No. 16-1564

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD FLECK,

Appellant,

v.

JOE WETCH, et al.,

Appellee,

APPELLANT'S OPENING BRIEF

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

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is a First and Fourteenth Amendment challenge to the requirement that North Dakota attorneys join and fund the State Bar of North Dakota ("SBAND") in order to practice law, and to SBAND's abuse of the boon of coerced membership by failing to seek affirmative member consent for expenditures not germane to its regulatory purpose. Arnold Fleck supported a state ballot measure in the November 2014 election only to find that SBAND was using dues compelled from him and others to fund the opposition. Though the measure was not germane to SBAND's core purpose, SBAND gave nearly $50,000 in member dues to a committee opposing the measure and did not provide Fleck with adequate notice, recourse, or an opportunity to consent. Due to this litigation, SBAND now affords members notice and recourse. But its procedures remain unconstitutional because members are still given no opportunity to affirmatively consent to funding expenditures unrelated to regulating the practice of law.

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 freedom.[1]

Fleck respectfully requests 15 minutes of oral argument time per side.

[1] 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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Arnold Fleck brought this civil rights action in the United States District Court for the Eastern District of North Dakota pursuant to 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202 to vindicate rights guaranteed by the First and Fourteenth Amendments. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2201, 1331, and 1343(a)(3) and (4). After the parties settled some of Fleck's claims in his favor, the parties moved for summary judgment. The District Court granted summary judgment against Fleck on January 28, 2016. Fleck timely filed his notice of appeal on February 29, 2016. This Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES – APPOSITE CASES

1. Whether the State Bar of North Dakota's failure to seek members' affirmative consent for non-germane expenditures violates the First and Fourteenth Amendments.

- *Knox v. Service Emps. Int'l Union*, 132 S. Ct. 2277 (2012)
- *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)
- *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986)

2. Whether conditioning the practice of law upon membership in and funding of the State Bar of North Dakota violates the First and Fourteenth Amendments.

- *Harris v. Quinn*, 134 S. Ct. 2618 (2014)

- *Knox v. Service Emps. Int'l Union*, 132 S. Ct. 2277 (2012)
- *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)
- *Lathrop v. Donohue*, 367 U.S. 820 (1961)

STATEMENT OF THE CASE

A. The State Bar Association of North Dakota

The State Bar Association of North Dakota is a mandatory bar association. N.D. Cent. Code §§ 27-11-22, 27-12-02. That means North Dakota compels attorneys to become members and pay association dues as a condition of practicing law in that jurisdiction. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 170-71 (Neb. 2013); ADD.2. It is unlawful for a person to practice law in North Dakota without being a member of SBAND and subsidizing its speech. N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-02. Pursuant to N.D. Cent. Code § 27-12-04, SBAND must receive $75 out of each member's mandatory dues for the operation of the lawyer discipline system and receive 80 percent of the remaining amount of the mandatory dues paid by SBAND members for the purpose of administering and operating the association.

Defendant-Appellee Miller, as Secretary-Treasurer of the State Board of Law Examiners, is charged with collecting mandatory dues from SBAND members and disbursing those dues to SBAND as proscribed by statute. N.D. Cent. Code §§ 27-11-22, 27-11-23, 27-12-04; JA.5 ¶ 14; JA.54 ¶ 8. Defendant-Appellees Wetch, Fiebelkorn-Zuger, and Weiler, as SBAND officers, enforce

laws requiring membership in and funding of SBAND as a prerequisite to practicing law in North Dakota. N.D. Cent. Code §§ 27-11-24, 27-12-02, 27-12-04; *see also* N.D. R. LWYR. DISC. Rule 2.4; *Thiel v. State Bar of Wis.*, 94 F.3d 399, 401-03 (7th Cir. 1996) *overruled on other grounds by Kingstad v. State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010) (State Bar of Wisconsin officials were appropriate parties to sue for constitutional injuries pursuant to *Ex Parte Young*, 209 U.S. 123, 159–60 (1908)).

SBAND engages in non-germane activities, JA.341-55; ADD.3, that is, activities not related to regulating the practice of law. *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986). SBAND conducts a variety of activities that include lobbying on bills pending before the North Dakota Legislature. ADD.3. For instance, SBAND spent $30,000 in compelled member dues opposing North Dakota Initiated Statutory Measure 3, a 2006 shared-parenting ballot measure. *Id.*; JA.62-63 ¶¶ 22-23. SBAND's activities are largely funded by mandatory member dues. JA.216.

