No. 16-1564

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD FLECK,

Appellant,

v.

JOE WETCH, et al.,

Appellee,

BRIEF OF APPELLANT

On remand from the Supreme Court of the United States

TIMOTHY SANDEFUR
JACOB HUEBERT
Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), requires reversal of the district court decision and judgment for Appellant, Arnold Fleck, on two grounds.

First, *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. In its previous decision, this Court concluded that this argument was foreclosed by *Keller v. State Bar*, 496 U.S. 1 (1990), but *Janus* shows that is not the case: just as there was no legitimate basis for compelling union membership in *Janus*, so there is no legitimate basis for compelling bar association membership here. Specifically, *Janus* made clear that the constitutionality of compulsory membership requirements must be determined by asking whether the state's legitimate interests in regulating the legal profession can be "achieved through means significantly less restrictive of associational freedoms," 138 S. Ct. at 2465 (citation omitted). In other words, *Keller*'s apparent acceptance of compulsory bar membership was based on a body of precedent that *Janus* has now definitively repudiated.

Second, *Janus* shows that the "opt-out" mechanism SBAND uses to collect its annual dues is unconstitutional. Under *Janus*, SBAND may not "attempt … to collect" a "payment" to fund its political and ideological activity without (1) clear, (2) affirmative, and (3) prior, consent by Fleck. *Janus*, 138 S. Ct. at 2486.

In its previous ruling, this Court held that SBAND's mechanism was really an "opt-in" mechanism in substance, because "North Dakota attorneys pay the annual license fee themselves," rather than having the amount directly deducted from their paychecks as in the union cases. *Fleck v. Wetch*, 868 F.3d 652, 656 (8th Cir. 2017). The Court concluded that although Fleck is presumed to acquiesce in SBAND's annual dues demand, he still opted in by "not choos[ing] the *Keller* deduction," and by making the "affirmative act of writing a check for the greater amount." *Id.* at 656–57. *Janus*, however, makes clear that sort of "opt-in" rule does not obtain the clear, affirmative, prior consent that the First Amendment requires. Because failing to make a *Keller* deduction is not an active step, it cannot satisfy the rigorous scrutiny that applies to "waiv[ers] [of] … First Amendment rights." *Janus*, 136 S.Ct. at 2486. Therefore, SBAND's billing practices must fail the applicable scrutiny.

ARGUMENT

This Court should declare SBAND's mandatory bar membership and its billing practices to be unconstitutional for the same reasons that the Supreme Court declared mandatory public-sector union fees to be unconstitutional in *Janus*. Just as the government cannot force its employees to pay union fees to attain its interest in "labor peace," *see Janus*, 138 S. Ct. at 2466, so it cannot force lawyers to join and pay dues to a bar association to serve its interest in regulating the legal profession and improving the quality of legal services. In both cases, the government can—and therefore must—serve its legitimate interests in ways

that are significantly less restrictive of the First Amendment rights of attorneys—specifically, their rights to choose which groups they will and won't associate with and what political and ideological speech they will and won't pay for.

And just as the state may not constitutionally make "any … attempt … to collect … a payment" from employees to support a public-sector union "unless the employee affirmatively consents to pay," *id.* at 2486, so SBAND may not attempt to collect dues from attorneys without (1) clear, (2) affirmative, and (3) prior consent. *Id.*

I. Mandatory state bar association membership violates the First Amendment freedoms of speech and association.

In *Janus*, the Court made unambiguously clear that "[t]he right to eschew association for expressive purposes" is "protected" by the First Amendment. *Id.* at 2463. 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. (*See* Appellant's Opening Br. at 9-11.) *Janus* shows that this infringement cannot survive the exacting scrutiny the First Amendment requires.

In its previous decision, this Court held that the question of compulsory bar membership was settled by *Keller*, 496 U.S. 1. But *Janus* indicates why that is not the case, or cannot be any longer.

