No. 16-1564

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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ARNOLD FLECK,

Appellant,

v.

JOE WETCH, et al.,

Appellee,

---

# APPELLANT'S REPLY BRIEF

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On appeal from the U.S. District Court for the District of North Dakota

JAMES MANLEY
JARED BLANCHARD
Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

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## SUMMARY OF THE ARGUMENT

All parties agree that Defendants Joe Wetch, Aubrey Fiebelkorn-Zuger, and Tony Weiler ("SBAND Defendants") must provide Plaintiff Fleck with safeguards that are carefully tailored to protect his rights because compelled membership in and funding of the State Bar of North Dakota ("SBAND") necessarily burdens Fleck's First Amendment rights. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990); *Knox v. Service Emps. Int'l Union*, 132 S. Ct. 2277, 2290–93 (2012). The entire disagreement about these safeguards comes down to a single proposition: should SBAND be able to take without asking? Or should it have to ask first?

SBAND Defendants argue that they should be allowed to assume that Fleck *wants* to fund all of SBAND's activities, even those non-germane activities with which he disagrees and is not required by law to fund. By their lights, if Fleck objects to paying more than is required, the burden is on him to opt out by checking a box each and every year to renew his objection and then subtracting that extra amount from the money he has to send to SBAND (via Defendant Penny Miller) to maintain his law license.

Fleck argues that SBAND should not be allowed to assume he wants to pay more than required, or to fund speech with which he disagrees. Rather, the burden should be on SBAND to ask attorneys to fund non-germane activities; Fleck should be able to affirmatively consent to paying additional dues by checking a box on his bar dues form if he is willing to fund SBAND activities

beyond those he is required by law to fund. The opt-out procedure that SBAND prefers creates a presumption of acquiescence in the loss fundamental rights, *Knox*, 132 S. Ct. at 2290, and "shift[s] the advantage of . . . inertia," *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), away from members' First Amendment rights and onto SBAND, which has "no constitutional entitlement to the fees" it compels from members. *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007). Opt-out is therefore not carefully tailored to protect First Amendment rights as required by *Keller*, 496 U.S. at 14, and; *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

SBAND Defendants provide no justification or rationale for why Fleck should be forced year in and year out to voice his unwillingness to fund SBAND's non-germane activities. They argue that *Keller*, by condoning *Hudson* safeguards for mandatory bars, settled the issue of opt-in versus opt-out in their favor. But this ignores the Supreme Court's first considered look at the issue of opt-in procedures in *Knox*. The *Knox* Court did not overrule *Hudson* but, in applying *Hudson*'s requirement of careful tailoring for mandatory dues procedures, found that the opt-out requirement at issue in that case violated the First Amendment. For this Court to strike down SBAND's opt-out procedure would also not contradict *Hudson* or *Keller*. Rather, it would ensure that SBAND's safeguards are carefully tailored to limit the infringement of Fleck's First Amendment rights, which is just what *Hudson* and *Keller* require. *Hudson*, 475 U.S. at 303; *Keller*, 496 U.S. at 16.

As to the issue of whether Fleck should be required to surrender his First Amendment rights to practice law in North Dakota in the first place, for now, it is foreclosed by *Keller* and *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961), and this Court must affirm the lower court's judgment on this claim. The only compelling interest found to justify compelling bar membership is regulating the practice of law. Compulsion is unnecessary to achieve that interest. Eighteen states today effectively regulate the practice of law without such compulsion. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 286 Neb. 1018, 1022 (2013). Fleck presents this argument here to preserve it for the proper forum.