B. Arnold Fleck and Measure 6

Arnold Fleck is a licensed North Dakota attorney. JA.3 ¶ 10. In addition to maintaining his law license, he is compelled by North Dakota law to join SBAND and subsidize its speech in order to earn a living practicing law in the State. N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-02; J.A.28 ¶¶ 2-7. Fleck strongly supported Measure 6, which appeared on the North Dakota ballot on

November 4, 2014. JA.29 ¶ 8. Measure 6 proposed to amend state law "to create a presumption that each parent is a fit parent and entitled to be awarded equal parental rights . . . ." ADD.3. Fleck not only contributed $1,000 to a ballot measure committee in support of Measure 6, he also participated in the campaign—even appearing on television and radio to debate the measure's merits. JA.29 ¶¶ 9-10; ADD.3.

A few weeks before the election, Fleck discovered—through a third party—that SBAND staunchly opposed Measure 6 and threw its weight—and members' money—behind the opposition. JA.29 ¶ 11; ADD.3. SBAND contributed $50,000 in compelled member dues to "Keeping Kids First," a committee that opposed Measure 6. ADD.3; JA.32-33; JA.352. Ultimately, Keeping Kids First returned some funds and SBAND's final contribution totaled $46,525.85. ADD.3; JA.41 ¶ XXXII. However, SBAND's support did not end with cash. Defendant Weiler, the Executive Director of SBAND, expended $3,694 worth of his time supporting Keeping Kids First. JA.352. SBAND also provided Keeping Kids First with support by allowing the ballot committee to use SBAND's email system and establish an email address with SBAND's domain name: keepingkidsfirst@sband.org. JA.9 ¶ 53; JA.42 ¶ XXXIV; ADD.3-4.

Under SBAND's then-applicable procedures (which were changed as a result of this lawsuit), Fleck received no notice of SBAND's Measure 6 activities. JA.29 ¶ 14; JA.24-25. Moreover, SBAND's procedures required

Fleck to request a refund from the Executive Director of SBAND, Defendant Weiler. JA.25. At the time, Defendant Weiler was actually serving on the committee of the Ballot Measure Committee that received SBAND's contribution. JA.10 ¶ 65; JA.44 ¶ XLIV. Faced with SBAND's deficient procedures and abuse of member dues for non-germane activities, Fleck filed this suit against SBAND.

C. Proceedings Below

On February 3, 2015, Fleck filed his Complaint for Declaratory and Injunctive Relief, alleging three claims for relief: (1) constitutionally deficient notice and objection procedures, including violation of the right to receive notice, 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 an escrow for the amounts reasonably in dispute while such objections are pending; (2) constitutionally deficient consent procedures, which violate the right to affirmatively consent to non-germane expenditures; and (3) the unconstitutionality of a mandatory bar association. JA.11-14 ¶¶ 70-89. On the same day, Fleck filed a Motion for Preliminary Injunction with respect to his first and second claims for relief. ADD.4. On May 14, 2015, the District Court ordered the parties to conduct settlement discussions under the supervision of a Magistrate Judge. *Id*.

Pursuant to a Joint Stipulation, SBAND adopted revised policies and procedures, which cured the procedural deficiencies that formed the basis of

Fleck's first claim for relief. Fleck accordingly withdrew his Motion for Preliminary Injunction.[2] JA.342 ¶¶ 8-9. The District Court adopted the Joint Stipulation, dismissed Fleck's first claim for relief, and found Fleck's Motion for Preliminary Injunction moot. JA.361.

Fleck then moved for summary judgment on his remaining claims regarding affirmative consent and the constitutionality of mandatory bar membership. Docket No. 43. Defendant Miller opposed this motion, Docket No. 47, and Defendants Wetch, Fiebelkorn-Zuger, and Weiler filed a cross-motion for summary judgment. Docket No. 48. On January 28, 2016, the District Court denied Fleck's motion for summary judgment and granted the cross-motion filed by Defendants Wetch, Fiebelkorn-Zuger, and Weiler. ADD.1. Fleck acknowledged his challenge to mandatory bar membership was foreclosed by binding precedent, and the District Court appropriately denied this claim. ADD.7-8. The District Court also erroneously found that Fleck's claim regarding his right to affirmatively consent to non-germane SBAND