Keller never actually decided the constitutionality of mandatory bar association membership, and is therefore not directly controlling on this

question.[1] Rather, *Keller* assumed, without deciding, that compulsory membership requirements are valid, and cited *Lathrop v. Donohue*, 367 U.S. 820 (1961), for that proposition. *Keller*, 496 U.S. at 7-9. *Keller* then went on to decide a narrower question: whether an attorney's "free speech rights were violated by the [state] Bar's use of his mandatory dues to support objectionable political activities," a question it answered in the affirmative. *Id.* at 9.

But *Lathrop* did not actually resolve the mandatory-membership question, either. It was a plurality decision so confusing in its wording that Justice Black remarked, "I do not believe that either the bench, the bar or the litigants will know what has been decided in this case—certainly I do not." *Id.* at 865 (Black, J., dissenting); *see also id.* at 848 (Harlan & Frankfurter, JJ., concurring) (complaining of the decision's "disquieting Constitutional uncertainty.") And the plurality said it was addressing "only … a question of compelled financial support of group activities, not with involuntary membership in any other aspect," *id.* at 828—meaning that *Lathrop*, too, failed to resolve the question presented in this case, and is also not directly controlling. Instead, the plurality simply *assumed* it was constitutional to force lawyers to join a bar association, *see id.* at 843, just as *Keller* did three decades later.

[1] 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.

To support its assumption that mandatory membership was constitutional, *Lathrop* cited another case that *also* did not actually decide the constitutionality of mandatory bar association membership: *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). *See Lathrop*, 367 U.S. at 842–43. *Hanson* involved, not mandatory bar association membership, but mandatory union membership. *Hanson*, 351 U.S. at 227. And *Hanson*'s sole reference to mandatory bar association membership was *also* non-binding, because it was dicta. The Court said, without analysis or discussion, that mandatory union membership for railway workers was "no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." *Id.* at 238. This was not *ratio decidendi* for the holding.

The bottom line is this: the question of whether lawyers may constitutionally be forced to join a bar association has never been resolved by a decision of the U.S. Supreme Court. Rather, it was assumed in a case (*Keller*) on the basis of a plurality opinion in a case that also assumed it (*Lathrop*) on the basis of non-binding dicta in a case that decided a different issue (*Hanson*).

What's more, *Hanson* has been abrogated. *See Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1194 (7th Cir. 1984) (describing *Hanson* as "no longer authoritative."), *aff'd* 475 U.S. 292 (1986). In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Court explained why *Hanson* had been superseded—because it had "disposed of the critical question in a single,

unsupported sentence that its author essentially abandoned a few years later." *Id.* at 2632. This last was a reference to the fact that "in his *Lathrop* dissent, Justice Douglas, the author of *Hanson*, came to the conclusion that the First Amendment *did not permit* compulsory membership in an integrated bar." *Id*. at 2629. The *Harris* Court also criticized *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—the case *Janus* finally overruled—for "treating *Hanson* ... as having all but decided the constitutionality of compulsory payments to a public-sector union." *Harris*, 134 S. Ct. at 2632; *see also Janus*, 138 S. Ct. at 2479-80 (describing *Abood*'s reliance on *Hanson* as "unwarranted"). Of course, *Lathrop* treated *Hanson* the same way—and so, in turn, did *Keller*, which has therefore been abrogated on this point, also.

In addition to its unwarranted reliance on *Hanson*'s dicta, *Lathrop* has another problem: it failed to apply the scrutiny that the Supreme Court's First Amendment jurisprudence requires. The *Lathrop* plurality said that, because legislators "might reasonably believe" that "the bulk of State Bar activities serve the function … of elevating the educational and ethical standards of the Bar," the state could "require that the costs of improving the profession in this fashion" be imposed on lawyers in the form of mandatory bar fees. 367 U.S. at 843. But *Janus* specifically holds that mere reasonableness is an "inappropriate" standard for deciding this question. *Id.* at 138 S.Ct. at 2480. It is *not* enough that legislators might "reasonably believe" that compelling association and speech might serve some legitimate purpose. *Janus* called the "reasonableness" standard

that the *Lathrop* plurality used "foreign to our free-speech jurisprudence." *Id*. at 2465

Janus made clear that courts must apply "exacting scrutiny"—or possibly even strict scrutiny—to the question of whether the state's decision to force an attorney to join the state bar association violates the First Amendment freedom of association. *Id.* at 2465. Under exacting scrutiny, any restriction on freedom of association "must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id.* (citation omitted).

