No. 19-670

IN THE

Supreme Court of the United States

ARNOLD FLECK,

Petitioner,

v.

JOE WETCH, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION FOR JOE WETCH, AUBREY FIEBELKORN-ZUGER, AND TONY WEILER

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QUESTIONS PRESENTED

North Dakota has an integrated bar, meaning that attorneys who are licensed to practice in North Dakota must maintain membership in and pay annual dues to the State Bar Association of North Dakota (SBAND). SBAND permits each attorney to calculate the annual fee he owes by specifying an annual licensing fee, a deduction available to any attorney who does not wish to contribute to SBAND's nonchargeable activities (*i.e.*, political activity), and several optional additional payments, such as membership in specialized sections or to support a pro bono fund. The questions presented are:

1. Whether a State violates the First Amendment's guarantee of freedom of association by requiring attorneys licensed in the State to join the state bar association.

2. Whether SBAND's fee structure, which gives every attorney the ex ante choice whether to contribute funds to support non-chargeable activities, violates the First Amendment.

PARTIES TO THE PROCEEDINGS

Respondents are current or former officers of SBAND, sued in their official capacity. Petitioner states (Pet. ii) that respondent Joe Wetch is the "President of the State Bar Association of North Dakota." Wetch's one-year term as President of SBAND ended in June 2016. In June of 2018, Zachary Pelham replaced Darcie Einarson as President of SBAND, and in June of 2019, Aubrey Fiebelkorn-Zuger (who was the Secretary/Treasurer when this action was filed) replaced Zachary Pelham as President. SBAND, created by statute, is a professional association of members of the legal profession licensed to practice law in the State of North Dakota and of attorneys who, by virtue of holding judicial or other office, are exempt from such licensing. N.D. Cent. Code § 27-12-02; Pet. App. 29a.

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INTRODUCTION

North Dakota law requires that all attorneys licensed to practice in the State be members of the State Bar Association of North Dakota (SBAND) and pay dues. Pet. App. 2a, 29a; N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-01, 27-12-02. Petitioner Arnold Fleck filed this action challenging SBAND's membership requirement and dues-collection procedures. In particular, Fleck argues that the membership requirement violates his First Amendment right to freedom of association and that the form SBAND uses to collect dues unconstitutionally requires him to do subtraction rather than addition. Neither argument warrants this Court's review.

First, Fleck asks this Court to decide a First Amendment question that no court of appeals has yet considered or addressed, let alone decided. Fleck initially conceded that *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality), already decided that a State does not violate the First Amendment by requiring membership in a state bar association. After this Court remanded this case to the Eighth Circuit, Fleck reversed course, arguing that those cases have been regularly misinterpreted and that the long-settled constitutionality of integrated bars is in fact unsettled. Fleck now asks this Court to be the first in the Nation to address that question. Fleck identifies no circuit conflict on the relevant issues—and, as the Eighth Circuit noted, he waived many of his key arguments in the proceedings below when he conceded that *Keller* and *Lathrop* control. In the alternative, Fleck asks the Court to overrule *Keller* in light of its recent decision in *Janus v. American Federation of State, County, and*

Municipal Employees, Council 31, 138 S. Ct. 2448 (2018). But in doing so, he does not even mention *stare decisis* and fails to acknowledge the Court's recent indications in the line of decisions culminating in *Janus*, that *Keller* remains good law, *see Harris v. Quinn*, 573 U.S. 616, 655-656 (2014). Given Fleck's concessions below and the absence of a circuit conflict on that issue, this Court should decline to consider the first question presented.

Fleck also asks that this Court constitutionalize precisely how—on the most minute level—an integrated bar can collect dues. That fact-bound question does not merit this Court's intervention. The court of appeals correctly rejected Fleck's arguments, and review of that decision is unwarranted.

STATEMENT OF THE CASE

1. Fleck's petition invokes two distinct lines of this Court's decisions: one involving the constitutionality of integrated bars and payment of bar dues and the other involving constitutional issues associated with public unions and the automatic deduction of agency fees from nonmember employees.

a. In 1961, this Court held in *Lathrop v. Donohue* that a State does not violate the First Amendment's guarantee of freedom of association by requiring, as a condition of being licensed to practice law, that attorneys join and financially support an integrated state bar that expresses opinions on and attempts to influence legislation. 367 U.S. 820, 842-843 (1961) (plurality); *id.* at 849 (Harlan, J., concurring in the judgment). But the Court "intimate[d] no view as to" whether a State could constitutionally compel an

attorney "to contribute his financial support to political activities which he opposes" by requiring attorneys to subsidize the advocacy efforts of an integrated state bar. *Id.* at 847-848.

Nearly thirty years later, in *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court addressed the constitutionality of using "compulsory dues to finance political and ideological activities of the State Bar" that some members opposed. *Id.* at 9. The Court held that a State may not require an attorney, as a condition of being licensed to practice law, to financially support the activities of an integrated state bar that are not germane to the bar's goals of "regulating the legal profession and improving the quality of legal services." *Id.* at 13-14. The Court specified that an integrated state bar may compel financial support only for "expenditures [that] are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop*, 367 U.S. at 843). Relying on its earlier decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court suggested that a state bar could comply with its constitutional obligations in that regard if, in the course of collecting fees, it provided "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 496 U.S. at 16 (internal quotation marks omitted).

b. In a parallel line of cases, which culminated in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448

(2018), the Court has considered the extent to which a public-sector labor union can compel employees who are not members to pay dues.