[2] Fleck has already had to exercise his ability to object to recent SBAND expenditures as non-germane under these revised procedures. See *In re Objection of Arnold Fleck to Family Law Task Force*, http://workingforabetterbar.org/wp-content/uploads/2016/04/1-27-16-Klein-Fleck-SBAND-decision.pdf (last accessed April 28, 2016). Fleck objected to a Family Law Task Force charged with proposing changes to North Dakota rules and statutes. *Id*. SBAND's designated mediator, Chief Magistrate Judge Karen Klein (ret.), found the objection premature because the Task Force had not yet proposed rules or statutory changes. *Id*. But she acknowledged that SBAND failed to "meet its burden to show all activities of the Task *will be* germane under *Keller [v. State Bar of California]*." *Id*. (emphasis added).

expenditures was foreclosed by prior precedent, and denied this claim. ADD.8-9. Accordingly, the District Court dismissed Fleck's remaining claims, ADD.12, and entered judgment in favor of Defendants. JA.377.

SUMMARY OF THE ARGUMENT

Under North Dakota law, Fleck must join SBAND and subsidize its speech in order to earn a living practicing law. Because this requirement necessarily burdens Fleck's First Amendment rights, Defendants must provide Fleck with safeguards that are carefully tailored to protect his rights. *See Keller*, 496 U.S. at 14; *Knox v. Service Emps. Int'l Union*, 132 S. Ct. 2277, 2290–93 (2012). SBAND's procedures put the burden on attorneys to "opt-out" of non-germane spending. By presuming acquiescence in the violation of fundamental rights, SBAND's procedures are not carefully tailored to protect those rights. The Constitution requires affirmative consent—i.e., "opt-in"—for non-germane expenditures of mandatory dues. SBAND's practices and procedures therefore violate the First and Fourteenth Amendments and Plaintiff's rights against compelled speech and association. This Court should reverse the judgment of the lower court on Fleck's affirmative consent claim because *Knox* necessitates opt-in for non-germane expenditures.

Alternatively, Fleck should not be required to surrender his First Amendment rights to practice law in North Dakota in the first place. Coerced association is permissible only in the rare instances when a compelling government interest cannot be achieved through less restrictive means. *Knox*,

132 S. Ct. at 2289. The sole compelling interest SBAND is intended to serve is regulating the practice of law. But compulsory association with SBAND is not necessary for that purpose. Eighteen states today effectively regulate the practice of law without mandating bar association membership. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 170-71 (2013). It is undeniable that this interest can be readily achieved through less restrictive means. The requirement that North Dakota attorneys join and fund the State Bar of North Dakota is an ongoing violation of the First and Fourteenth Amendments.

However, Fleck acknowledges that this alternative claim challenging the constitutionality of mandatory bar association membership is foreclosed by *Keller* and *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961), and that this Court must affirm the lower court's judgment on this claim. Fleck presents this argument here to preserve it for the proper forum.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, viewing all facts in favor of Fleck, and giving him the benefit of any inference from the undisputed facts. *Riedl v. General Am. Life Ins. Co.*, 248 F.3d 753, 756 (8th Cir. 2001); *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359 (8th Cir. 1993). There were no disputes of material fact below. ADD.7.

ARGUMENT

I. PATCHING THE HOLE IN SBAND'S SAFEGUARDS BY REQUIRING AFFIRMATIVE CONSENT IS CONSISTENT WITH *HUDSON* AND *KELLER*—AND IS NECESSITATED BY *KNOX*

The Supreme Court outlined certain procedures in *Hudson* and *Keller* that are required to protect the First Amendment rights of attorneys who are forced to join bar associations. But the *Hudson* and *Keller* procedures are only a sketch, which the Court has continued to fill in, most recently in *Knox*, where the Court required affirmative consent for certain non-germane expenditures from mandatory dues. The District Court erred when it held that *Hudson* and *Keller* endorsed "opt-out"; rather, *Knox* considered the issue for the first time and required affirmative consent, i.e., "opt-in."

A. *Hudson* and *Keller*'s First Amendment safeguards are not exhaustive.

There is inherent tension between mandatory associations like an integrated bar association and the First Amendment because compelled membership and dues are "a form of compelled speech and association" that burdens First Amendment rights. *Knox*, 132 S. Ct. at 2289. Because of this inherent tension, the Supreme Court allows mandatory associations to collect and spend dues only for expenditures that are "germane" to the narrow purpose which justifies burdening members' First Amendment rights in the first place. *Id.*; *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps.*, 466

U.S. 435, 447 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977).

