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 REPLY BRIEF

---

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**

**Statutes**



**Other Authorities**

## INTRODUCTION

*Janus v. AFSCME*, 138 S. Ct. 2448, 2465 (2018), makes clear that exacting scrutiny applies here, which means SBAND bears the burden of proving that the state's compelling interest in regulating the legal profession cannot be attained by a means substantially less restrictive of Fleck's First Amendment rights. It has not met this burden. It is both obvious that the state *can* regulate the practice of law without mandatory membership and subsidy—and that many other states already *do*. Therefore, using the same analysis that *Janus* used shows that mandatory membership and subsidization of SBAND is unconstitutional.

If *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), "directly controls" Plaintiffs' challenge to compulsory membership for purposes of *Agostini v. Felton*, 521 U.S. 203, 237 (1997), this Court must apply it. But this Court must determine for itself whether *Keller*, which did not directly address that question, qualifies as "directly control[ling]" under *Agostini*.

This Court must also revisit its holding that SBAND's billing practice qualifies as an "opt-in" rule instead of a constitutionally suspect "opt-out" rule, *Fleck v. Wetch*, 868 F.3d 652, 656–57 (8th Cir. 2017). *Janus* makes clear that consent in this circumstance must be (1) clear, (2) affirmative, and (3) prior to any attempt to collect money from attorneys. 138 S. Ct. at 2486. SBAND argues that there is no meaningful difference between (a) a dues bill with a presumptive total that includes non-chargeable expenses, and where inaction

results in a waiver of rights—and (b) a bill that does *not* include non-chargeable expenses in the presumptive total, and in which only an affirmative act results in waiver. Supplemental Brief of Appelles Joe Wetch, et al. ("Wetch Br.") at 25, Supplemental Brief of Penny Miller ("Miller Br.") at 17. But *Janus*'s three-part affirmative consent requirement shows that only the latter is constitutionally adequate—and therefore that SBAND's billing practice is unconstitutional.

## ARGUMENT

### I. SBAND's argument that *Janus* permits compulsory bar association membership is unpersuasive.

*Janus* requires this Court to apply exacting scrutiny. 138 S. Ct. at 2483. Exacting scrutiny means that the statutes requiring attorneys to join and fund SBAND must "'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id*. at 2465 (quoting *Knox v. SEIU*, 567 U.S. 298, 310 (2012)).

SBAND emphasizes that this level of scrutiny does not require that the government choose the *least* restrictive means. Wetch Br. at 22. True, but exacting scrutiny does require the state to prove it could not attain its compelling interest by a mechanism that would inflict substantially less damage on freedom of association. *Cf. U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238

n.11 (10th Cir. 1999). The mandatory membership requirement at issue here[1] fails that test.

The state interest at issue—which no one disputes is compelling—is the regulation of the practice of law—more specifically, the "protect[ion] [of] the public health, safety, and other valid interests" by "establish[ing] standards for licensing … and regulating the practice of [attorneys]." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). So the question under exacting scrutiny is whether the state can serve *that* compelling interest "through means significantly less restrictive of associational freedoms" than mandatory membership and dues. *Janus,* 138 S. Ct. at 2465 (citations omitted). It is SBAND, not the Appellants, that bears the burden of proof on that question. *Nixon v. Adm'r of Gen. Servs*., 408 F. Supp. 321, 368 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977) ("Where an infringement of associational freedom can be shown, the government bears the burden of showing that the action it defends serves a compelling government interest that cannot be promoted in a less restrictive way."). And that burden is "heavy." *Galda v. Rutgers*, 772 F.2d

[1] SBAND seeks to downplay the coercive nature of its membership requirement by saying that "the only 'compelled association' upon members of SBAND is the payment of fees to fund expenditures." Wetch Br. at 17. But it has long been recognized that "[c]ompelling a person to subsidize the speech of other private speakers raises … First Amendment concerns. As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Janus*, 138 S. Ct. at 2464 (citations omitted). Indeed, the Supreme Court acknowledged this in the primary case SBAND relies on, *Keller*, 496 U.S. at 9-16.

1060, 1066 (3d Cir. 1985). The state must show that no less restrictive means will achieve its compelling interests.

The Appellees have made no serious effort to discharge that burden. SBAND cannot meet that burden simply by reciting the importance of the role attorneys play, Wetch Br. at 15, and then gesturing toward the whole suite of requirements that the state imposes as, in a general sense, advancing state interests. Instead, SBAND must show that its compelling interest in regulating the practice of law *cannot* be served unless the state forces attorneys to join and subsidize SBAND *in addition to* requiring them to pass the bar exam, to comply with statutes setting forth the duties of lawyers, to meet continuing legal education requirements, and so on. It has not done so.