## ARGUMENT

### I. REQUIRING AFFIRMATIVE CONSENT IS CONSISTENT WITH *HUDSON* AND *KELLER*

Fleck is not asking this Court to overturn *Hudson* or *Keller*. Rather, his affirmative consent claim is merely seeking what *Hudson* and *Keller* require: safeguards carefully tailored to minimize the infringement on First Amendment rights caused by compelled association. *Hudson*, 475 U.S. at 303; *Keller*, 496 U.S. at 16. *Hudson* and *Keller* approved certain minimum safeguards, but when squarely confronted with the question of opt-in, the Supreme Court required affirmative consent for certain non-chargeable expenditures in *Knox*, 132 S. Ct. at 2290–93. Without the addition of affirmative consent, SBAND's procedures are not carefully tailored to protect Fleck's First Amendment rights and are

therefore below the baseline necessary to permit SBAND to enjoy the "remarkable boon" of receiving compelled dues. *Id*. at 2290.

**a. *Knox* has direct application and rejected opt-out procedures**

*Knox* is the Supreme Court's most recent elaboration of what *Hudson* means by "carefully tailored." While SBAND Defendants characterize the Supreme Court's recent per curiam decision in *Friedrichs* as "reject[ing] the assertion an 'opt-in' procedure is constitutionally required", SBAND Resp. at 21, the decision did nothing of the sort. *Friedrichs* was "affirmed by an equally divided Court." *Friedrichs v. California Teachers Assoc.*, 136 S. Ct. 1083 (2016) (per curiam). It is well established that "an affirmance by an equally divided Court [is not] entitled to precedential weight." *Neil v. Biggers*, 409 U.S. 188, 192 (1972). "The legal effect would be the same if the appeal, or writ of error, were dismissed." *Durant v. Essex Co.*, 74 U.S. 107, 112 (1868). Accordingly, the only result from *Friedrichs* is that *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), remains good law and *Mitchell v. Los Angeles Unified Sch. Dist.*, 963 F.2d 258 (9th Cir. 1992), a case never relied upon or adopted by this Court, continues to apply in the Ninth Circuit.

Beyond their misplaced reliance on *Friedrichs*, SBAND Defendants attempt to avoid *Knox* by arguing that Fleck is not entitled to decide whether or not to fund SBAND's activities because opt-in safeguards would overrule the validation of opt-out procedures that the Supreme Court condoned earlier in *Hudson* and *Keller*. SBAND Resp. at 19. But in *Knox*, the Court observed that

*Hudson* and *Keller* never actually considered whether opt-out procedures satisfy the First Amendment. Instead, those cases "assumed without any focused analysis that the dicta from [*International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961)] had authorized the opt-out requirement as a constitutional matter." *Knox*, 132 S. Ct. at 2290.

Prior to *Knox*, the Supreme Court had simply not addressed the fact that opt-out procedures create a presumption of acquiescence in the loss of fundamental rights, which "represents something of an anomaly" in the law of the First Amendment. *Id.* Typically, courts "do not presume acquiescence in the loss of fundamental rights." *Id*. (quoting *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999)) (internal quotation marks omitted). Yet the opt-out rule inherently "put[s] the burden on the nonmember," thereby "creat[ing] a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Id*. *Knox* noted that this conflict was previously overlooked due to "historical accident" rather than "careful application of First Amendment principles." *Id*.

Still, in requiring opt-in procedures in *Knox*, the Supreme Court did not overturn *Hudson*, but merely applied *Hudson*'s requirement of careful tailoring to the issue of opt-in versus opt-out for the first time. Nor would this Court overturn *Hudson* or *Keller* by patching the same opt-out hole in SBAND's procedures. Rather, this Court would ensure that SBAND's safeguards are

carefully tailored to limit the infringement of members' First Amendment rights as expressly required by *Hudson* and *Keller*. *Hudson*, 475 U.S. at 303; *Keller*, 496 U.S. at 16. As such, SBAND Defendants' reliance on *Agostini v. Felton*, 521 U.S. 203, 237 (1997), is misplaced. *Knox* has "direct application," *id*., to opt-out, and that case rejects it definitively in favor of opt-in.

