No. 17-886

IN THE

Supreme Court of the United States

ARNOLD FLECK,

Petitioner,

v.

JOE WETCH, AUBREY FIEBELKORN-ZUGER, TONY WEILER, AND PENNY MILLER,

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 or she owes by specifying an annual licensing fee, a deduction available to any attorney who does not wish to contribute to SBAND's non-chargeable activities (*e.g.*, political activity), and several optional additional payments for, *e.g.*, membership in specialized sections or to support a pro bono fund. The questions presented are:

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

2. Whether this Court should overrule its decisions in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality), which held that a State may require membership in an integrated bar as a condition of practicing law and may require payment of dues to such a bar for certain germane expenses.

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. On June 15, 2018, Zachary Pelham will replace Darcie Einarson as President of SBAND. 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. 15a.

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INTRODUCTION

Petitioner asks this Court to use this case to overrule two binding decisions of this Court. Petitioner concedes that respondents should prevail under those precedents and does not identify any circuit conflict regarding the application of those binding precedents. And, although petitioner expressly calls on this Court to overrule two of its own decisions, he does not so much as mention the doctrine of *stare decisis*. Nothing in this Court's recent public-union decisions calls into question its earlier cases upholding state laws requiring membership in and payment of dues to an integrated bar. In fact, the Court recently went out of its way to distinguish integrated-bar cases from public-union cases. The court of appeals correctly rejected petitioner's arguments, and review of that decision is unwarranted.

STATEMENT OF THE CASE

1. 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 30 years later, the Court took up that question in *Keller v. State Bar of California*, 496 U.S. 1 (1990). The Court relied on its intervening decision in *Abood v. Detroit Board of Education*, which had held that compulsory public-union dues of objecting nonunion employees could not be used to support political and ideological causes of the union unrelated to collective-bargaining activities. 431 U.S. 209, 235-236 (1977). The Court in *Keller* 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." *Keller*, 496 U.S. 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 this 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).

This Court has thus expressed approval of "opt-out" systems in which an objecting member of a union

or integrated bar has the right to opt out of contributing to non-germane activities with which she disagrees. As the Court noted in *Knox v. SEIU, Local 1000*, however, the Court's "cases have given surprisingly little attention to th[e] distinction" "between opt-out and opt-in schemes." 567 U.S. 298, 312 (2012). The Court in *Knox* noted 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." *Ibid.* But the *Knox* Court had no occasion to consider the viability of opt-out systems for the payment of annual dues (because *Knox* was about a special assessment for solely political activity). *Id.* at 304-305.

More recently, this Court has questioned the continuing viability of *Abood*. *Harris v. Quinn*, 134 S. Ct. 2618, 2627-2638 (2014). And the Court is currently considering whether to overrule *Abood* in *Janus v. AFSCME, Council 31*, No. 16-1466 (argued Feb. 26, 2018). But even while strongly impugning the validity of *Abood*, the Court has been careful to explain that its decisions upholding integrated-bar laws do not suffer from the same infirmities the Court has attributed to *Abood*.

Thus, 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. 134 S. Ct. at 2639-2644. At the same time, the *Harris* Court explained that its holding did *not* call into question its earlier integrated-bar cases. In par-

ticular, the Court explained that its decision in *Keller*—which held "that members of [an integrated] 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"—"fits comfortably within the framework" the Court adopted in *Harris*. *Id.* at 2643. "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.* at 2643-2644. Because "States 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 2644.

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. 1a-2a, 15a; N.D. Cent. Code § 27-12-02. Membership in and payment of dues to SBAND is a condition of being licensed to practice law in North Dakota. N.D. Cent. Code §§ 27-11-01, 27-11-22, 27-12-02; Pet. App. 15a. "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. 15a. SBAND sets annual bar dues for its members. *Id.* at 16a. By statute, $75 of each member's annual fee is paid to

SBAND to fund the lawyer-discipline system, and 80% of the remainder of the fee is paid to SBAND "for the purpose of administering and operating the association." *Ibid.* (quoting N.D. Cent. Code § 27-12-04).

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. 16a. SBAND also engages in activities deemed "nonchargeable" in *Keller*, 496 U.S. at 14, including lobbying on bills pending before the state legislature and other political or ideological activities. Pet. App. 16a-17a.

b. Petitioner Arnold Fleck is an attorney licensed to practice in North Dakota and a member of SBAND. Pet. App. 14a. In February 2015, Fleck filed this suit challenging North Dakota's integrated bar requirement. *Id.* at 18a. Fleck asserted three claims: (1) that SBAND's procedures for allowing members to object to non-germane expenditures does 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 2a.[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. 5a-7a; 18a, 38a-53a. 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 19a.