On the other hand, Fleck has shown that the state *can* regulate the practice of law without compelling membership: in the same way that it regulates the practice of other trades and professions without compelling membership in trade associations. It can establish standards for the practice of law and enforce those against practitioners who violate them. "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O'Connor, J., concurring).

Doctors are not required to join the North Dakota Medical Association. Psychologists are not required to join the North Dakota Psychological

Association. Paralegals are not required to join the Western Dakota Association of Legal Assistants or the Red River Valley Paralegal Association. Yet the state regulates all these professions and others by setting out mandatory minimum standards for licensure, restrictions and requirements for practice, and rules for continuing education. There is no reason it cannot do the same for law. That is what 19 states already do. *Cf. Janus*, 138 S. Ct. at 2466 (examining current practice to show that state's legitimate interests could be attained in significantly less burdensome ways).

Secretary-Treasurer Miller argues in her brief that "[t]he mere fact that other states operate voluntary bars does not, ipso facto, establish that North Dakota can advance its governmental interests through means significantly less restrictive than the system it chose." Miller Br. at 13. On the contrary, it proves exactly that. *Janus* found that 28 states operate without mandatory fees for public sector unions but still have unions that serve as exclusive bargaining representatives. 138 S.Ct. at 2466. This, the Court said, disproved the unions' argument for mandating fees. *Id.* at 2465. So, here: the fact that many states have voluntary bar associations but still manage to regulate the profession shows that the argument SBAND makes is simply not true. Even without the example of those 19 states, it would be obvious that it is *possible* for the state to regulate the practice of law and ensure that attorneys adhere to ethics rules without forcing them to join and subsidize a bar association *See, e.g.*, Bradley Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms*

*the Legal Profession*, 22 Fla. St. U. L. Rev. 35, 63 (1994) ("In a voluntary bar state … the state can directly assume its proper regulatory functions aimed at protecting the public interest. Voluntary bar associations are then free to tend to the broader issues of improving professional standards, and to promoting voluntary pro bono, educational, and other programs.").[2] The California State Bar's *amicus* brief essentially proves the viability of that model. *See, e.g.*, Cal. *Amicus* Br. at 1 (noting that California Bar "[spun] off its associational and membership components into the California Lawyers Association, and became a regulatory agency.").

SBAND recites a long list of services it provides, such as "law-related public education programs," "involvement in [the] Court Facilities Improvement Advisory Committee," and "the Lawyer Referral Program." Wetch Br. at 19-20. But SBAND's list conflates two different categories of activities: those directed toward regulating the practice of law, and those relating to other things. Some of the items listed—such as proceedings to disbar attorneys who act illegally, N.D. St. § 27-14-06, are in the first category. Others, such as "SBAND involvement in Court Facilities Improvement

[2] This would also likely improve the quality of bar associations. *See* Peter Martin, *A Reassessment of Mandatory State Bar Membership in Light of Levine v. Heffernan*, 73 Marq. L. Rev. 144, 178 (1989) ("voluntary bar status is a feasible alternative for several reasons. First, there are no legal or political identity problems. … Second, voluntary bar membership would be consensual, thus eliminating internal disruption by dissident lawyers. … More importantly, without a legislature or court constantly looking over its shoulder, the voluntary bar would essentially be an autonomous association.").

Advisory Committee," Wetch Br. at 19, are in the second. "But there is a difference" between these categories, *Keller*, 496 U.S. at 15, and that difference is important. While the state has a compelling interest in protecting the public through licensing, *Goldfarb*, 421 U.S. at 792, and "ensuring that attorneys adhere to ethical practices," *Harris v. Quinn*, 573 U.S. 616, 656 (2014), it does not have *carte blanche* to force attorneys to join an association and fund programs that SBAND simply thinks good in the abstract. In fact, it may not even compel attorneys to sacrifice associational freedoms for a *compelling* government purpose, if that purpose can be accomplished in a significantly less restrictive way.