In *Abood v. Detroit Board of Education*, the Court held that compulsory public-union dues were constitutional as long as they were not used to support political and ideological causes of the union unrelated to collective bargaining activities. 431 U.S. 209, 235-236 (1977). But beginning in 2012, the Court began to question the continuing viability of *Abood*. *Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 315-317 (2012); *Harris v. Quinn*, 573 U.S. 616, 627 (2014). Initially, in *Knox*, the Court cautioned that "requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in"—"creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." 567 U.S. at 312. Because *Knox* was about a special assessment for solely political activity, the Court had no occasion to actually consider the viability of such opt-out systems for the payment of annual dues. *Id.* at 304-305.

Two years later, in *Harris*, the Court declined to apply *Abood*, instead applying a stricter standard to strike down a union-fees law applicable to quasi-public employees. 573 U.S. at 647-656. At the same time, the Court in *Harris* explained that its holding did *not* call into question its earlier integrated-bar cases, instead stating that *Keller* "fits comfortably within the framework" the Court adopted in *Harris*. *Id.* at 655. "Licensed attorneys," the Court reasoned, "are subject to detailed ethics rules, and the bar rule requiring the payment of dues" at issue in *Keller* "was part of this

regulatory scheme." *Id.* Because "[s]tates also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices," the decision in *Harris* was "wholly consistent with [the Court's] holding in *Keller*." *Id.* at 655-656. *Harris* and the Court's prior decision in *Knox* also left intact the portion of *Keller*'s decision explaining that integrated bars can meet their constitutional obligations in collecting annual mandatory dues by "adopting the sort of procedures described in *Hudson*." *Keller*, 496 U.S. at 17.

In 2018, the Court ultimately overruled *Abood*, holding in *Janus* that public-union agency fees violate the First Amendment. 138 S. Ct. at 2478. It further held that any attempt to collect such fees from nonmembers must be by the affirmative consent of the employee and not by automatic deduction from the employee's wages. *Id.* at 2486. However, *Janus* did not mention the integrated-bar line of cases at all. *See* 138 S. Ct. at 2498 (Kagan, J., dissenting) (noting that the majority in *Janus* did "not question" cases like *Keller* that are outside the labor sphere).

2. a. North Dakota has an integrated bar that requires all attorneys who are licensed to practice in the State to maintain membership in and pay annual dues to the State Bar Association of North Dakota (SBAND), unless exempt by virtue of holding judicial or other office. Pet. App. 2a, 29a; N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-02; Pet. App. 29a. "The objectives of SBAND are to improve professional competence, promote the administration of justice, uphold the honor of the profession of law and encourage cordial relations among members of the State Bar." Pet.

App. 29a. SBAND sets annual bar dues for its members. *Id.* at 30a.

In support of its objectives, "SBAND investigates complaints against attorneys," "facilitates attorney discipline, promotes law-related education and ethics" activities, "facilitates and administers a volunteer lawyers program and a lawyer assistance program, administers a client protection fund, provides advisory services to government officials on various legal subjects, monitors" and educates members of the bar about the "status of various legislative measures, and provides information to the legislature on matters affecting regulation of the legal profession and matters affecting the quality of legal services available to the people of the State of North Dakota." Pet. App. 30a. SBAND also engages in activities deemed non-chargeable in *Keller*, 496 U.S. at 14, including lobbying on bills pending before the state legislature and other political or ideological activities. Pet. App. 30a-31a.

b. Petitioner Arnold Fleck is an attorney licensed to practice in North Dakota and a member of SBAND. Pet. App. 28a. In February 2015, Fleck filed this suit challenging North Dakota's integrated bar requirement. *Id.* at 32a. Fleck asserted three claims: (1) that SBAND's procedures for allowing members to object to non-germane expenditures did not comply with the constitutional safeguards set out in *Keller* and in *Hudson*; (2) that any integrated-bar requirement violates his speech and association rights guaranteed by the First Amendment; and (3) that SBAND employs an opt-out procedure that violates his right to

affirmatively consent before subsidizing non-germane expenditures. *Id.* at 16a.[1]

In response to this lawsuit, SBAND agreed to amend its policies governing the collection of fees—and the parties to this suit agreed that the adoption and implementation of those revised policies would fully and completely resolve Fleck's first claim that the minimum safeguards required by *Keller* and *Hudson* were lacking. Pet. App. 19a-21a, 32a, 52a-56a. SBAND adopted the revised policies and procedures on September 18, 2015, and the district court adopted the joint stipulation and dismissed Fleck's first claim on November 24, 2015. *Id.* at 33a.

