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 PETRA MANDIGO HULM

JAMES E. NICOLAI
Counsel of Record
OFFICE OF ATTORNEY GENERAL
500 N. 9th Street
Bismarck, ND 58501
(701) 328-3640
jnicolai@nd.gov

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), this Court "agree[d] that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." *Id*. at 4. The question presented is whether the requirement that North Dakota attorneys join the state's bar association violates the freedom of association.

2. A fee statement is sent to North Dakota attorneys setting forth an annual fee amount and stating that they may deduct a specified amount if they do not wish to pay for non-chargeable activities. The question presented is whether this procedure violates the First Amendment.

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INTRODUCTION

The principal issue presented by the petition is whether the requirement that North Dakota attorneys join the State Bar Association of North Dakota (State Bar) violates petitioner Fleck's First Amendment right to freely associate. But Fleck changed his legal theory on this freedom-of-association claim twice midstream, *after* his initial appeal to the Eighth Circuit. As a consequence, Fleck now relies on a legal theory that was never addressed in the courts below. Fleck's failure to timely assert his new theory makes this a singularly poor vehicle through which to address the first question presented.

In the district court and in his initial Eighth Circuit appeal, Fleck repeatedly conceded that *Keller v. State Bar of California*, 496 U.S. 1 (1990), foreclosed his freedom-of-association claim, which could prevail only if this Court granted certiorari and overruled *Keller*. This concession stifled both the factual and legal development of the claim. Both the district court and the Eighth Circuit simply noted the concession and declined to address the claim.

After this Court granted certiorari, vacated the judgment, and remanded back to the Eighth Circuit, Fleck reversed course and maintained that *Keller* did not control his freedom-of-association claim, and that the Eighth Circuit was therefore not bound to apply *Keller* as directly-controlling precedent. The Eighth Circuit again declined to address the merits of the claim. Rather, the Eighth Circuit held the claim had

been forfeited, noting Fleck's "misrepresent[ations]," his reversal on *Keller*, and how his earlier concession prevented the claim's factual development in the district court.

Now, in this second petition for writ of certiorari, Fleck changes his position yet again by contending the question of *Keller*'s application to his claim is ambiguous. But even if that is true, *Keller*'s alleged ambiguity was patent in the language of *Keller* itself and has existed for many years, well before this Court's recent decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). Given that *Keller*'s alleged ambiguity is untethered to *Janus*, Fleck cannot use the latter case as an excuse for his earlier concessions. Fleck's litigation tactics deprived the lower courts of the timely opportunity to address in the first instance whether, in fact, *Keller* left the issue open and, if it did, whether mandatory bar membership violates the freedom of association. With numerous other challenges to mandatory bar membership waiting in the wings, there is no reason for the Court to use this case as the vehicle through which to tackle this issue.

The second issue the petition presents—challenging North Dakota's specific bar fees procedure—is equally unworthy of this Court's review. In the public union context, *Janus* held that the First Amendment requires the entity holding the purse strings to have the clear and affirmative consent of a non-union member before deducting union dues from wages. But in the integrated bar context, attorneys hold their own purse strings and have complete control over the amount

they pay *into* North Dakota's integrated bar. That is, the concepts of a "deduction" or an "opt out" are simply not the same when the choice is always the attorney's to begin with. In short, North Dakota attorneys—who are "sophisticated and trained to understand legal communications"—exercise their own choice to fund the State Bar's political activities by writing a check for a greater amount, or declining to do so by writing a check for a lesser amount. The clear and affirmative consent required by *Janus* is present, even assuming that requirement applies in this context.

On top of that, the petition presents no circuit split on the question whether *Janus*'s consent requirements apply to voluntary payments made *into* an integrated bar. Nor is the Eighth Circuit's decision, which is fact-bound to the specific manner in which the State Bar administers its billing procedure, likely to have any effect on other state bar associations. Certiorari should be denied.[1]

STATEMENT OF THE CASE

North Dakota, like many other states, utilizes an integrated bar that requires every licensed lawyer to maintain membership in and pay annual dues to the State Bar. N.D. Cent. Code §§ 27-11-02, 27-12-02(1), 27-12-04. The lion's share of the dues reflect the fee for the

[1] Petra Mandigo Hulm is now the Secretary-Treasurer of the State Board of Law Examiners. Pursuant to Rule 35.3, Ms. Mandigo Hulm should be substituted for Penny Miller.

privilege of practicing law in the state and are used to regulate matters germane to the practice of law. N.D. Cent. Code § 27-11-24; *see also* Pet. App. 30a (describing the regulatory functions performed by the State Bar). But a small portion of the fee reflects the amount the State Bar uses for non-germane expenses that may include political speech. Pet. App. 30a; *see also id.* at 58a (indicating that $1.45 of the $380 annual license fee for the year 2018, for example, was for non-germane expenses).