When, in *Harris*, a state made the same argument SBAND makes (that mandatory fees supported worthwhile programs), the Court answered: "in order to pass exacting scrutiny, more must be shown." *Id*. at 651. SBAND also must show that "the cited benefits … could not have been achieved if [SBAND] had been required to depend for funding on the dues paid by those [attorneys] who chose to join." *Id.*

Just as *Harris* found that there were plenty of organizations that provided the kinds of services the union provided, "even though [these alternatives] are dependent on voluntary contributions," *id*., so there are many organizations today that provide "law-related public education programs," "lawyer referral,"

and other such services without compulsory membership and subsidization.[3] Even if there were not, there is no reason to believe that voluntary entities could not do so in the future.[4]

When Nebraska eliminated mandatory funding for anything other than lawyer regulation, it noted that the "many laudable and worthwhile programs" overseen by that state's bar—including lawyer referral and continuing education—"can continue to thrive with the aid of voluntary dues, grants, and gifts." *In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 179 (Neb. 2013). SBAND has given this Court no reason to doubt that the same principles apply in North Dakota. On the contrary, there are many states with voluntary bar associations, and the services SBAND lists are available there. New York and Massachusetts, for example, are two of the highest-population states with voluntary bar associations—and both of those associations provide lawyer referral services,[5] continuing

[3] As part of the Court's inquiry into whether less-restrictive means are available, it is proper for the Court to consider alternatives other than those available through state coercion. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 821–22 (2000).

[4] For this reason, the arguments by *amici* Texas Legal Ethics Counsel and Missouri—that the activities they engage in other than regulating the practice of law are valuable—are unpersuasive. Such services can be provided voluntarily, which is the substantially less restrictive means that exacting scrutiny requires. Similar services are important to the practice of medicine, too, and are provided by organizations such as the American Medical Association, yet North Dakota does not require doctors to join the AMA.

[5] https://www.massbar.org/public/lawyer-referral-service; http://www.nysba.org/lawyerreferral/.

education programs,[6] and help with the improvement of court facilities,[7] just to name a few.

Miller quotes a magazine article to the effect that California's recent change in its bar's structure "created new challenges, including budgetary ones." Miller Br. at 11 (quoting Lyle Moran, *California Split: 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change,* ABA Journal, Feb. 2019[8]). No doubt it did—but this is not enough to prevail under exacting scrutiny. Instead, SBAND must prove it *cannot* attain its goals through a significantly less intrusive method than mandating membership.

The only effort SBAND makes to meet its burden—a citation to *Tabbaa v. Chertoff*, 509 F.3d 89 (2d Cir. 2007), in which the Border Patrol detained persons who attended a conference that the government suspected was helping organize terrorist activities—falls far short. In *Tabbaa*, the court found that the Border Patrol's detention and questioning burdened the attendees' associational freedoms and was subject to exacting scrutiny. *Id.* at 102. The government

---

[6] https://www.massbar.org/education; http://www.nysba.org/CLE/.
[7] https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26865; https://www.massbar.org/docs/default-source/mba-reports/ecochallenge2009.pdf?sfvrsn=6.
[8] http://www.abajournal.com/magazine/article/1-year-after-californias-state-bar-became-2-entities-observers-see-positive-changes/. As its title indicates, the article Miller cites actually shows that the separation of California's bar into a mandatory regulatory side and a voluntary non-regulatory side has been largely successful. An official with the new, voluntary California Lawyers Association said it "is well-positioned to take on additional responsibilities and ensure that the attorneys in the state of California continue to receive the services that they have traditionally received through the [mandatory] Bar." *Id.*

then *met its burden* under that test by proving it could not attain its compelling interest in a way that was significantly less restrictive of the attendees' associational rights. *Id.* at 103. The government proved that it focused only on specific conferences it had reason to believe were involved in terrorism, and detained and questioned only those individuals who actually attended the conferences. *Id*. The government also showed that it could not have attained its compelling interests by stopping only individuals it already knew to be actively involved with terrorism. *Id.* at 104. For example, one of its goals was to determine that the attendees were in fact who they said they were, and the government showed that that "would not have been possible if [Border Patrol] officials were limited to reviewing passports and other identification documents." *Id*. at 105.

In other words, *Tabbaa* was a routine application of the "significantly less restrictive means" analysis in which the government *met* its burden of proof: there was no way to attain its goals in a manner that was significantly less harmful to associational freedoms. Here, by contrast, SBAND has provided no evidence that it cannot do what many other states already do—i.e., regulate the practice of law without forcing lawyers to join SBAND and fund its non-regulatory activities.