Under SBAND's revised policies and procedures, the Board of Law Examiners sends SBAND's "Statement of License Fees Due" to SBAND's members every year. Pet. App. 19a, 58a-60a. The Statement informs each member that he must pay annual dues of either $380, $350, or $325, depending on years of practice, unless the attorney is exempt. *Id.* at 19a, 58a-60a. The Statement identifies that figure as the "annual license fee." *Id.* at 19a. The Statement requires members to certify they have complied with rules governing trust accounts and malpractice insurance and permits

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[1] When the action was commenced, SBAND did not advise its members that they could opt out of paying for non-germane expenses in advance, did not inform members of the breakdown between germane and non-germane expenses, and did not permit members to challenge SBAND's calculation of germane expenses before an impartial decisionmaker. Pet. App. 19a. Instead, a member who dissented from a position on any legislative or ballot-measure matter could be refunded the portion of dues that would otherwise have been used to support that activity. *Id.* Those practices are no longer in place.

members to check boxes to enroll in specialized SBAND sections for additional fees, to contribute to the bar foundation, or to donate to a pro bono fund. *Id.* at 19a, 58a. Pursuant to the revised policy, the Statement also includes the following passage:

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

Id. at 19a-20a, 58a. Next to that new section is a blank allowing the member to write in an amount to be deducted from the license fees due. *Id.* at 20a, 58a. At the end of the Statement, the member must add any selected optional fees to the annual license fee and then subtract the "Keller deduction" if applicable. *Id.* The accompanying instructions for completing the license renewal form direct: "If you choose the optional Keller deduction, please deduct that amount from the total section and foundation fees to be remitted. See enclosed insert explaining Keller deduction policy." *Id.* at 59a. Those calculations result in the amount due. *Id.* at 20a. "Members return the completed Statement with a check payable to the State Board of Law Examiners, which collects license fees and issues annual licenses." *Id.*; *see* N.D. Cent. Code § 27-11-22.

As explained in the insert accompanying the dues Statement and instructions, SBAND calculates the available Keller deduction as a percentage of annual license fees based on the percentage of fees that SBAND spent on non-germane activities in the most recent year for which an audited financial report is available. Pet. App. 20a, 58a-60a; 17-886 Pet. App. 46a-50a. Additionally, the insert summarizes *Keller*'s

holding and sets out the process for members to object to SBAND's chargeability determinations. Pet. App. 20a; 17-886 Pet. App. 46a-50a. The new "Keller Policy," 17-886 Pet. App. 51a-53a, which is available on SBAND's member website, provides the following additional notice:

> SBAND shall provide periodic notice to its membership of any expenditures that deviate from its pre-collection notice. SBAND shall also provide notice of any position it adopts regarding legislative proposals and initiated and referred measures within two weeks of SBAND's vote to adopt such positions. After being emailed to members of SBAND, such notices will be readily accessible at www.sband.org.

Pet. App. 20a-21a; 17-886 Pet. App. 52a

c. Fleck and Respondents filed cross-motions for summary judgment on Fleck's two remaining challenges, *i.e.*, whether North Dakota may constitutionally require Fleck to be a member of and pay dues to SBAND and whether SBAND's revised procedures satisfy minimum First Amendment protections. Pet. App. 28a-29a.

Fleck argued that his "claim challenging the constitutionality of conditioning the practice of law upon SBAND membership and payment of SBAND dues is presently foreclosed by" this Court's decisions in *Keller* and *Lathrop* but argued that those decisions should be overruled based on *dicta* in *Knox*. Pet. App. 35a-36a. The district court granted summary judgment to Respondents on that claim. *Id.*

Fleck further conceded that SBAND's revised procedures comply with the minimum protections set out in *Keller* and *Hudson* but again argued that those decisions should be overruled based on *dicta* in *Knox*. Pet. App. 41a-42a. The district court granted summary judgment to Respondents on that claim as well, explaining that it was "unaware of any federal or state court which has interpreted *Knox* to hold that the 'opt-out' procedures established in *Hudson* are unconstitutional, or that the 'opt-in' procedures advocated by [Fleck] are constitutionally required." *Id.* at 43a. The district court declined to overrule "long-standing precedent upholding the validity of 'opt-out' procedures as established by the Supreme Court in *Hudson* (1986), and directly applied to integrated bars in *Keller* (1990)." *Id.* at 42a, 43a.

d. Fleck appealed, and the Eighth Circuit affirmed. Pet. App. 15a-25a. The court of appeals summarily disposed of Fleck's claim that his First Amendment rights were infringed by North Dakota's requirement that he join and pay dues to an integrated bar, noting that "Fleck concede[d]" that that question was resolved by *Keller*. *Id.* at 16a.

The court of appeals also affirmed the grant of summary judgment on Fleck's argument "that SBAND's 'opt-out' procedure violates his right to affirmatively consent before subsidizing non-germane expenditures." Pet. App. 16a; *id.* at 23a-25a. The court explained that it is "obvious" that "the opt-out issue debated by the Court in *Knox* is simply not implicated by SBAND's revised license fee Statement." *Id.* at 24a. The court explained that, in the cases involving agency fees, the employer had transferred a portion of the employees' pay directly to the union unless the employee

took affirmative steps to object and obtain a rebate, whereas SBAND members themselves choose how much money to transfer to SBAND—and, in particular, whether or not to pay for non-germane expenses. *Id.* Relying on Fleck's concession that SBAND adequately discloses to members their right not to pay the full fee, the court concluded that a member who chooses not to take the *Keller* deduction affirmatively "opts in" to subsidizing non-germane activities "by the affirmative act of writing a check for the greater amount." *Id.*

e. Fleck then filed a petition for a writ of certiorari. Pet. App. 2a. This Court granted the petition, vacated the decision below, and remanded the case for further consideration in light of its opinion in *Janus*. *Fleck v. Wetch*, 139 S. Ct. 590 (2018).

f. On remand, the Eighth Circuit again affirmed the district court's rejection of Fleck's First Amendment claims. Pet. App. 1a-14a.