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. 5a, 44a-46a. 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 5a, 48a-49a. The Statement identifies that figure as the "annual license fee." *Id.* at 5a. 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. 5a. 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. *Ibid.* 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 5a, 44a. Pursuant to the revised policy, the Statement also includes the following passage:

> OPTIONAL: Keller deduction relating to nonchargeable 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 5a-6a, 44a. Next to this new section is a blank allowing the member to write in an amount to be deducted from the license fees due. *Id.* at 6a, 44a. At the end of the Statement, the member adds any selected optional fees to the annual license fee and then subtracts the "Keller deduction" if applicable. *Ibid.* 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 45a. Those calculations result in the amount due. *Id.* at 6a. "Members return the completed Statement with a check payable to the State Board of Law Examiners, which collects license fees and issues annual licenses." *Ibid.*; *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. 6a, 44a-50a. Additionally, the in-

sert summarizes *Keller*'s holding and sets out the process for members to object to SBAND's chargeability determinations. *Id.* at 6a, 46a-50a. The new "Keller Policy," *id.* at 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.

Id. at 6a-7a, 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. 14a-15a.

Fleck acknowledged that his claim challenging the constitutionality of conditioning the practice of law upon membership in and payment of dues to SBAND is 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. 21a-22a. The district court granted summary judgment to respondents on that claim. *Ibid.*

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 overturned based on *dicta* in *Knox*. Pet. App. 27a. The district court granted summary judgment to respondents on that claim as well, explaining that this "Court in *Knox* was careful to distinguish the 'opt-out' procedures accepted in *Hudson*, in the context of annual dues assessments, from procedures which are required in the context of mid-year special assessments and dues increases," which were at issue in *Knox*. *Ibid.* 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," 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 28a, 29a.

d. Fleck appealed, and the Eighth Circuit affirmed. Pet. App. 1a-11a. 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 2a.

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. 2a; *id.* at 9a-10a. The court explained that it "agree[d] with the district court that

the decision in *Knox* left in place annual procedures established in *Hudson*, and cross-referenced in *Keller*, which included an opt-out feature." *Id.* at 9a. And the court further 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 10a. The court explained that, in the cases on which Fleck relies, the employer had transferred a portion of the employees' pay directly to the union unless the employee affirmatively opted out—and that the union was entitled to use the transferred fees for non-germane expenses "at least until the employee successfully objects and obtains a rebate." *Ibid.* In contrast, the court explained, SBAND members themselves choose how much money to transfer to SBAND—and, in particular, whether or not to pay for non-germane expenses. *Ibid.* 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." *Ibid.* "Thus," the court explained, "the opt-out issue debated but not decided in *Knox* is irrelevant to whether SBAND's revised license fee procedures comply with the mandates of *Keller* and *Hudson*." *Id.* at 10a-11a.

THE PETITION SHOULD BE DENIED

Petitioner Fleck does not contest that SBAND's existence, membership requirements, and collection procedures pass constitutional muster under this Court's on-point decisions in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality). He does not contend

that the courts of appeals are divided about how to apply *Keller* and *Lathrop*. And he does not contend that any intervening statutory developments have called into question the applicability of those decisions. Instead, he boldly calls on the Court to overrule those decisions, relying on this Court's recent decisions in public-union cases—none of which calls into question *Keller* or *Lathrop* and one of which actually goes out of its way to reaffirm those decisions. In so doing, Fleck does not even mention the doctrine of *stare decisis*, let alone attempt to explain why it should not apply here. The Court should reject Fleck's invitation. The first question presented is not even actually presented in this case, and all legal questions that are presented are controlled by on-point precedent. The Petition should be denied.

I. Review Of The First Question Presented Is Not Warranted.

Fleck asks the Court to use this case to overrule *Keller* and *Lathrop*. In particular, Fleck argues that this Court's discussion in *Knox v. SEIU, Local 1000*, 567 U.S. 298, 312 (2012), about using an opt-out structure to collect a non-germane public-union special assessment, requires the Court to hold that an integrated bar cannot use an opt-out procedure to collect its non-germane expenses. That issue does not warrant further review for two reasons: (1) it is not presented in this case because SBAND uses an opt-in procedure and (2) this Court has recently and carefully distinguished the integrated-bar setting from the public-union setting.