In the case of mandatory bar associations, that compelling interest is regulating the practice of law. *Keller*, 496 U.S. at 14; *Lathrop*, 367 U.S. at 843; *see also Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014) (*Keller* "held that members of this bar 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."); *United Foods*, 533 U.S. at 414 (*Keller*'s "central holding" was that "objecting members were not required to give speech subsidies for matters not germane to the larger regulatory purpose which justified the required association.").

To ensure that members are only compelled to foot the bill for this narrow subset of expenditures, mandatory associations must institute safeguards "carefully tailored to minimize the infringement" of members' First Amendment rights. *Hudson*, 475 U.S. at 303.

Hudson and *Keller* established that carefully tailored safeguards *start* with: (a) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-germane 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 16; *Hudson*, 475 U.S. at 310. Such carefully tailored safeguards are meant to both ensure that members' mandatory dues are used only for germane expenditures and help provide a member recourse to protect her constitutional rights. *Hudson* at 302-3, 307 n.20. But this was never intended as an *exhaustive* list of the means whereby mandatory associations must protect the constitutional rights of members.

The court below erred in finding that Fleck's challenge to SBAND's "opt-out" procedure would necessitate overturning *Hudson* or *Keller*. ADD.10-11. Fleck does not ask this Court to overturn *Hudson* and *Keller*; he is merely seeking what *Hudson* and *Keller* require: safeguards carefully tailored to minimize the infringement on First Amendment rights necessarily caused by compelled association. *Hudson*, 475 U.S. at 303; *Keller*, 496 U.S. at 16. Those cases offered only an initial sketch of safeguards, which the Supreme Court has filled in over the years, most recently requiring affirmative consent for certain non-germane expenditures in *Knox*, 132 S. Ct. at 2290–93.

B. Carefully tailored safeguards cannot presume acquiescence in the loss of fundamental rights.

In *Knox,* the Court observed that *Hudson* and *Keller* never considered the question of whether the availability of opt-out procedures is enough to satisfy the First Amendment. *See Knox*, 132 S. Ct. at 2290–91 (such cases "assumed without any focused analysis that the dicta from [*Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961)] had authorized the opt-out requirement as a

constitutional matter."). *Knox* addressed the question of opt-in versus opt-out for the first time. The case involved a California public union that abused its "extraordinary" power to compel dues by extracting a special assessment from public-sector employees to fund its opposition to several ballot measures. 132 S. Ct. at 2291. Employees were given no opportunity to object or opt out of the assessment. *Id*. at 2285–86. In response to the union's brazen actions, the Supreme Court not only held that the union had to supply employees with notice of the special assessment, the union had to obtain affirmative consent—i.e. employees must "opt in"—to the special assessment in order to provide constitutionally adequate safeguards. *Id*. at 2291–93. While *Knox* itself only involved a special assessment, the Court reaffirmed that all "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 291.

Just like the union in *Knox*, SBAND cannot identify a state interest—let alone a compelling one—in "shift[ing] the advantage of . . . inertia," *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966), 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 v. Washington Educ. Ass'n*, 551 U.S. 177, 185 (2007).[3]

[3] The differences between this case and *Knox* show that SBAND members suffer an even *greater* injury to their associational rights than the public

Opt-out procedures that shift the burden onto attorneys pose a great risk to First Amendment rights. Opt-out requirements "nudge" individuals to acquiesce because "people have a strong tendency to go along with the status quo or default option." Richard H. Thaler & Cass R. Sunstein, *Nudge* 8 (2008). Actually, attorneys are more than just "nudged" into acquiescence. Given SBAND's power to regulate the practice of law and threaten an attorney's license and livelihood, putting the burden on an attorney to inform the bar that he does not wish to fund its non-germane activities puts that attorney at odds with his regulator in order to protect his First Amendment rights. These considerations led the Supreme Court to hold in *Abood* that it violates a compelled member's right of privacy to force him to disclose the specific causes he opposes, because that "may subject him to economic reprisal, threat of physical coercion, and other manifestations of public hostility and might dissuade him from exercising the right to withhold support because of fear of exposure of his beliefs and of the consequences of this exposure." 431 U.S. at 241 n.42 (internal quotations and citations omitted). An "opt-out" scheme that

---

employees suffered 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 SBAND and to associate with its speech as a condition of practicing law. If forcing public employees to opt out of subsidizing non-germane 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," the risk is greater here, given that Fleck is not even free to refuse to join. *Knox,* 132 S. Ct. at 2290.

forces an attorney to actively affirm that he does not wish to fund the bar's non-germane activities creates the same risk of reprisal and is equally unconstitutional.