North Dakota's mandatory bar membership cannot survive exacting scrutiny because the state can achieve any goals related to its legitimate purpose—"regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13—by "means significantly less restrictive of associational freedoms," *Janus*, 138 S. Ct. 2465, than mandatory membership.

On this point, *Janus*'s details are instructive. In that case, the government argued that compelling public-sector workers to subsidize a union with mandatory fees was necessary to serve the state's interest in maintaining "labor peace." *See id.* at 2465-66. The "labor peace" theory held that compelling public-sector workers to subsidize a union with agency fees was necessary because of the union's designation as workers' sole bargaining representative. Without compulsory agency fees, the theory went, the union would not be able to act as the sole bargaining representative, and the result would be "pandemonium"

caused by conflicts between different unions. *Id.* at 2465. *Janus* found that assumption to be "simply not true," *id.*, because, in fact, several federal entities and several states designate public sector unions as exclusive representatives but do not compel nonmembers to pay agency fees, and no such "pandemonium" has resulted. Consequently, the Court found that "it is now undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees"—and those fees could not survive exacting scrutiny. *Id.* at 2466.

North Dakota's mandatory bar fails exacting scrutiny for the same reason: the state can achieve its goals for the legal profession without mandating bar membership or dues. It is obvious as a *theoretical* matter how the state could regulate attorneys' professional conduct without compelling membership: by acting as a regulator, penalizing those who break the rules, and providing educational services to ensure that practitioners know the rules, which is what the state already does for countless other trades.

And it is undisputed that as a *factual* matter some 19 states and Puerto Rico already do regulate the practice of law without requiring membership in a state bar association. *See* Appellants' Opening Br. at 18 n.4. As explained in previous briefing, this includes states with such large populations of lawyers as Massachusetts, New York, and New Jersey—as well as states with some of the

smallest bars, such as Vermont and Delaware.[2] *See id.* at 18-19 (citing Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with Hudson and Keller*, 1 Tex. Tech J. Tex. Admin. L. 23, 24 n.1 (2000)).[3] Thus the state's argument that it must force people to join because of "issues of scale," Br. of Wetch Appellees at 10, is "simply not true," *Janus*, 138 S. Ct. at 2465. And because it is not true, North Dakota's mandatory bar membership fails exacting First Amendment scrutiny, just like mandatory union fees did in *Janus*.

II. SBAND's opt-out funding rule violates the First Amendment.

Janus also makes clear that, regardless of whether mandatory membership and fees inherently violate First Amendment rights, SBAND violates an attorney's First Amendment rights when it attempts to collect payments for "non-germane" expenditures—i.e., expenditures of funds on political or ideological speech and other activities not related to "regulating the legal profession and improving the quality of legal services," *Keller*, 496 U.S. at 13—without the attorney's clear, affirmative, and prior consent.

---

[2] There are 2,978 lawyers in Delaware and 2,227 in Vermont. American Bar Association, *National Lawyer Population Survey 2018*, https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_by_State_2018.pdf.

[3] In 2013, Nebraska eliminated its mandatory membership requirement, noting that such requirements "present issues under the First Amendment … because members are required to join the group," which "'implicate[s] the First Amendment freedom of association, which includes the freedom to choose not to associate.'" *In re Pet. for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013) (quoting *Kingstad v. State Bar*, 622 F.3d 708, 712-13 (7th Cir. 2010)).

Janus reiterated that forcing a person to subsidize speech with which he disagrees violates the First Amendment, 138 S. Ct. at 2464, and 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. This, the Court said, was not sufficient. *Id*. at 2486. Instead, the government may only give an employee's money to a union in the first place if the employee has *affirmatively consented* to subsidizing the union's speech *before* the deduction is attempted. *Id.*

And *Janus* made clear that its decision was *not* confined to a situation in which money is directly deducted from a worker's paycheck, but also applied to "*any*" effort to obtain a payment from workers to subsidize a public-sector union's activities: "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." *Id.* (emphasis added).