On remand to the court of appeals, Fleck argued for the first time that *Keller* did not address whether mandatory membership in a state bar association violates his First Amendment right of association and asked the Court to apply the heightened standard of review adopted in *Janus* to that question. Pet. App. 6a. The court of appeals declined to do so because, it held, Fleck had waived any argument that *Keller* did not control his First Amendment association claim. The Eighth Circuit emphasized that Fleck had repeatedly conceded that *Keller* and *Lathrop* foreclosed his ability to pursue his freedom of association claim, a concession Respondents "relied [on] in part" at the cross-motion for summary judgment stage, and again at the ap-

pellate stage. *Id.* at 7a. The court thus expressed frustration that Fleck's initial "petition to the Supreme Court for a writ of certiorari misrepresented his position," *id.* at 7a, by "falsely assert[ing]" that the Eighth Circuit's initial decision "'affirmed the dismissal of Fleck's challenge . . . on the basis of' *Keller* and *Lathrop*," when, in reality, the court's decision was based on Fleck's earlier concession. *Id.* The court of appeals declined on remand to address Fleck's new argument that *Keller* did not address his First Amendment claim "*for the first time*" without the requisite factual record, particularly in light of the "highly fact-intensive" nature of the issue. *Id.*

The court also rejected Fleck's claim on remand that SBAND's revised dues procedures are invalid under *Janus*. Without deciding whether *Janus* requires "opt-in" procedures for all non-germane activities in the integrated-bar setting, the Eighth Circuit held that SBAND's procedures already require attorneys to affirmatively "opt-in." Pet. App. 11a. Since attorneys are sophisticated legal communicators who must affirmatively calculate an amount and write a check in order to pay their dues, the court found that "SBAND's revised fee statement and procedures clearly do not force members to pay non-chargeable dues over their objection." *Id.* And the court found it telling that "[t]he record contains no evidence" that an attorney "has ever" failed to notice "the option to take the Keller deduction"—and no evidence that that "is likely to happen." *Id.* at 12a-13a. The court further noted that SBAND's fee statement gives members adequate notice of "their constitutional right to take the Keller deduction" and that Fleck's own "stipulation that the revised fee procedures" fully resolved his first claim

strongly supports such a conclusion. *Id.* at 12a. Finally, the court distinguished *Janus* from the Court's integrated-bar cases, noting that *Janus* did not "question the use of the *Hudson* procedures *when it is appropriate to do so*." *Id.* at 13a.

THE PETITION SHOULD BE DENIED

Petitioner Fleck asks this Court to consider a question that he did not raise below, that was not decided below, and that has not yet been considered by any court of appeals. Having originally conceded that *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lathrop v. Donohue,* 367 U.S. 820 (1961) (plurality), bar any challenge to the constitutionality of the integrated bar, Fleck now insists that those cases have been repeatedly misread and that that long-settled constitutional question remains unanswered. To disguise the fact that he already waived that line of argument below, he relies on this Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), which does not mention integrated bar associations at all. In fact, a case that *Janus* heavily relies on reaffirmed that integrated bar associations comport with this Court's public-union cases. *See Harris v. Quinn*, 573 U.S. 616, 655-656 (2014). As an afterthought, Fleck asks this Court to overrule its decision in *Keller*, without even mentioning the doctrine of *stare decisis*. But the Court has already determined that *Keller* is consistent with its public-union cases and there is no conflict among the circuits on that issue. Even if there were reason to reconsider *Keller* in light of the decision in *Janus*, there is no reason this Court should be the first court in the Nation to do so.

Fleck's second question is not actually presented in this case given that SBAND already employs an affirmative-consent procedure that goes above and beyond the requirements of controlling precedent. And any answer this Court provides to Fleck's narrow question of precisely how integrated bars should format its dues-collection form would be fact-bound to the procedures at issue in this case. The Petition should be denied.

I. Review of the First Question Presented Is Not Warranted.

Fleck asks this Court to find that *Keller* and *Lathrop* did not settle the constitutionality of mandatory bar association membership—an argument he raised for the first time on remand. He also argues that this Court's decision in *Janus* changes the controlling level of scrutiny. Review is unwarranted for a number of reasons. First, as the Eighth Circuit held, Fleck waived his argument that *Keller* and *Lathrop* did not already uphold the constitutionality of integrated bar associations when he conceded that point below. Second, this Court recently concluded that *Keller* is fully consistent with its agency-fee cases. Third, review of the first question presented is premature because, although many federal courts are currently considering whether *Janus* has any implications for integrated bar associations, no court of appeals has yet addressed that issue.

A. *Fleck Has Waived Any Argument That Keller and Lathrop Did Not Decide the Constitutionality of Compulsory Bar Association Membership.*

Through concessions to both the district court and the Eighth Circuit, Fleck waived the argument he now presents as his lead argument, *i.e.*, that this Court's decisions in *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *Lathrop v. Donohue*, 367 U.S. 820 (1961), do not foreclose his First Amendment challenge to mandatory state bar associations. Because this is "a court of review, not of first view," *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 (2005)), the Court should decline Fleck's invitation to be the first court in the country to consider that argument.