A. Review of the first question presented is unwarranted because it is not actually presented in this case. Fleck relies on this Court's discussion in *Knox* of

the wisdom of allowing public unions to use opt-out procedures to collect fees for non-germane expenses. Relying on *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court in *Knox* noted that a "'[u]nion should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used'" "to further political and ideological ends with which they do not agree." *Knox*, 567 U.S. at 312 (quoting *Hudson*, 475 U.S. at 305). The fee at issue in *Hudson*—like the fee at issue in *Knox*—was deducted by the employer from the paycheck of employees who were not union members. *Hudson*, 475 U.S. at 295; *see Knox v. Cal. State Emps. Ass'n, Local 1000*, 628 F.3d 1115, 1130 (9th Cir. 2010) (Wallace, J., dissenting). The Court explained in *Hudson* that a system that automatically deducts fees and then provides dissenters with an opportunity to opt out of the fees by obtaining a rebate "does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose." 475 U.S. at 305. In *Knox*, the Court reiterated that concern, noting that "[a]n opt-out system" that automatically deducts contributions and requires a dissenter to take affirmative action to retain or reacquire her funds "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.

Fleck argues that SBAND currently employs the same type of "opt-out system" discussed in *Knox*. Fleck is incorrect, as the court of appeals correctly concluded. Pet. App. 10a (holding 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"). 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. *Id.* at 5a-7a, 44a-53a. 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. SBAND's revised system bears no resemblance to the opt-out systems discussed in *Knox* and preceding cases. 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.

Fleck nevertheless contends that SBAND's procedures amount—as a constitutional matter—to an opt-out system because an attorney who chooses not to fund non-germane activities must use subtraction rather than addition when calculating the amount of fees he owes. *See* Pet. 13-14. 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. Fleck does not contend that the materials SBAND sends to its members fail to adequately disclose the portion of the annual dues that is attributable to chargeable activities and the portion that is attributable to non-chargeable activities. Although the 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. 44a-45a, Fleck apparently believes that many attorneys will choose not 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 grounding in reality and should not form the basis of a new constitutional rule.

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 or she affirmatively chooses to remit a check to pay for those activities. That is precisely what this Court has understood to be an opt-in system in *Knox* and other cases.

B. This Court established the minimum required safeguards to protect the First Amendment rights of integrated-bar members in *Keller* and *Hudson*. *See* Pet. App. 2a, 21a-22a. The Court held in *Keller* that the First Amendment permits an integrated bar to use members' mandatory dues to fund activities germane to the "State's interest in regulating the legal profession and improving the quality of legal services," but not to "fund activities of an ideological nature which fall outside of those areas of activity." 496 U.S. at 13-14. The Court in *Keller* also stated that an integrated bar could meet its constitutional obligations "by adopting the sort of procedures described in *Hudson*." *Id.* at 17. In *Hudson*, the Court "outlined a minimum set of procedures by which a union in an agency-shop relationship could meet its" obligations under the First Amendment. *Ibid.* 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).

It cannot be doubted that SBAND's revised procedures provide greater protection for dissenters' rights than the minimum procedures established in *Hudson* and approved of in *Keller*. Nothing in the Court's more recent decisions calls into question the validity of SBAND's revised procedures—even if Fleck were correct that they should be conceptualized as an opt-out system rather than an opt-in system. In *Harris v. Quinn*, this Court recently reaffirmed the validity of integrated bars such as SBAND, distinguishing them from the type of public (or quasi-public) union shops at issue in the decisions Fleck relies on. 134 S. Ct. 2618, 2643-2644 (2014). The fee-collection system at issue in *Harris* was an opt-out system, providing for automatic deduction of union fees directly from nonmembers' paychecks. *Id.* at 2625-2626. The Court struck down the system at issue in that case, applying a stricter standard than that previously adopted in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)—but in so doing, it reaffirmed its holding in *Keller* that "members of [an integrated] bar c[an]not be required to pay the portion of bar dues used for political or ideological purposes but" can "be required to pay the portion of the dues used for activities connected with proposed ethical codes and disciplining bar members." *Harris*, 134 S. Ct. at 2643 (citing *Keller*, 496 U.S. at 14). The Court explained that *Keller* "fits comfortably within the framework applied in"

Harris and concluded that the two decisions are "wholly consistent." *Id.* at 2643-2644.

Notably, the Court in *Keller endorsed* the use of an opt-out system to protect the rights of objecting members of an integrated state bar. 496 U.S. at 16-17 (describing the types of procedures that would satisfy the requirements of the First Amendment). The Court's more recent pronouncement in *Harris* that *Keller* remains good law—and that it is consistent with recent developments in the law governing collection of public union dues—therefore endorsed the Court's previous holdings that the minimum safeguards outlined in *Hudson* (including the use of an opt-out system) are constitutionally sufficient. Because SBAND's revised procedures provide significantly *greater* protection to objecting members, those procedures are necessarily constitutional as well. The court of appeals correctly upheld SBAND's revised procedures, and review of that decision is unwarranted.