In *Knox*, the Court recognized that 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." 132 S. Ct. at 2290. The Court called this "an anomaly" in First Amendment law, *id*., because courts "'do not presume acquiescence in the loss of fundamental rights.'" *Id.* Yet opt-out procedures create a presumption of acquiescence in the loss of fundamental rights.

Knox observed that this contradiction had been overlooked due to "historical accident" rather than "careful application of First Amendment principles." *Id*. *Hudson* and *Keller,* the Court noted, "assumed without any focused analysis that the dicta from [*Street*, 367 U.S. 740] had authorized the opt-out requirement as a constitutional matter." *Id*. Thus the District Court's holding—that Fleck is not entitled to the choice to opt *in* to non-germane spending, because opt-out procedures were supposedly condoned in *Hudson* and *Keller*, ADD.10-11—was in error. Prior to *Knox*, the Court had simply not addressed the question.

True, *Knox* did not overrule *Hudson*, but it did apply *Hudson*'s requirement of careful tailoring to the issue of opt-in versus opt-out procedures for the first time, and found that the opt-out requirement at issue in that case

violated the First Amendment. For this Court to do the same would also not betray *Hudson* or *Keller*. Rather, it would ensure that SBAND's safeguards are carefully tailored to limit the infringement of members' First Amendment rights, which is just what *Hudson* and *Keller* require. *Hudson*, 475 U.S. at 303; *Keller*, 496 U.S. at 16.

SBAND's opt-out rule punches a hole in its safeguards, which 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. *Knox* made clear that only patching that hole with an *affirmative consent* requirement will create a sufficient barrier between compelled dues and voluntary funds to satisfy the careful tailoring requirement. Because of this, the court below erred in finding that SBAND's procedures do not infringe on Fleck's rights to free association and speech. ADD.12.

II. THE SUPREME COURT SHOULD OVERTURN *LATHROP* AND *KELLER*.

Fleck acknowledges that binding precedent forecloses this Court from holding compelled membership and funding of SBAND unconstitutional. *See Keller*, 496 U.S. at 1; *Lathrop*, 367 U.S. at 843.

Lathrop and *Keller* hold that a State can mandate bar membership as a condition of practicing law, which is irreconcilable with basic First Amendment principles and subsequent decisions, and thus should be overruled. *See, e.g., Knox*, 132 S. Ct. at 2291 ("By authorizing a union to collect fees from

nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate."). In order to preserve Fleck's alternative claim for further review, Fleck explains why those decisions "rest on reasons rejected in some other line of decisions" and why Fleck is therefore likely to ultimately prevail. *Cf. Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[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 [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (citation omitted)).

The First Amendment protects the right not to support causes and activities that conflict with one's beliefs and the right not to be compelled into unwanted associations. *See, e.g., United Foods*, 533 U.S. at 410 ("[T]he [First] Amendment may prevent the government from . . . compelling certain individuals to pay subsidies for speech to which they object." (citations omitted)); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) ("Freedom of association . . . plainly presupposes a freedom not to associate." (citation omitted)). Indeed, it is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris*, 134 S. Ct. at 2644. That is because "'compelled funding of the speech of other private speakers or groups' presents the same dangers as compelled speech." *Id.* at

2639 (quoting *Knox*, 132 S.Ct. at 2288); *see also id.* at 2656 (Kagan, J. dissenting) ("[T]he 'difference between compelled speech and compelled silence' is 'without constitutional significance.'" (*quoting Riley v. National Fed'n of Blind of N.C.,* 487 U.S. 781, 796 (1988)).

There is no question SBAND's mandatory dues are "a form of compelled speech and association" that burden First Amendment rights. *Knox*, 132 S. Ct. at 2289. Compulsory subsidies such as mandatory bar dues "cannot be sustained unless two criteria are met." *Id*. First, all coerced association must be justified by a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id*. (internal citations and grammar omitted). Second, even in the "rare case" where coerced association is found to be justified, compulsory fees "can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id*. (*quoting United Foods,* 533 U.S. at 414). Moreover, while both a public union special assessment and an attempt to compel nonmember fees from home healthcare workers have both flunked this test, both failed under the *commercial-speech* standard. *See Harris*, 134 S. Ct. at 2639. Indeed, when applying that test most recently in *Harris*, the Court observed that "it is arguable" that that standard "is *too permissive*" but found that it was unnecessary to address the question at that time. *Id*. (emphasis added).