In his haste to secure this Court's review, Fleck waived the argument that what he now describes as *Keller*'s "ambiguous" holding leaves the door open for freedom of association challenges to integrated bars. Pet. 24. Although that argument now dominates Fleck's petition, *see id.* at 12-13, 24-29, Fleck repeatedly conceded below that his First Amendment claim "is presently foreclosed by" both *Keller* and *Lathrop*. Pet. App 35a; *see also id.* at 6a-7a. In fact, Fleck insisted to the Eighth Circuit that, because "the District Court appropriately denied this claim," "the lower court's dismissal of this claim should be affirmed." 16-1564 Appellant Br. 20 (8th Cir. Apr. 29, 2016). It was not until the case returned to the Eighth Circuit on remand from this Court that Fleck first argued that "*Keller* never actually decided the constitutionality of

mandatory bar association membership, and is therefore not directly controlling on this question." 16-1564 Appellant Br. 3-4 (8th Cir. Feb. 15, 2019).

In an attempt to dodge his concessions, Fleck has repeatedly misrepresented his prior position before this Court. Fleck's first petition for a writ of certiorari falsely asserted that the Eighth Circuit had "affirmed the dismissal of Fleck's challenge to mandatory bar membership on the basis of *Keller*, 496 U.S. 1, and *Lathrop*, 367 U.S. 820." 17-886 Pet. 7; *see also* Pet. App. 7a. And Fleck has chosen to maintain that fiction in his current petition, stating that the Eighth Circuit "reaffirmed its prior decision that *Keller* forecloses Fleck's freedom of association challenge to compulsory association," Pet. 9, when in fact the court "decline[d] to consider these issues" because the "record [was] inadequate as the result of Fleck forfeiting the issue in the district court and on appeal," Pet. App. 9a.

The Eighth Circuit correctly concluded that Fleck's earlier concessions waived any argument that *Keller* does not foreclose his First Amendment challenge. Pet. App. 9a. To ensure "that parties may have the opportunity to offer all the evidence they believe relevant," an appellate court ordinarily "does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). This Court should decline Fleck's invitation to take up, for the first time, arguments Fleck chose to concede in the first instance. *See Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below.").

Fleck now contends that *Lathrop* decided only the question of the constitutionality of compelled dues and that its statements about compulsory bar membership

were merely *dicta*. Pet. 24-25. He further argues that *Keller* left open the ultimate constitutionality of compulsory membership when it declined to answer whether an attorney can "be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified." *Keller*, 496 U.S. at 17; *see also* Pet. 24-25. To excuse the tardiness of his claims, Fleck contends that it was "impossible [for him] to have forfeited those issues, given that all proceedings below occurred before *Janus* was decided." Pet. 28. But Fleck's interpretation rests entirely on the language of *Keller* and *Lathrop* rather than *Janus*. *See id.* at 24-27. In fact, *Janus* does not address *Keller* or *Lathrop* at all. *See Janus*, 138 S. Ct. at 2459-2486. Whether through choice or negligence, Fleck did not argue that *Keller* and *Lathrop* permit freedom of association challenges to the integrated bar even though that argument was readily available to him throughout this litigation. Because Fleck has forfeited that argument, this Court should decline his invitation to decide in the first instance an issue he expressly waived below.

Even if Fleck had not waived the argument that *Keller* does not foreclose a challenge to the constitutionality of the integrated bar, that argument is meritless. *Keller*'s opening paragraph firmly states that "lawyers admitted to practice in the State may be required *to join* and pay dues to the State Bar." *Keller*, 496 U.S. at 4 (emphasis added). And every court that has applied *Keller* and *Lathrop* has concluded that those cases upheld the constitutionality of integrated bar associations. *See, e.g.*, *Eugster v. Wash. State Bar Ass'n*, 684 F. App'x 618, 619 (9th Cir. 2017), *cert. denied* 137 S. Ct. 2315 (2017); *Brown v. Fla. Bar*, 406

F. App'x 434, 434 (11th Cir. 2010), *cert. denied*, 563 U.S. 1021 (2011); *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 714 (7th Cir. 2010); *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999) (noting that *Keller* reaffirmed *Lathrop* on the question of whether compulsory bar associations comport with the First Amendment), *cert. denied*, 528 U.S. 1156 (2000). That has remained true even after the Court's decision in *Janus*. *See Boudreaux v. La. State Bar Ass'n*, No. cv-19-11962, 2020 WL 137276, at *23 (E.D. La. Jan. 13, 2020); *Schell v. Gurich*, 409 F. Supp. 3d 1290, 1298 (W.D. Okla. 2019); *Gruber v. Or. State Bar*, 3:18-cv-1591-JR, 2019 WL 2251826, at *9-10 (D. Or. Apr. 1, 2019), *appeal filed*, No. 19-35470 (9th Cir. May 29, 2019). Fleck's reading of *Keller* and *Lathrop* is therefore contrary to decades of settled precedent and should not be credited by this Court.