When North Dakota attorneys receive their annual Statement of License Fees Due, each has the option of writing a check or making payment for an amount that reflects just his or her annual license fee to practice law. Each attorney, if he or she chooses, may also voluntarily support the State Bar's political speech by writing a check or making payment for the slightly greater amount that includes non-germane expenses; an amount expressly disclosed on the annual statement and accompanying instructions.

The non-chargeable expenses are clearly explained on the fee statement as follows:

> 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.)

Pet. App. 10a. The referenced two-page insert is entitled Notice Concerning State Bar Dues Deduction and Mediation Process and explains both how the State

Bar calculates non-germane activities and how members may object to that process. *Id.*

In 2015, petitioner Fleck filed suit against officers of the State Bar and the State Board of Law Examiners, alleging that the State Bar adopted an "opt out" procedure that violates his First Amendment rights by forcing him to pay compulsory fees to fund speech he opposes. Pet. App. 32a. Fleck also alleged that an integrated bar association inherently violates his freedom not to associate with an entity engaging in speech with which he disagrees, irrespective of whether he has to fund that speech. *Id.*

In the district court, Fleck conceded his freedom-of-association claim was foreclosed by *Keller*. The district court accepted Fleck's concession and did not address that claim:

> Although Fleck has conceded his third claim for relief is foreclosed by Supreme Court precedent, he asserts this long-standing precedent should be overturned by the Supreme Court on a future appeal on the basis that *Keller* and *Lathrop* [*v. Donohue*, 367 U.S. 820 (1961)] are irreconcilable with basic First Amendment principles and subsequent decisions and, in particular, the United States Supreme Court decision in *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012). As Fleck has conceded his legal arguments are contrary to United States Supreme Court precedent directly on point, the Court will grant summary judgment in favor of the Defendants on the third claim for relief.

Pet. App. 36a. The district court addressed Fleck's challenge to the State Bar's billing procedures, and granted summary judgment against Fleck on that claim. *Id.* at 44a. Fleck appealed to the Eighth Circuit.

On appeal, Fleck again conceded his freedom-of-association claim was foreclosed by *Keller*. The Eighth Circuit accepted Fleck's concession and did not address that claim. *See* Pet. App. 16a ("Second, Fleck alleged that an integrated bar violates his freedoms not to associate and to avoid subsidizing speech with which he disagrees. . . . Fleck concedes we are bound by *Keller*, so we need not further address this issue."). With respect to Fleck's challenge to the State Bar's billing procedure, the Eighth Circuit affirmed the district court, concluding that "the opt-out issue debated by the Court in *Knox[v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012)] is simply not implicated by SBAND's revised license fee Statement." Pet. App. 24a. Under the billing procedure used by the State Bar (referred to as "SBAND" in the Eighth Circuit) North Dakota attorneys are not compelled to opt out of compulsory fees automatically withheld by an employer, but instead voluntarily agree to pay *into* the State Bar "non-germane expenses by the affirmative act of writing a check for the greater amount." *Id.*

Shortly after the Eighth Circuit's decision, this Court decided *Janus*, which involved public union dues withheld from the paychecks of non-union members. The Court held that the Free Speech Clause bars the government from compelling non-union members to pay agency fees that reimburse public-sector unions

for their collective bargaining and related activities. 138 S.Ct. at 2460. The Court also held that public unions must obtain clear and affirmative consent before withholding union dues from a non-member's wages. *Id.* at 2486. Fleck's first petition for certiorari, in which he argued that *Janus* may impact his case, was pending when *Janus* was decided. The Court summarily granted the petition and directed the Eighth Circuit to consider whether *Janus* impacted its earlier decision. *See Fleck v. Wetch*, 139 S. Ct. 590 (2018).

On remand, Fleck reversed course on whether *Keller* foreclosed his freedom-of-association claim. Recognizing that the Eighth Circuit would be bound to apply a directly-controlling case even if *Janus* may have undermined its reasoning, Fleck now contended that his freedom-of-association claim was not controlled by *Keller*. No. 16-1564, Appellant Br. 3-4 (8th Cir. Feb. 15, 2019). He now claimed that *Keller* included language declining to address a broader freedom-of-association claim like the one Fleck raises here. *See Keller*, 496 U.S. at 17 ("Petitioners challenge not only their compelled financial support of group activities, but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]. The California courts did not address this claim, and we decline to do so in the first instance.") (internal citation and quotation marks omitted).