SBAND Defendants also attempt to distinguish *Knox* on the basis that its ruling was limited to the facts of the case. But the factual differences between this case and *Knox* actually point to an even *greater* injury to SBAND members' associational rights than was suffered by the public sector employees in *Knox*. Public sector employees can at least choose not to be members of the union they are forced to fund. Fleck is given no similar choice: he is *required* to join as a condition of practicing law. Thus *Knox* provides significant authority for the proposition that an opt-out procedure does not adequately safeguard the constitutional rights of those *compelled* to fund a *mandatory* association. The Court found that forcing public employees to opt out of subsidizing non-chargeable activities "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." 132 S. Ct. at 2290. That risk is greater here, given that Fleck is not even free to refuse to join the association.

Whether in the context of a special assessment or mandatory bar dues, it is axiomatic that "measures burdening the freedom of speech or association must serve a compelling interest and must not be significantly broader than

necessary to serve that interest." *Id.* at 2291. Just like the union in *Knox*, Defendants do not and cannot identify a state interest—let alone a compelling one—in "shift[ing] the advantage of . . . inertia," *Katzenbach*, 383 U.S. at 328, away from members who wish to exercise their First Amendment rights, and onto SBAND, which has "no constitutional entitlement to the fees" it compels from members. *Davenport*, 551 U.S. at 185.

**b. SBAND's procedures are not carefully tailored to protect Fleck's First Amendment rights**

Fleck and SBAND's continued disagreement over shared parenting illustrates the problem with opt-out and how it impermissibly shifts the burden on Fleck. Although Measure 6—the ballot measure Fleck supported and SBAND spent nearly $50,000 in mandatory dues opposing—failed at the polls in 2014, SBAND continues to spend member dues on the subject. Opening Br. at 12, fn. 2. If an identical shared-parenting measure were to appear on the North Dakota ballot in a future election, under SBAND's current opt-out procedure, Fleck would still be presumed to want to fund the opposition to the ballot measure unless he opts out. If for any reason he fails to timely opt out, Fleck will have automatically forfeited his First Amendment right not to fund non-germane expenditures and his money will support legislative goals he is on record staunchly opposing.

An opt-out system places the burden on the wrong party and leads to the unjust and needless encroachment upon First Amendment rights that the

*Hudson*/*Keller* safeguards are supposed to prevent. There is no compelling government interest that can justify the inherent First Amendment burden of collecting compelled dues for non-germane expenditures; only funds given voluntarily are constitutionally permitted to fund such expenditures. Therefore, only affirmative consent creates a sufficient barrier between compelled dues and voluntary funds. Just like the union procedures at issue in *Knox*, SBAND's opt-out procedure is not the carefully tailored safeguards *Hudson* and *Keller* require. SBAND Defendants cannot escape *Knox*'s bottom line: presuming acquiescence wrongly presumes against fundamental rights. SBAND must afford its compelled membership "carefully tailored" safeguards for their free speech rights. *Keller*, 496 U.S. at 14; *Hudson*, 475 U.S. at 310. After *Knox*, that tailoring must include an opt-in requirement. 132 S. Ct. at 2295.

Unable to demonstrate a compelling interest or justification for forcing SBAND members to bear the burden of opting out of non-chargeable activities or distinguish *Knox*, SBAND Defendants can only point out that no court has yet applied *Knox* to a mandatory bar's opt-out procedures. SBAND Resp. at 21. Yet SBAND Defendants also fail to point to any challenge to a mandatory bar's opt-out procedures that has been rejected. SBAND Defendants try to do so by highlighting the district court decision in *Eugster v. Washington State Bar Ass'n*, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015). SBAND Resp. at 21–22. However, the plaintiff in *Eugster* did not challenge the Washington State Bar Association's lack of opt-in procedures, nor did the District Court address

opt-in versus opt-out or *Knox* in its opinion. *Eugster*, 2015 WL 5175722. Moreover, Mr. Eugster has appealed the District Court's decision to the Ninth Circuit and his opening brief contains no challenge to the Washington State Bar Association's lack of opt-in procedures. Brief of Appellant, *Eugster v. Washington State Bar Ass'n*, No. 15-35743 (9th Cir. Sept. 21, 2015). *Eugster* simply has no bearing on Fleck's affirmative consent claim.