Moreover, by conceding below that the constitutionality of compulsory bar membership had previously been decided by *Keller* and *Lathrop*, Fleck has ensured that this Court has only an anemic record to rely on in making a fact-intensive determination. Appellate courts generally do "not consider an issue not passed upon below" to ensure that both parties have the opportunity to proffer sufficient evidence in defense of their position. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). As the Eighth Circuit noted, the Court in *Lathrop* explained that resolving the question of the constitutionality of the integrated bar requires a "highly fact-intensive" inquiry. Pet. App. 7a; *see also Lathrop*, 367 U.S. at 827-848 (using "the character of the integrated bar shown on [that] record" to determine whether there was "any impingement upon protected rights of association"). A factual record would

allow the Court to determine the degree to which an SBAND member's associational rights have been impinged. *Cf. Lathrop*, 367 U.S. at 827-828 ("[H]is compulsory enrollment imposes only the duty to pay dues."). A developed record could address, for example, whether SBAND members are required to list their names on the SBAND website; the extent of SBAND's legislative activities; whether SBAND members are required to attend meetings or to vote in elections; and whether SBAND is involved in any other activities that may impose a burden on associational freedoms. If, as Fleck contends, *Lathrop* "did not squarely uphold the constitutionality of mandatory bar associations," Pet. 24, then a careful assessment of the intricacies of SBAND's particular structure and of SBAND's activities will be necessary to assess the extent of any burden on Fleck's associational rights. *See Lathrop*, 367 U.S. at 835-839, 842-844; *see also Knox v. Serv. Emps. Int'l Union, Local 100*, 567 U.S. 298, 315-317 (2012) (applying a fact-intensive inquiry in the context of agency fees). None of those questions can be answered on the record as it now stands.

B. This Court's Decision in Keller Is Consistent with Its Recent Agency-fee Cases.

In the alternative, Fleck asks this Court to reconsider its holding in *Keller* in light of its recent decision in *Janus*. Pet. 24. But *Janus* provides no basis to doubt the continuing viability of *Keller*. After all, the *Janus* majority did not even cite *Keller* in its opinion, 138 S. Ct. at 2459-2486, perhaps because the Court had recently reaffirmed in *Harris* that *Keller* is consistent with the Court's decisions in the public-union cases.

See Harris, 573 U.S. at 656. This Court should therefore decline Fleck's invitation to revisit that settled precedent.[2]

Fleck contends that the Court's decision in *Janus* fundamentally altered the controlling standard of review in this case. Pet. 12. Not so. *Janus* applied the same heightened scrutiny standard that had already been announced in cases like *Knox* and *Harris*, *see Janus*, 138 S. Ct. at 2465, and all nine justices have confirmed that *Keller* is consistent with that standard, *see Harris*, 573 U.S. at 655-656; *id.* at 670 (Kagan, J., dissenting). Fleck's assertion that *Janus* "abrogated *Keller*," Pet. 12, therefore has no basis in this Court's decisions.

In fact, this Court has already found that *Keller* "fits comfortably" within the heightened scrutiny framework applied in *Janus* based on the strength of the interests at stake in the state bar context. *See Harris*, 573 U.S. at 655. AState's interests in regulating the legal profession and improving the quality of legal services are well-recognized and not disputed here. *See id.*; *Keller*, 496 U.S. at 13-14. To fulfill its mission, SBAND "investigates complaints against attorneys," "facilitates attorney discipline, promotes law-related education and ethics" activities, "facilitates and administers a volunteer lawyers program and lawyer assistance program, administers a client protection fund, provides advisory services to government officials on various legal subjects," monitors and educates

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[2] Curiously, Fleck asks this Court to overrule only *Keller*, Pet. 24, despite his earlier concession that constitutional challenges to mandatory bar associations are foreclosed by both *Keller and Lathrop*, *see* Pet. App. 35a.

members of the bar about the "status of various legislative measures, and provides information to the legislature on matters affecting regulation of the legal profession and matters affecting the quality of legal services available to the people of the State of North Dakota." Pet. App. 30a. And this Court has also recently identified a State's "strong interest" in ensuring that the costs for attorney oversight are borne by members of the bar, rather than the general public. *Harris*, 573 U.S. at 655-656. Indeed, *Harris* declared that *Keller* is "*wholly consistent*" with the framework used in the public-union cases. *Id.* at 656 (emphasis added).

There are good reasons to draw a distinction between integrated bars and public unions, as the Court did in *Harris*. First, the Court has found compelled contributions permissible when they are "part of a broader collective enterprise in which [one's] freedom to act independently is already constrained by the regulatory scheme." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 414-415 (2001). Unlike unions, the role of most integrated state bars is first and foremost to regulate their members. *See Glickman*, 521 U.S. at 473 ("[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services."). Second, much of *Janus*'s analysis hinged on the fact that unions serve as the exclusive representative of all employees in collective bargaining, speaking for its membership on "sensitive political topics" and "matters of profound 'value and concern to the public.'" *Janus*, 138 S. Ct. at 2467, 2476 (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)).

But a bar association is not the exclusive representative of its membership in any context. A lawyer is always free to publicly take a position contrary to that of the state bar of which the lawyer is a member. Thus, compulsory membership places less of a burden on the lawyer's First Amendment rights. Third, a lawyer has a special role as an "officer of the court," a role that may allow for a greater imposition on his rights than what may be permissible in other contexts. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072 (1991); *see also id.* at 1066 ("Membership in the bar is a privilege burdened with conditions.").

Although Fleck asks this Court to overrule *Keller* (at least to the extent *Keller* upheld the constitutionality of integrated bars), Pet. 28-29, he does not even mention the doctrine of *stare decisis*. *See Janus*, 138 S. Ct. at 2478-2479 (noting the Court's presumption of *stare decisis*); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019). Fleck's evasion of *stare decisis* may be due to Fleck's own realization that *Keller* remains good law after the Court went to great lengths in its recent agency-fee cases to underline *Keller*'s continuing viability, *see Harris*, 573 U.S. at 655.