Finally, having failed to show what it is required to show—that the state's compelling interests are unattainable by a significantly less-restrictive alternative—SBAND argues that it does not restrict the free speech of

individual attorneys. Wetch Br. at 21. But that is irrelevant. First, the Supreme Court has made clear that *even where* a restriction on freedom of association is "unrelated to the suppression of ideas," the state *still* may not impose that restriction if there are "means significantly less restrictive of associational freedoms" available to achieve its compelling interest. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 641 (2000). Second, the individual employees in *Janus* were also free to voice their personal disagreements with the union. But in both *Janus* and this case, that fact simply does not address whether the state's compelling interest can be attained in a significantly less restrictive way. *Janus*, 138 S. Ct. at 2466.[9]

It would be anomalous to say that Fleck's freedom of association is unharmed because he can express his personal disagreements with *the state-sanctioned trade association for attorneys in North Dakota, which all lawyers must join*. SBAND is, after all, "the official statewide organization of lawyers."[10] When it argues that it only "takes political positions"on its own behalf," and "does not purport to speak for the member attorneys themselves," Wetch Br. at 21, it is disregarding the fact that SBAND acts as the state-designated spokesman for the entire legal profession. This Court, however,

[9] *Keller* itself held that mandatory bar associations should be treated like public-sector unions for First Amendment purposes. 496 U.S. at 12–14. *Amici* Alaska, et al., essentially ignore this in their effort to the opposite. Br. *Amici* Alaska, et al., at 19-21.

[10] https://www.sband.org/.

must "look beyond the theory to examine the practical reality of the situation." *Stark v. Indep. Sch. Dist., No. 640*, 123 F.3d 1068, 1081 (8th Cir. 1997). If nothing else, *Janus* shows that the mere opportunity to voice disagreement is insufficient to protect the First Amendment rights of dissenters.

Because the government's compelling interest here can be attained in a significantly less restrictive manner, the membership requirement is unconstitutional.

## II. How the *Agostini* rule applies in this case.

*Agostini*, 521 U.S. at 207, requires this Court to "follow the case which directly controls," even if that precedent has been abrogated by subsequent Supreme Court rulings. Therefore, even though *Janus* has eliminated a key premise on which *Keller* depended, this Court must still follow *Keller* if it directly controls with regard to Fleck's argument against compulsory membership.

But to apply the *Agostini* rule, this Court must first determine whether *Keller* does directly control. *Cf. Northport Health Servs. of Ark., LLC v. Rutherford*, 605 F.3d 483, 488–91 (8th Cir. 2010). Wetch and Miller emphasize Fleck's pre-*Janus* concession that his challenge to the constitutionality of mandatory membership "is *presently* foreclosed by *Keller* and *Lathrop* [*v. Donohue*, 367 U.S. 820 (1961)]." Wetch Br. at 6 (emphasis added, citations omitted). But concessions or stipulations between parties cannot determine the answer to the question of whether the *Agostini* rule applies here—in other

words, the question of whether *Keller* is one of those precedents that "has direct application" despite "rest[ing] on reasons rejected in some other line of decisions." *Agostini*, 521 U.S. at 237 (citations and quotation marks omitted). And *that* question cannot be resolved by concession or stipulation. *See United States v. Ogles*, 440 F.3d 1095, 1099 (9th Cir. 2006) ("We are not bound by a party's concession as to the meaning of the law."); *Hankins v. Lyght*, 441 F.3d 96, 104 (2d Cir. 2006) ("We are required to interpret federal statutes as they are written … and we are not bound by parties' stipulations of law."); *United States v. One 1978 Bell Jet Ranger Helicopter*, 707 F.2d 461, 462 (11th Cir. 1983) ("It is clear that a stipulation of the parties … may be ignored by the court if it is a stipulation as to what the law requires."); *Noel Shows, Inc. v. United States*, 721 F.2d 327, 330 (11th Cir. 1983) ("A stipulation by the parties to a lawsuit as to questions of law is not binding."); *King v. United States*, 641 F.2d 253, 258 (5th Cir. 1981) (Court "is not bound by the parties' stipulations of law").

This Court "is not bound to accept a concession when the point at issue is a question of law," and concessions "do not, at least as to questions of law that are likely to affect a number of cases in the circuit beyond the one in which the concessions are made, relieve this Court of the duty to make its own resolution of such issues." *Deen v. Darosa*, 414 F.3d 731, 734 (7th Cir. 2005). This Court is therefore obligated to determine for itself whether *Keller* "directly controls" for purposes of the *Agostini* rule.