II. Review Of The Second Question Presented Is Not Warranted.

Fleck also asks (Pet. 18-29) this Court to grant the Petition in order to overrule *Keller* and *Lathrop* by holding that a State may not require membership in an integrated bar (as a condition of practicing law) without running afoul of the First Amendment. That issue does not warrant review. This Court recently denied a certiorari petition raising the same question. *Eugster v. Wash. State Bar Ass'n*, 137 S. Ct. 2315 (2017). The Court should do the same here.

Fleck concedes this Court has previously upheld the constitutionality of mandatory bar association

membership in *Keller* and *Lathrop*. He argues, however, that this Court's more recent public-union cases suggest that those decisions should be overruled. He is incorrect. Remarkably, Fleck does not even *mention* the doctrine of *stare decisis*, let alone attempt to argue why it should not apply to the multiple controlling decisions that he would have the Court overrule. That is a sufficient reason alone to deny review of the second question presented.

More fundamentally, nothing in the Court's recent public-union cases impugns the ongoing validity of *Keller* and *Lathrop*. In *Harris*, the Court called into question the viability of its public-union precedents, explaining that because *Abood*'s "foundations" were "questionable," it would not extend *Abood* to the quasi-public union at issue in *Harris*. 134 S. Ct. at 2638. The Court instead applied the stricter scrutiny found in "generally applicable First Amendment standards" (as Fleck asks this Court to do, *see* Pet. 24-25) to strike down the union-fee scheme at issue. 134 S. Ct. at 2639-2641. But as explained above, in the course of doing that, the Court emphatically reaffirmed that *Keller* remained good law, even under the stricter standard applied in *Harris*. *Id.* at 2643-2644. The Court explained that "[l]icensed attorneys are subject to detailed ethics rules, and [a] bar rule requiring the payment of dues [i]s part of this regulatory scheme." *Id.* at 2643. The Court reaffirmed that States 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." *Id.* at 2644. Nothing in any subsequent decision calls into question the Court's approval of mandatory bar membership and payment of dues for germane expenses.

Like the state bar at issue in *Keller*, SBAND is an organization created by law to regulate the State's legal profession. SBAND's mission is "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. 15a; *see Harris*, 134 S. Ct. at 2644 (noting that the dues payments upheld in *Keller* "served the 'State's interest in regulating the legal profession'") (quoting *Keller*, 496 U.S. at 13). "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. 16a; *see Keller*, 496 U.S. at 16 (explaining that bar members can have "no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession"). The holding of *Keller* directly controls this case.

Fleck contends (Pet. 19-22) that, even if it might be permissible to require dues payments for germane expenses, it is too difficult to discern which expenses are germane and which are not. This Court has repeatedly recognized that such a determination can be murky—which is why the Court requires (and why

SBAND provides) notice to members of a bar's expenditures and an opportunity to object to particular expenditures. Fleck does not identify any problem with SBAND's revised procedures governing an attorney's right to object to particular expenditures; nor does he contend that SBAND fails to provide sufficient notice to members of how it spends its money. Instead, he argues vehemently that the Court should just throw out the whole integrated-bar system—and overturn multiple controlling decisions of this Court—rather than requiring bars and attorney members to sort out chargeability questions. The Court should reject Fleck's request.[2]

Finally, the Court should reject Fleck's attempt to yoke this case to *Janus v. AFSCME, Council 31*, No. 16-1466 (argued Feb. 26, 2018), which presents the question whether this Court should overrule *Abood* and declare public-sector agency-fee arrangements to be unconstitutional. As discussed, SBAND's dues procedures do not involve the type of opt-out procedures generally used for collection of public-union fees. SBAND does not automatically deduct fees from an attorney's paycheck; each attorney determines on her own whether to pay for non-germane expenses, and each attorney must take the affirmative step of

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[2] Although he does not even attempt to identify a circuit conflict, Fleck does contend (Pet. 28) that there has been "a flood of litigation" about whether integrated bars are providing the necessary safeguards, arguing that overruling *Keller* and *Lathrop* "would end the current flood." In support of his colorful suggestion, Fleck can identify only *five* cases in the 28 years since *Keller* was decided—a drought more than a flood. The lack of litigation on that issue suggests that States have had little trouble implementing the necessary constitutional safeguards.

writing a check to SBAND for the appropriate amount. And, as discussed, the recent public-union cases that have impugned the viability of *Abood* have either said nothing about integrated-bar requirements or have gone out of their way to emphasize that requiring fees for an integrated bar does not raise the same First Amendment concerns that compulsory public-union dues may. *Harris*, 134 S. Ct. at 2643-2644. This Court recently denied a petition for a writ of certiorari raising the same question Fleck raises and should deny Fleck's Petition as well. *See Eugster v. Wash. State Bar Ass'n*, 137 S. Ct. 2315 (2017).

CONCLUSION

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

Respectfully submitted,

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