C. Review of the Constitutionality of the Integrated Bar Is Premature.

Even if the recent decision in *Janus* casts doubt on the constitutionality of compulsory bar association membership, there is no need for this Court to be the first Court in the country to consider that question. The Court should wait until the circuits have had sufficient time to assess what implications (if any) *Janus* has for the constitutionality of mandatory state bar associations before addressing that issue in the first instance.

As Fleck notes, Pet. 11-12 nn.1-9, several First Amendment challenges to integrated state bars are currently pending. *See*, *e.g.*, *Taylor v. State Bar of Mich.*, No. 1:19-cv-00670-RJJ-PJG (W.D. Mich. filed Aug. 22, 2019); *Boudreaux v. La. State Bar Ass'n*, No. 2:19-cv-11962, 2020 WL 137276 (E.D. La. Jan. 13, 2020); *File v. Kastner, et al.*, No. 2:19-cv-01063-LA (E.D. Wis. filed July 25, 2019); *Schell v. Gurich*, 409 F. Supp. 3d 1290 (W.D. Okla. 2019); *McDonald v. Longley*, No. 1:19-cv-00219-LY (W.D. Tex. filed Mar. 6, 2019); *Gruber v. Or. State Bar*, No. 3:18-cv-1591-JR, 2019 WL 2251826, at *9-10 (D. Or. Apr. 1, 2019), *appeal filed*, No. 19-35470 (9th Cir. May 29, 2019). But no court of appeals has yet discussed, let alone decided, how the analysis in *Janus* applies to that question.[3] Like the Eighth Circuit in this case, the Seventh Circuit has issued a decision summarily accepting the plaintiff's concession that his First Amendment challenge is foreclosed by *Keller*. *Jarchow v. State Bar of Wis.*, No. 19-3444 (7th Cir. Dec. 23, 2019), *petition for cert. filed*, No. 19-831 (Jan. 2, 2020). If this Court is inclined to consider how the First Amendment applies to integrated state bars, it should wait for a case in which the parties and the lower courts actually address that issue. In the meantime, Fleck's petition should be denied.

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[3] The only case Fleck suggests conflicts with the unbroken line of court of appeals cases relying on *Keller* to reject First Amendment challenges to integrated bars is *Casillas v. Colegio de Tecnicos y Mecanicos Automotrices de Puerto Rico*, 2019 WL 2147491 (P.R. May 8, 2019)—which involves neither a bar nor the First Amendment. *See id.* at *13-14 (deciding whether the Puerto Rico Constitution bars compulsory membership in an automotive technicians association).

II. Review of the Second Question Presented Is Not Warranted.

Fleck asks the Court to opine on the minute details of how *this* bar association should collect fees and "to reiterate that *Janus* forbids states from presuming a willingness to waive constitutional rights, and requires clear and affirmative consent to such a waiver, instead." Pet. 15. But that issue is not even presented in this case because SBAND already uses a procedure requiring its members to affirmatively opt in to paying non-germane fees. Moreover, the narrow question posed here implicates only fact-specific minutiae of SBAND's dues-collection form and is therefore of limited constitutional significance.

A. This Question Is Not Presented in This Case.

Review of whether *Janus*'s opt-in requirement applies to an integrated bar's non-germane fees is unwarranted here because it is not actually presented in this case: SBAND already uses an opt-in procedure requiring members to affirmatively consent ex ante to paying non-germane fees. The Court concluded in *Janus* that agency fees could not automatically be deducted from employees' wages or otherwise collected "[u]nless employees clearly and affirmatively consent before any money is taken from them." 138 S. Ct. at 2486. Here, as the Eighth Circuit correctly held, *Janus*'s consent requirement is fulfilled when SBAND members each calculate the amount they wish to pay and affirmatively write a check to the bar association for that amount. Pet. App. 12a.

In response to this lawsuit, SBAND adopted a procedure that permits each attorney to calculate the amount of dues he will pay, including by deciding

whether to pay for non-chargeable activities. Pet. App. 18a-21a, 32a, 52a-56a. Only after each attorney has made that calculation does the attorney remit payment to SBAND for the amount of dues he has calculated—thereby affirmatively opting in to support non-chargeable activities, but only if he wishes. The Eighth Circuit thus correctly held that SBAND employs an opt-in procedure. *Id.* at 11a-12a.

Fleck argues that SBAND currently employs an opt-out system because members must subtract the amount of non-chargeable dues before paying them instead of adding them to the total amount due on the invoice before writing a check. The court of appeals correctly rejected that argument. Pet. App. 11a-12a (applying *Janus* to the facts of this case and finding that *Janus* does not threaten SBAND's collection procedures, which "clearly do not force members to pay non-chargeable dues over their objection"). SBAND does not (and cannot) automatically deduct any fees from attorneys' wages and does not (and cannot) retain and use attorneys' funds for non-germane expenses if an attorney does not take the affirmative step of voluntarily paying for such activities. The Court should therefore decline Fleck's invitation to find that the lower court erred in its application of *Janus* to the facts of this case.

B. The Second Question Presented Is Fact-Specific and of Minimal Significance.

The constitutional question Fleck would have this Court consider is so fact-bound that any answer would have little significance. Fleck relies on *Janus*'s affirmative-consent requirement in arguing that "[t]he mechanical act of writing a check . . . is simply not the kind of affirmative consent *Janus* contemplated." Pet.