A higher level of scrutiny is warranted in the context of mandatory bars,

as they engage in activities such as lobbying and funding ballot measure opposition. But it is also unnecessary here to address what standard of First Amendment scrutiny applies, because mandatory bar associations flunk even the commercial speech standard. Regulating the practice of law *can* be achieved by means that are less restrictive of First Amendment freedoms than mandatory bar membership: 18 states have already found ways of doing so without compelling membership at all.[4]

The regulatory arrangements of these voluntary bar states respect the wisdom that "[t]he mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights." *Lathrop*, 367 U.S. at 876 (Black, J., dissenting). Yet they have not led to any lapse in the regulation of attorneys or failed to achieve high standards of legal practice. These states are not unique in some way that enables them to regulate the practice of law in a manner that is beyond the reach of states that now use a mandatory bar. For instance, both New York, one of the largest economies in the world,[5] and

---

[4] These states are Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont. 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).

[5] The State of New York has a GDP of $ 1,444,406,000—the third largest in the United States. 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&I

Vermont,[6] the smallest economy in the United States, are both voluntary bar states. Economies of scale differ from state to state, but these shifts of scale do not necessitate mandatory membership in, and funding of, a bar association.

While voluntary bar states continue to adequately regulate their attorneys without violating their First Amendment rights, states with mandatory bars have struggled to own up to the responsibilities that accompany the privilege of receiving coerced dues. Despite the paramount importance of implementing safeguards to limit the infringement of members' First Amendment rights, ten years after *Keller* was decided, a staggering 26 of the 32 states with mandatory bar associations had failed to institute safeguards that met the constitutional minimum. Brock, *supra* note 5, at53-85.[7] Unsurprisingly, this has led to a

---

ndustryKey=1&YearGdp=2015Q2&YearGdpBegin=-1&YearGdpEnd=-1&UnitOfMeasureKeyGdp=Levels&RankKeyGdp=1&Drill=1&nRange=5 (last accessed April 28, 2016). Moreover, New York is the 16th largest economy in the world. *See* H. Joseph Drapalski III, *The Viability of Interstate Collaboration in the Absence of Federal Climate Change Legislation*, 21 Duke Envtl. L. & Pol'y F. 469, 479 n.46 (2011).

[6] 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 April 28, 2016). As a comparison, North Dakota's approaches twice that: $53,686,000. *Id*.

[7] Professor Brock identified the mandatory state bar associations of Alabama, Alaska, Arizona, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming as having either deficient

flood of litigation. *See, e.g.*, *Lautenbaugh v. Nebraska State Bar Ass'n*, 2012 WL 6086913 (D. Neb. Dec. 6, 2012); *Kingstad v. State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010); *Romero v. Colegio De Abogados De Puerto Rico*, 204 F.3d 291 (1st Cir. 2000); *Popejoy v. New Mexico Bd. of Bar Comm'rs*, 887 F. Supp. 1422 (D.N.M. 1995); *Schneider v. Colegio de Abogados de P.R.*, 917 F.2d 620 (1st Cir. 1990). Now, 25 years later, many mandatory bars *admit* that they still lack these constitutionally obligatory safeguards.[8] With less restrictive means plainly available, there is no longer any excuse for North Dakota to continue violating attorneys' First Amendment rights. Mandating membership in SBAND crosses "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 Supreme Court's decisions in *Keller* and *Lathrop*, the lower court's dismissal of this claim should 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. Judgment should be entered accordingly.

Keller/*Hudson* safeguards or no *Keller*/*Hudson* safeguards at all. Brock, *supra*, at 53–85.

[8] American Bar Association, Unified Bar Association Fact Sheet, http://www.americanbar.org/content/dam/aba/uncategorized/barservices/resourcepages/unifiedbars_factsheet.authcheckdam.pdf (last accessed April 28, 2016).

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 29th day of April, 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*
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 4,903 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 , addendum, and joint appendix have been scanned for viruses and are virus free.

Dated: April 29, 2016

_/s/ *Jared Blanchard*
Jared Blanchard
Attorneys for Plaintiff