Thus, *Janus* requires at least three elements to exist in order for the type of consent that it contemplates to be valid: "employees," the Court held, must "[1] clearly and [2] affirmatively consent [3] before any money is taken from them." *Id.*

SBAND's collection of money from attorneys for non-germane activities violates the First Amendment, just as the union fees in *Janus* did, because SBAND does not obtain attorneys' consent to pay in a manner that is (1) clear,

(2) affirmative, and (3) prior to the collecting of funds, as *Janus* requires. Instead, SBAND sends attorneys a bill that prominently lists the *total* amount of dues—with the nonchargeable expenses included. In other words, SBAND presumes that the attorney is willing to pay those expenses, unless the attorney takes an affirmative step of *deducting* the nonchargeable expenses from the presumptive total.

This form of collection is not (1) *clear*, because the *Keller*-deductible amount could easily be missed by a hasty reader. The type of consent contemplated by *Janus* amounts to a waiver of First Amendment rights. 138 S. Ct. at 2486 ("By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed."). But a waiver of First Amendment rights must be knowing, voluntary, and intelligent. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 145 (1967). This requires "'clear and compelling' evidence," *Janus*, 138 S. Ct. at 2486, "that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver," *Erie Telecomm., Inc. v. City of Erie, Pa.*, 853 F.2d 1084, 1096 (3d Cir. 1988). Yet the form SBAND sends to attorneys—which already includes the non-chargeable amount included in the presumptive total, and states in unobtrusive text that the attorney may make a "*Keller* deduction," with no reference to First Amendment rights, let alone clear waiver language—plainly fails this test. (JA.348.) *Cf. Fuentes v. Shevin*, 407 U.S. 67, 94–96 (1972) (written form that failed to elicit express and knowing consent did not satisfy the

knowing and voluntary requirement). Next to its "*Keller* deduction" line, SBAND's form says "See Insert," but that insert likewise fails to explain that *Keller* protects an attorney's First Amendment right not to fund a bar association's political or ideological speech, or that declining to make the "*Keller* deduction" waives the attorney's First Amendment rights. (JA 351-52.) SBAND's procedure therefore fails to obtain the "clear" consent required by *Janus*.

SBAND's collection of fees for non-chargeable activities is also not (2) *affirmative*, because, again, SBAND fails to obtain conscious, positive assent and instead presumes acquiescence unless the recipient of the bill consciously objects. In other words, the required affirmative act here is to *object*. Agreement is presumed in the absence of an affirmative act by the recipient of the bill. This is *passive*, not affirmative, consent, and it may not be consent at all. SBAND's system is such that error, oversight, confusion, or mere acquiescence would result in subsidization of SBAND's nonchargeable expenses. That's particularly likely given that SBAND designs its bill to *include* the *Keller*-deductible amount in the presumptive total that attorneys are instructed to pay—but *other* "optional" payments are *not* included in that presumptive total. As a result, a member can opt out of *some* amounts by *not adding* them to the presumptive total, but for other optional amounts—amounts that involve activity the member has a constitutional interest in—the member must take the affirmative step of *subtracting* them from the presumptive total in order to opt out. This could easily

confuse even attorneys, or—one might imagine—legal assistants tasked with renewing bar memberships for all the attorneys in an office, who may not grasp the significance of the different mathematics problems that SBAND requires attorneys to solve. *Janus*'s "affirmative" consent requirement forbids a billing process whereby a person could waive First Amendment rights by mere oversight or inaction.

Finally, SBAND's billing practice does not obtain constitutionally valid consent (3) *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 and thereby opt out. *Janus* carefully specifies that clear and affirmative consent is required *before* the government may make "any … attempt" to collect agency fees, 138 S. Ct. at 2486—and, by way of analogy, before it may make any attempt to obtain bar dues that subsidize SBAND's political activities—regardless of whether those collections take the form of direct withholding in a paycheck or a bill sent to the recipient which the recipient must pay. SBAND does not attempt to comply with this requirement.