And while SBAND Defendants are correct that the Nebraska Supreme Court chose to modify its court rules to limit the use of compelled bar membership dues only for direct regulation of the practice, SBAND Resp. at 21-22, that court acknowledged that it was encouraged to make those changes because *Knox* "cast doubt on the constitutional validity of opt-out systems for dissenting members," just as Fleck argues. *In re Petition*, 286 Neb. at 1031.

Finally, SBAND's assertion that no mandatory bar has yet adopted an opt-in procedure misses the mark. SBAND Resp. at 21. It is unsurprising that mandatory bar associations have not jumped to modify their procedures; as Fleck noted in his Opening Brief, many have still failed to comply with *Keller* at all. Opening Br. at 19–20. Among other failings previously addressed, Fleck again notes here that, 25 years after *Keller*, many mandatory bars *admit* that they still lack constitutionally obligatory safeguards.[1] The continued failure of

[1] American Bar Association, Unified Bar Association Fact Sheet, http://www.americanbar.org/content/dam/aba/uncategorized/barservices/resourcepages/unifiedbars_factsheet.authcheckdam.pdf (last accessed June 14, 2016).

mandatory bar associations to implement any of *Keller*'s minimum safeguards should not inure to SBAND's benefit.

Ultimately, SBAND's opt-out rule punches a hole in its safeguards that prevents those safeguards from being "carefully tailored to minimize the infringement of free speech rights," as *Keller* and *Hudson* require. *Knox*, 132 S. Ct. at 2291. The Supreme Court made clear in *Knox* that only patching that hole with *affirmative consent* will create a sufficient barrier between compelled dues and voluntary funds to satisfy the careful tailoring requirement of *Keller* and *Hudson*. *Id.* at 2295-96. It is this Court's duty to apply *Knox*, reverse the judgment of the District Court, and order SBAND to provide its members with the opportunity to affirmatively consent to non-germane expenditures. [2]

## II. MANDATORY BAR MEMBERSHIP IS UNNECESSARY TO REGULATE THE PRACTICE OF LAW

[2]Appellee-Defendant Miller takes no position on Fleck's affirmative consent claim and asserts that only Fleck's second stated issue applies to her. Miller's Response at 2-3. This is incorrect. As Secretary-Treasurer of the State Board of Law Examiners, she is charged with collecting mandatory dues from SBAND members and disbursing those dues to SBAND as proscribed by statute. N.D.C.C. §§ 27-11-22, 27-11-23, 27-12-04; Compl. (Doc. 1) ¶ 14; Miller Answer (Doc. 21) ¶ 8. In order for Fleck to obtain the relief he seeks, Defendant Miller must necessarily be enjoined from her ministerial collection and disbursal of mandatory bar dues pursuant to her statutory obligations. Accordingly, Defendant Miller possesses the requisite nexus to Fleck's injuries under both of his claims under appeal. *See Kitchen v. Herbert*, 755 F.3d 1193, 1201–02 (10th Cir. 2014) *cert. denied*, 135 S. Ct. 265 (2014) (Salt Lake County Clerk's ministerial denial of plaintiffs' marriage licenses pursuant to Utah's ban on gay marriage made Clerk a proper party to sue because "these plaintiffs' injuries were caused by the Clerk's office and would be cured by an injunction prohibiting the enforcement of [the gay marriage ban]. Accordingly, the Salt Lake County Clerk possessed the requisite nexus to plaintiffs' injuries.").

Fleck acknowledges that binding precedent forecloses this Court from holding compelled membership and funding of SBAND unconstitutional. *See Keller*, 496 U.S. 1; *Lathrop*, 367 U.S. 820, 843 (1961). However, he provides a brief rebuttal to Defendants' arguments against ending compulsory bar membership in order to preserve this claim for the proper forum.