Fleck's obligation of candor requires him to inform the Court that *Keller*'s statement that mandatory bar membership is constitutional was technically *obiter dictum*, based on a plurality decision (*Lathrop*) in which it was also *obiter dictum*, and which was in turn based on still another decision (*Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956)) in which, again, it was *obiter dictum*. Fleck has maintained all along that *Keller*'s continuing applicability to this case is subject to change.[11] And indeed, it has changed, because *Janus* overturned a central element of *Keller* by making clear that "exacting scrutiny" is the appropriate constitutional standard here, instead of the reasonableness standard that *Keller* used. *See Keller*, 496 U.S. at 8 ("'[the state] might reasonably believe'" that mandating bar membership would serve government interests (quoting *Lathrop*, 367 U.S. at 843)). *Janus* overruled that, by expressly rejecting reasonableness as "foreign to our free-speech jurisprudence," 138 S. Ct. at 2465, and requiring the higher "exacting scrutiny" that neither *Keller* or *Lathrop* applied. Given that *Janus* has rejected the reasoning of *Keller* and *Lathrop*, therefore, this Court must determine whether and to what degree those cases "directly control[]." *Agostini*, 521 U.S. at 237. Prior to *Janus*, this Court found (on *de novo* review) that it *did* directly control. *Fleck*, 868 F.3d at 653.

[11] In his Motion for Summary Judgment, for instance, Fleck stated that although *Keller* controlled at that time, "*Friedrichs v. California Teachers Association* is pending before the United States Supreme Court and may resolve these claims." Doc. 44 at 3 n.1.

Wetch argues that *Keller* was reaffirmed in *Harris*. Wetch Br. at 13-14. What *Harris* actually said, however, was that *Keller* "held that members of [the] bar … could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members." *Harris*, 573 U.S. at 655. That is all. *Harris* was silent with regard to the constitutionality of compulsory membership.

So was the North Dakota Supreme Court in *Menz v. Coyle*, 117 N.W.2d 290, 296–97 (N.D. 1962), which Wetch cites. Wetch Br. at 15–16. That case simply did not address the question of compulsory membership—or the First Amendment. Fleck, of course, does not dispute that the state has a compelling interest in regulating the practice of law, which is the point of the language Wetch quotes from that case. But the question here is whether that compelling interest can be achieved in a significantly less restrictive manner. *Janus*, 138 S. Ct. at 2466.

## III. *Janus* makes clear that SBAND's procedure is not an "opt-in" but is an unconstitutional "opt-out" rule.

As to SBAND's billing procedure—under which it sends out an annual bill with a presumptive total that includes non-chargeable expenses, so that attorneys who wish *not* to subsidize SBAND's political activities must take the affirmative step of subtracting that amount and sending a check—SBAND argues that "*Janus* did not even discuss 'opt-in' versus 'opt-out.'" Wetch Br. at 25. But that is not true. Although *Janus* did not use the words "opt-in" or "opt-

out," it did make clear that individuals must "clearly and affirmatively consent *before*" they are required to pay an association money that it may use for political or ideological speech. *Janus*, 138 S. Ct. at 2486 (emphasis added). SBAND's billing practice fails that test.

*Janus*'s requirements that consent be (1) clear, (2) affirmative, and (3) prior to *any attempt* to collect money, are based on the fact that payment constitutes a waiver of First Amendment rights. *Id.* A waiver of First Amendment rights cannot be presumed, but must be freely given, as provable by "'clear and compelling' evidence." *Id.* Notably, neither Miller nor Wetch address all three of these elements.

This Court's previous conclusion that SBAND's billing practice qualifies as an "opt-in" rule cannot survive *Janus*'s tripartite requirement. SBAND's procedure is not *clear* because the form is so confusing—with no attention drawn to the potential waiver of rights, and with its requirement that the person filling it out add in some places and subtract in others—that a person's payment cannot constitute clear and compelling evidence of consent to waive First Amendment rights. It is not *affirmative* because no affirmative act is required for the attorney to end up subsidizing non-chargeable activities; mere inaction—the failure to subtract—will result in a waiver of First Amendment rights. And it is not *prior* to the "attempt … to collect," *Janus*, 128 S.Ct. at 2486, because the attorney is presented with the card and must deduct, sign, and pay at *that* point—instead of being asked beforehand. Therefore this Court's previous

conclusion—that an attorney "opts-in" if he "does not choose the *Keller* deduction," 868 F.3d at 656-57, can no longer stand.