Thus, the putative "consent" that SBAND obtains from its compulsory members is not the "freely given" or "clear[] and affirmative[] consent" that *Janus* requires "before any money is taken"—whether it be taken through direct "deduct[ion] from … wages" or in "any other" manner. 138 S. Ct. at 2486. This Court's previous conclusion—that SBAND's billing practice was really an "opt-in" system because the recipient of SBAND's annual dues bill must choose to

subtract the amount that would go to nonchargeable expenses, and then write out a check for the final total and send it to SBAND, *Fleck*, 868 F.3d at 656–57—is therefore no longer tenable. Such a procedure does not meet the standard for consent required by *Janus* because it is not clear, affirmative, and prior.

This conclusion is consistent with common sense: the definition of an opt-in rule is that it presumes, as a default, that the person *does not* consent unless the person indicates that he does. But SBAND's billing practices do not do that. It sends Fleck and other lawyers a bill with the nonchargeable expenses *included*—i.e., presumed—and Fleck must then take the affirmative step of "choos[ing] the *Keller* deduction" and "writ[ing] a check for the lower amount." *Fleck*, 868 F.3d at 656. If he fails to take that affirmative step, then the default remains in place—and he is forced to pay for the nonchargeable expenses. Thus SBAND's rule forces lawyers to affirmatively opt out, and cannot be deemed an opt-in rule. It improperly "presume[s] acquiescence in the loss of fundamental rights.'" *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) (citation omitted). SBAND's billing practices are impermissibly designed to exploit "the advantage of … inertia," *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), in a manner that maximizes the "risk that the fees … will be used to further political and ideological ends with which they do not agree." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 312 (2012).

One District Court put the point well when it described opt-out requirements as "analogous to a governmental pronouncement that a citizen who

fails to cast a ballot on election day will be considered to have voted for a previously designated 'default' candidate. The law does not permit such an imposition of an unconstitutional default." *Lutz v. Int'l Ass'n of Machinists & Aerospace Workers*, 121 F. Supp. 2d 498, 507 (E.D. Va. 2000). We do not presume a vote is cast when a voter submits a blank ballot, and SBAND may not presume that Fleck supports its non-chargeable expenditures if he fails to "choose the *Keller* deduction." *Fleck*, 868 F.3d at 656. SBAND's billing practice fails the *Janus* test for affirmative consent, because it fails to obtain clear, affirmative, and prior consent before attempting to collect money from attorneys.

CONCLUSION

Janus requires reversal of the District Court's order and entry of judgment in Fleck's favor.

Respectfully submitted,

/s/ Timothy Sandefur

Timothy Sandefur
Jacob Huebert
Goldwater Institute
Scharf-Norton Center for Constitutional Litigation
500 East Coronado Road
Phoenix, AZ 85004
(602) 462-5000
Facsimile: (602) 256-7045
litigation@goldwaterinstitute.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system as follows:

Randall J. Bakke
Shawn A. Grinolds
122 East Broadway Avenue
P.O. Box 460
Bismark, ND 58502-0460
rbakke@smithbakke.com
sgrinolds@smithbakke.com

Douglas A. Bahr
James E. Nicolai
ND Office of Attorney General
500 N. 9th St.
Bismarck, ND 58501-4509
dbahr@nd.gov
jnicolai@nd.gov

/s/ *Timothy Sandefur*
Timothy Sandefur

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(C) and this Court's January 11, 2019 Order, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. THE BRIEF CONTAINS 3,745 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. THE BRIEF 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 Times New Roman 14 pt.

3. Pursuant to 8th Cir. R. 28(h)(2), the electronically filed brief has been scanned for viruses and is virus free.

Dated: February 15, 2019

_/s/ *Timothy Sandefur*
Timothy Sandefur
Attorneys for Appellant