SBAND Defendants and Miller are correct that the Supreme Court recognized in *Lathrop* and *Keller* that a state may mandate bar membership as a condition of practicing law. SBAND's Response at 6-7; Miller's Response at 3–4. However, this makes *Lathrop* and *Keller* irreconcilable with basic First Amendment principles and subsequent decisions. *See, e.g.*, *Knox*, 132 S. Ct. at 2291 ("[O]ur prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate."); *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014).

Compulsory bar membership cannot be tolerated because it "does not serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms" as the First Amendment requires. *Id.* at 2639 (internal citations omitted). The sole compelling state interest found to justify compulsory bar membership is improving the practice of law through the regulation of attorneys. *Keller*, 496 U.S. at 14; *Lathrop*, 367 U.S. at 843. Yet 18 states—Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont—have

already found ways of regulating attorneys without compelling membership at all. *See In re Petition*, 286 Neb. at 1022. SBAND Defendants and Miller have not and cannot overcome this overwhelming demonstration that conditioning the practice of law on mandatory bar membership is unnecessary and unconstitutional.

*Keller* authorizes mandatory bar associations to compel funds from members only for activities related to the compelling government interest in improving the practice of law through the regulation of attorneys. *Keller*, 496 U.S. at 14; *Lathrop*, 367 U.S. at 843. SBAND Defendants attempt to stretch *Keller* beyond this limit to allow SBAND to use mandatory dues for two broad purposes: (1) the regulation of attorneys, and (2) improving the quality of legal services. SBAND Resp. at 10–11. But severing "improving the quality of legal services" from the regulation of attorneys would make it unclear what activities are and are not chargeable. Fortunately, the Supreme Court has resolved this confusion.

Compelled expenditures must be limited to regulation of attorneys because *Keller* rejected the view that attorneys could be forced to fund expenditures related to "all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." *Keller*, 496 U.S. at 15. Instead, *Keller* hewed to *Lathrop*'s limit on compelled expenses: "elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the

State." *Lathrop*, 367 U.S. at 843; *see Keller* 496 U.S. at 14 (quoting *Lathrop*). The Supreme Court again reiterated in *Harris* that *Keller* held bar members "could not be required to pay the portion of bar dues used for political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members." 134 S. Ct. at 2643 (*citing Keller*, 496 U.S. at 14)); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 414 (2001) ("The central holding in *Keller*, moreover, was that the objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association."). The Supreme Court has consistently made clear that *Keller* authorized mandatory bars to compel dues for one narrow purpose: regulating attorneys to ensure they adhere to ethical practices.

SBAND Defendants state that "[t]he important interests of the State of North Dakota served by SBAND," are limited to "'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.'" SBAND Resp. at 9 (*quoting Menz v. Coyle*, 117 N.W.2d 290, 296-97 (N.D. 1962)). These can be accomplished by more carefully tailored means.

SBAND Defendants argue that North Dakota attorneys cannot be

regulated except by forcing them against their will to join and fund SBAND because of economies of scale. SBAND Resp. at 10. SBAND Defendants look at Fleck's example of New York as a voluntary bar state and assert without argument or rationale that New York can afford to protect the First Amendment rights of attorneys because of its large number of attorneys and its large economy. *Id*. But they ignore that states large and small thrive with voluntary bar associations; Fleck also pointed out that the state with the smallest GDP in the country, Vermont, also does not precondition the practice of law on mandatory bar membership.[3] Opening Br. at 18–19. Indeed, Vermont has a vastly smaller economy than North Dakota, but roughly the same number of licensed attorneys.[4] Yet it manages to regulate its attorneys without violating their First Amendment rights.