15. Fleck thus asks this Court to answer the exceedingly narrow question of whether having state bar members perform addition or subtraction when writing a check to their bar association is of constitutional significance. None of this Court's First Amendment decisions countenance that degree of formalism—and Fleck cannot offer any reason grounded in those decisions for the constitutional line he would have this Court draw.

Although SBAND's dues form and accompanying instructions inform members no fewer than four times that they must complete the entire form (which includes the decision whether to pay for non-chargeable activities), Pet. App. 58a-60a, Fleck believes that attorneys (sophisticated and trained in legal communication) may be unable to follow the instructions and will thereby be duped into affirmatively remitting payment for non-chargeable activities to which they object. *See* Pet. 14. That concern has no basis in reality, as recognized by the appellate court, *see* Pet. App. 12a-13a, and should not form the basis of a new constitutional rule. Fleck does not even allege that he or anyone else has been confused by SBAND's revised procedures. This Court should decline to issue a constitutional ruling based on Fleck's fly-specking of SBAND's revised dues-collection procedures. Under those procedures, no member attorney contributes to non-chargeable activities unless he affirmatively chooses to remit a check to pay for those activities.

Moreover, it is not even clear how this Court would evaluate whether, as a practical matter, members accidentally remit payment for non-chargeable offenses they prefer not to subsidize—because Fleck

himself opted not to develop the factual record necessary to answer that question. Early on in the litigation, Fleck conceded that SBAND's revised procedures "resolve[d] fully and completely" his first claim for relief, Pet. App. 52a, making SBAND "compl[iant] with the minimum safeguards required by *Keller*," *id.* at 16a. After the joint stipulation agreeing to SBAND's revised procedures, Fleck immediately moved for summary judgment, affirmatively declining the opportunity to develop a factual record about how lawyers interpret SBAND's dues-collection form in practice. *See id.* at 12a-13a. And the existing record is devoid of evidence that any attorney has ever neglecting to subtract the non-germane fees to which the attorney objects when the attorney affirmatively calculates and writes the amount he or she will pay. *See ibid.* This Court therefore has no factual record on which to address Fleck's narrow and fact-specific question.

The limited scope of that issue is highlighted by Fleck's failure to identify *any* other bar association with a similar collection scheme. That notable absence suggests that any answer to Fleck's question would have little bearing on bar fee-collection schemes beyond SBAND's. Fleck also has failed to identify any circuit conflict about whether the type of system SBAND employs should be viewed as an opt-in system or an opt-out system. Fleck does not identify any court of appeals decision that even discusses *how* a State may permissibly collect fees for its integrated bar. Fleck's inability to identify any similar dues-collection procedure or circuit conflict suggests that that issue has not arisen outside the discrete factual confines of this case. Any answer to Fleck's question would thus

have little significance to anyone beyond the 2,900 members of SBAND.[4]

There is, moreover, no constitutional reason that all States must use precisely the same form to collect fees for their integrated bars. In *Kidd v. Pearson*, the Court explained that federalism allows States to retain authority over matters of "purely internal concern." 128 U.S. 1, 16 (1888). The federalist structure "preserves to the people numerous advantages," such as "assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogenous society . . . [and] allow[ing] for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). A state bar association's regulation of the legal profession within its borders is itself a matter of internal concern. The precise method by which bar associations collect members' fees, including the type of arithmetic used, is a trivial detail that should be left to state experimentation in order for the States to assess what system works most efficiently within their borders.

C. SBAND's Opt-In Procedures Exceed What Is Constitutionally Required.

Not only is the second question presented fact-bound and of narrow constitutional significance, but SBAND's current procedures already surpass the minimum safeguards required by *Keller* and *Hudson*, *see* Pet. App. 16a, 35a-36a. The Court held in *Keller* that, although the First Amendment permits an integrated bar to use members' mandatory dues to fund activities

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[4] *See* State Bar Association of North Dakota, https://www.sband.org/ (last visited Jan. 31, 2020).

germane to "the State's interest in regulating the legal profession and improving the quality of legal services," it does not permit those fees to be used to "fund activities of an ideological nature which fall outside of" such germane activities, 496 U.S. at 13-14. *Keller* further stated that an integrated bar could meet its constitutional obligations in collecting dues "by adopting the sort of procedures described in *Hudson*." 496 U.S. at 17. Those procedures "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 16 (quoting *Hudson*, 475 U.S. at 310).

The Court's recent public-union cases do not cast doubt on the validity of the dues-collection procedures upheld in *Keller*. As noted, in *Harris*, this Court reaffirmed its holding in *Keller* and explained that *Keller* "fits comfortably within the framework applied in" *Harris*, concluding that the two decisions are "wholly consistent." 573 U.S. at 655-656. And in *Janus*, the Court did not mention the integrated-bar line of cases. *See Janus*, 138 S. Ct. 2448, 2498 (2018) (Kagan, J., dissenting) (noting that the *Janus* majority did "not question" cases like *Keller* that are outside *Janus*'s scope).

It cannot be doubted, nor does Fleck dispute, that SBAND's revised procedures provide greater protection for dissenters' rights than the minimum procedures established in *Hudson* and approved of in *Keller*. SBAND's revised procedures explain how it arrived at the amount of the *Keller* optional fee, give each member the choice of whether to fund non-germane activities, and require members to take the affirmative act

of calculating an amount and writing a check. Those procedures clearly surpass what is constitutionally required. The court of appeals correctly upheld SBAND's revised procedures, and review of that decision is unwarranted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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