated bar in *Keller* that the procedures established under *Chicago Teachers Union, Local No. 1, v. Hudson*, 475 U.S. 272 (1986) satisfied constitutional requirements. *See Keller*, 496 U.S. at 16 ("We believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*.") (footnote added). Fleck concedes SBAND's new procedure complies with the minimum requirements of *Hudson/Keller* safeguards.[3] *See* Doc. 43 at p. 10 ("Although Defendants have revised SBAND's procedures to meet the minimum requirements of the *Hudson/Keller* safeguards . . . ."); JA.369 ("Fleck concedes SBAND's newly adopted procedures are in compliance with the minimum safeguards established under Keller and Hudson, and that such new procedures resolve the first claim for relief in this case.") As a result, Fleck's challenge to SBAND's procedure is also foreclosed and this Court must affirm the District Court's dismissal of such claim. *See Agostini*, 521 U.S. at 237 ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the

[3] The *Hudson/Keller* safeguards that integrated bar associations must provide are: (a) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-chargeable activities, verified by an independent auditor; (b) a reasonably prompt decision by an impartial decision maker if a member objects to the way his or her mandatory dues are being spent; and (c) an escrow for the amounts reasonably in dispute while such objections are pending. *Keller*, 496 U.S. at 14; *Hudson*, 475 U.S. at 310.

[lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (citation omitted).

Fleck argues the calculation of fees must involve an addition for non-germane expenditures, as opposed to a subtraction for non-germane expenditures as utilized by SBAND. This argument fails for several reasons.

First, this Court previously determined that SBAND members affirmatively "opt-in" to payment of non-germane expenditures by calculating the amount they pay, and by voluntarily submitting payment for such expenditures. *Fleck*, 868 F.3d at 656. As a result, Fleck's "opt-in" versus "opt-out" argument is a non-issue relative to SBAND's fee procedures. *Janus* did not even discuss "opt-in" versus "opt-out", much less determine that an "opt-in" procedure was required, and is inapposite on that issue.

Second, consistent with *Janus*, by affirmatively consenting to payment of non-germane expenditures through member calculation and payment for non-germane expenditures, SBAND members waive their First Amendment rights in relation thereto. *See Janus*, 138 S. Ct. at 2486 (by agreeing to pay, a person waives their First Amendment rights in relation to such payment).

Third, no court has adopted Fleck's position that affirmative consent requires an "addition" rather than a "subtraction" calculation. Under either approach, a person calculates and ultimately voluntarily pays the funds at issue.

Fourth, under *Keller*, which remains binding precedent, an integrated bar's procedures for collection of funds for non-germane expenditures is constitutional if the minimum safeguards established in *Hudson* are met. Fleck has conceded SBAND's new procedures comply with *Keller/Hudson*.

Fifth, as this Court previously noted in its judgment, "Fleck admits the revised Statement of License Fees Due (JA.348)) adequately discloses a member's option not to fund non-germane expenditures, the issue resolved by the settlement and dismissal of his first claim." *Fleck*, 868 F.3d at 656. Fleck's current argument SBAND's form of collection is allegedly "not [] *clear*, because the *Keller*-deductible amount could easily be missed by a hasty reader" is therefore foreclosed. Brief of Appellant at p. 11 (italics in original). In addition, the *Keller* deduction is prominently featured on the revised Statement of License Fees Due as the last line item in the fees calculation performed by the members themselves, as follows:

> OPTIONAL: Keller deduction relating to nonchargeable activities. Members wanting to take this deduction may deduct $10.07 if paying $380; $8.99 if paying $350; and $7.90 if paying $325. (See Insert).

JA.348. The referenced insert is SBAND's Notice Concerning State Bar Dues Deduction and Mediation Process ("Keller Deduction Notice") (JA.351-JA.352) which explains the distinction between chargeable versus non-chargeable expenditures, how the *Keller* deduction amount was calculated, and the process by

which members may challenge such determinations by SBAND. SBAND also provides its members with the SBAND Keller Policy (JA.354-JA.355), which also provides information on the Keller deduction and how challenges thereto will be governed. Both the Keller Deduction Notice and SBAND Keller Policy advise members that SBAND may not use the compulsory fees of any member who objects for activities that are not germane under *Keller*. SBAND also categorizes all expenditures for ideological or political activities as non-chargeable. *See* JA.352 at Detailed Calculation of the Dues Deduction (categorizing expenses for political or ideological activities as non-chargeable).

Sixth, SBAND's members are all judges or attorneys – highly educated individuals specifically trained in the interpretation and application of the law. Considering the prominence of the Keller Deduction on the Statement of License Fees Due, and the information provided in the Keller Deduction Notice and SBAND Keller Policy, Fleck's argument that any consent to payment for non-chargeable (i.e. non-germane) expenditures is not knowing, voluntary and intelligent is without merit. SBAND members clearly and affirmatively consent to payment for non-germane (i.e. non-chargeable) expenditures.

Further, as previously recognized by this Court, the voluntary payment of funds by SBAND members is also materially distinguishable from the withholding of agency fees from paychecks in the labor context. *Fleck*, 868 F.3d at 656. In the

public-sector union context, such as in *Janus*, agency fees are automatically deducted from employee wages with no form of employee consent required. *See, e.g. Janus*, 138 S. Ct. at 2486. The Supreme Court in *Janus* concluded such a procedure violates the First Amendment "unless the employee affirmatively consents to pay." *Id.* SBAND's procedures provide members the choice of whether to pay money to SBAND for non-germane expenditures in the first instance. Money is freely given to SBAND by its members for non-germane expenditures - not withheld from paychecks.

Dismissal of Fleck's challenge to the procedures utilized by SBAND in collecting funds for non-germane expenditures was appropriate and should be affirmed.

CONCLUSION

For the foregoing reasons, SBAND Appellees request the District Court's grant of summary judgment in favor of SBAND Appellees, and dismissing Appellant Fleck's claims, be in all things affirmed.

Dated this 29th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 6,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in Time New Roman 14 pt. This brief has been filed electronically, pursuant to Circuit Rule 28A(h), in non-scanned PDF format, and the file has been scanned for viruses and it is virus-free.

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Dated: March 29, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2019, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

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