As these examples demonstrate, economies of scale differ from state to state, but the viability of a voluntary bar does not. While these shifts of scale

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[3] The State of Vermont has a GDP of $29,750,000. U.S. Department of Commerce Bureau of Economic Analysis, Gross Domestic Product by State, http://www.bea.gov/iTable/drilldown.cfm?reqid=70&stepnum=11&AreaTypeKeyGdp=5&GeoFipsGdp=XX&ClassKeyGdp=NAICS&ComponentKey=200&IndustryKey=1&YearGdp=2015Q2&YearGdpBegin=-1&YearGdpEnd=-1&UnitOfMeasureKeyGdp=Levels&RankKeyGdp=1&Drill=1&nRange=5 (last accessed June 14, 2016). North Dakota's approaches twice that: $53,686,000. *Id*.

[4] There are approximately 2,200 attorneys licensed to practice in Vermont. American Bar Association, *Lawyer Population by State*, http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2015.authcheckdam.pdf (last accessed June 14, 2016). There are approximately 2,700 attorneys licensed to practice in North Dakota. Miller's Answer (Doc. 21) at ¶ 17.

may necessitate differing attorney licensing fees to cover regulatory costs, they do not necessitate mandatory membership in, and funding of, a bar association. That is why 18 states—large, small, and in-between—do not condition the practice of law on bar membership. SBAND Defendants fail to meet their burden of establishing that North Dakota's interest in regulating the practice of law cannot be achieved through means significantly less restrictive of associational freedoms than compulsory membership and subsidization.[5]

With less restrictive means plainly available, there is no longer any excuse for North Dakota to continue violating attorneys' First Amendment

[5] SBAND Defendants also argue that their ability to force attorneys to fund activities that do not directly involve speech, or are otherwise content neutral, does not implicate Fleck's First Amendment rights. SBAND Resp. at 11 ("Annual dues are utilized by SBAND for many purposes, most of which have nothing to do with speech."). *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291 (1st Cir. 2000), demonstrates that SBAND's assertion is completely meritless because it rejected the same "nothing to do with speech" argument SBAND Defendants raise. The First Circuit held that the First Amendment prevented attorneys from being compelled to fund decidedly non-speech expenditures for life insurance. The First Circuit recognized what SBAND Defendants ignore: compelled membership burdens First Amendment rights even if the group does not speak. "The very act of the state compelling an employee or an attorney to belong to or pay fees to a . . . bar association implicates that person's First Amendment right not to associate." *Id*. at 301. "Compelling financial support for activities wholly unrelated to [significant] public interests . . . *weakens the justification* that supported the intrusion on First Amendment associational interests in the first place." *Id.* While *Lathrop* holds that a person may be compelled to associate and pay the bar association for certain purposes, that "does not mean she may be compelled to associate and financially contribute for all purposes." *Id*. (citations and footnotes omitted). Likewise, SBAND cannot simultaneously argue that it has sufficient interests to override Fleck's First Amendment rights—and that it may also override those rights when it is pursuing *different* interests. *All* SBAND activities funded with mandatory dues implicate Fleck's First Amendment rights.

rights. Mandating membership in SBAND "cross[es] the limit of what the First Amendment can tolerate." *Knox*, 132 S. Ct. at 2291.

Fleck should prevail at the Supreme Court on the merits of this claim; however, given the decisions in *Keller* and *Lathrop*, the lower court's dismissal of this claim must be affirmed.

## CONCLUSION

The decision below should be reversed as to Fleck's affirmative consent claim because *Knox* requires opt-in for non-germane expenditures, but affirmed in all other respects.

Respectfully submitted,

/s/ *Jared Blanchard*
James Manley
Jared Blanchard
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 14th day of June, 2016, 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
Solicitor General
Office of Attorney General
500 N. 9th St.
Bismarck, ND 58501-4509
dbahr@nd.gov

/s/ *Jared Blanchard*
James Manley
Jared Blanchard

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. THE BRIEF CONTAINS 4,040 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 2013 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: June 14, 2016

_/s/ *Jared Blanchard*_____
James Manley
Jared Blanchard
*Attorneys for Plaintiff*