Wetch and Miller argue that SBAND's billing practices adequately obtain affirmative consent. They base this on their view that there is no difference between (a) a situation in which a person is presented with a bill that states a presumptive total which *includes* non-chargeable expenses that he must subtract if he wishes not to pay, and (b) a situation in which a person receives a bill with a presumptive total that does *not* include non-chargeable expenses—and is free to add those optional expenses if he *does* wish. Wetch Br. at 25, Miller Br. at 17. But *Janus*'s three-part affirmative consent rule makes clear that there is a critical difference between these two. In situation (a), the default is that the attorney *pays* the non-chargeable expenses—meaning that he might waive First Amendment rights as a result of error or inaction. No *affirmative* act is required for the waiver to occur; mere acquiescence is sufficient. But in situation (b), the default rule is that the attorney does *not* pay the expenses, and does *not* waive First Amendment rights, as a result of error or inadvertence. The only way a waiver can occur in situation (b) is if the attorney takes an *affirmative* step. That means only option (b) can satisfy *Janus*'s requirement that a waiver of First Amendment rights be (1) clear, (2) affirmative, and (3) prior to payment. 138 S. Ct. 2487.

Because "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and…do not presume acquiescence in the loss

of fundamental rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations and quotation marks omitted), it is the *state's* burden to take steps necessary to obtain constitutionally adequate consent to a waiver of First Amendment rights. But Wetch tries to shift this burden onto Fleck instead, arguing that SBAND's billing rules are constitutional because attorneys are "highly educated" and "specifically trained in the interpretation and application" of confusing, complicated legal documents. Wetch Br. at 27. The reality, however, is that lawyers can make mistakes, too, and can be confused by fine-print forms that require them to *add* some voluntary expenses and then *subtract* others. Also, annual bar dues are often paid by executive assistants, who may not realize that SBAND's bills are traps for the unwary. Maybe lawyers should be more diligent than that—although it's startling that the State Bar of North Dakota openly avows that lawyers must scrutinize its bills as if they were adhesion contracts proffered by an adversary in litigation. But *Janus* does not allow SBAND to employ such tactics in any event. *Janus* says that SBAND's form constitutes a proffered waiver of constitutional rights, 138 S Ct. at 2486, and because such waivers must be knowing and intelligent, they cannot be buried in technical fine print—even if the parties involved are attorneys.[12] Instead, to be

[12] The sophistication of the parties is not enough. In *National Polymer Products, Inc. v. Borg–Warner Corp.*, 641 F.2d 418, 423–24 (6th Cir. 1981), the court found that a purported waiver of First Amendment rights was not clear and unambiguous enough to satisfy the constitutional requirement even though it had been reviewed by counsel. Given the strong presumption against the validity of such waivers—i.e., the requirement that they be clear, knowing, and

valid, a waiver of First Amendment rights must be (1) *clear*—meaning express and unambiguous. Also, (2) it must require an *affirmative* act by the attorney before it is valid, and (3) the consent must be obtained *before* "any … attempt [is] made to collect such a payment." *Id*.

Because under SBAND's billing procedure, mere mistake would result in a waiver of First Amendment rights, that practice fails to obtain *clear* evidence of intentional waiver. Because acquiescence, rather than an affirmative act, would result in waiver, it fails to obtain *affirmative* consent. And because members are not given the opportunity to agree to pay before SBAND sends the bill, the billing practice also fails to obtain *prior* consent. Therefore *Janus* shows that this Court must revisit and reverse its prior determination on the opt-in/opt-out question.

---

voluntary—the ambiguity of the waiver at issue rendered it invalid. Likewise, in *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1298 (D. Minn. 1990), *aff'd,* 939 F.2d 578 (8th Cir. 1991), the District Court found that a publisher and reporter—sophisticated parties—did not waive First Amendment rights by agreement because the agreement was too vague. "[T]he effect of the waiver must be clear," it held, and must not use "open-ended term[s]." 733 F. Supp. at 1298.

## CONCLUSION

Compelling membership in a bar association as a condition of practicing law fails exacting scrutiny and is therefore unconstitutional. SBAND's billing practice also fails to obtain clear and affirmative consent prior to making an attempt to collect annual dues. Because both violate *Janus*'s requirements, this Court should reverse the district court's judgment and declare that North Dakota's requirements that attorneys join and fund SBAND violate the First Amendment.

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 16th day of April, 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), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. THE BRIEF CONTAINS 4,937 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 16, 2019

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