In his initial petition for writ of certiorari to this Court, Fleck claimed that the Eighth Circuit had

decided his freedom-of-association claim was foreclosed by *Keller*. The Eighth Circuit specifically took Fleck to task for that assertion:

> Fleck's petition to the Supreme Court for a writ of certiorari misrepresented his position before our court. The petition stated that he "acknowledged [to the district court] that his challenge to mandatory bar membership was foreclosed by binding precedent." But it then falsely asserted that our court "affirmed the dismissal of Fleck's challenge to mandatory bar membership on the basis of" *Keller* and *Lathrop* and asked the Supreme Court to "reverse the Eighth Circuit's decision and overrule *Keller* and *Lathrop*." Then on remand, he argued the constitutionality of mandatory bar association membership to this court *for the first time*, on a district court summary judgment record that did not address this issue, an issue a majority of the Court treated as highly fact-intensive in *Lathrop*.

Pet. App. 7a. The Eighth Circuit again declined to address the merits of Fleck's freedom-of-association claim, noting that "Fleck *explicitly* chose not" to pursue that claim in the district court or the Eighth Circuit. *Id.* at 6a. The Eighth Circuit concluded that "the record is inadequate as the result of Fleck forfeiting the issue in the district court and on appeal" and therefore "we decline to invoke our discretion to take up this claim for the first time on remand." *Id.* at 9a.

With respect to Fleck's challenge to the State Bar's billing procedure, the Eighth Circuit held that "*Janus*

does not alter our prior decision[.]" *Id.* at 13a. The Eighth Circuit noted the distinction between the procedure at issue in *Janus*, where union fees were deducted from a non-member's wages, and the State Bar's billing procedures, under which attorneys control the amount they pay into the association. "The member's right to pay or refuse to pay dues to subsidize nonchargeable expenses is clearly explained on the fee statement and accompanying instructions, *in advance of the member consenting to pay by delivering a check to SBAND*." *Id.* at 12a. And that consent is provided by an "audience [that] is sophisticated and trained to understand and appreciate legal communications." *Id.* at 11a. In other words, the clear and affirmative consent required by *Janus* is present.

REASONS FOR DENYING THE PETITION

Neither question the petition presents is worthy of this Court's review. On the freedom-of-association issue, the decision below never addressed petitioner's primary argument about an alleged ambiguity in *Keller*. This Court generally declines to review cases where the lower courts were deprived of an opportunity to address the issue in the first instance. Fleck's current argument that *Keller* is ambiguous was never timely presented below, where instead Fleck maintained that *Keller* foreclosed his claim. Cases brought in other jurisdictions are likely to address whether *Keller* controls and, if not, the constitutionality of mandatory bar membership post-*Janus*. The Court would

benefit from those questions actually being addressed by a lower court before it accepts review of the issue.

Second, the line between germane and non-germane expenses is not so vague as the petition contends, and is not a reason for reviewing *Keller*. Although *Abood*'s difficult-to-draw line between chargeable and nonchargeable union expenditures was abandoned in *Janus*, this Court previously signaled that its jurisprudence on mandatory bar associations stands independent of the "shaky foundation" of *Abood*. *See Harris v. Quinn*, 573 U.S. 616, 655-56 (2014).

Nor is certiorari warranted on the second question presented. The petition does not identify a current circuit split on the question whether the clear and affirmative consent requirements of *Janus* should apply to voluntary payments *into* an integrated bar. Nor is there a circuit split on whether a procedure similar to the State Bar's satisfies *Janus*'s requirements, even assuming they apply. On top of that, the Eighth Circuit decision is sound. The State Bar's billing procedure satisfies the clear and affirmative consent requirements of *Janus*. Fleck's "opt out" arguments simply do not apply where attorneys control their own purse strings before choosing to make payments that fund an integrated bar's non-germane expenses.

I. Certiorari is not warranted on the first question presented.

A. The courts below never addressed petitioner's primary argument about an alleged ambiguity in *Keller*.

Fleck's petition emphasizes *Keller*'s alleged ambiguity on the constitutionality of mandatory bar membership as a primary reason why the Court should grant review in this case. *See* Pet. at 12-13, 19, 24-29. Yet Fleck never presented the issue of *Keller*'s ambiguity to the courts below; it is being presented for the first time in this petition. Because that issue was not passed on by the lower courts, granting review in this case would be improvident.

In the district court, Fleck not only conceded that his freedom-of-association claim "is presently foreclosed by *Keller*, 496 U.S. 1 and *Lathrop*, 367 U.S. at 843," but insisted that the district court "must deny his motion for summary judgment as it relates [to] this claim." D. Ct. Dkt. Civil No. 1:15-cv-13, 44 at 3. Consequently, the district court not only declined to address the merits of that claim, but also declined to address whether *Keller* actually foreclosed the claim, specifically relying upon Fleck's concession to grant summary judgment. Pet. App. 36a.

In the initial proceedings before the Eighth Circuit, Fleck repeatedly maintained the concession that *Keller* directly foreclosed his freedom-of-association claim, "acknowledg[ing] that binding precedent forecloses this Court from granting relief on this

alternative claim and present[ing] this issue here to preserve it for the proper forum. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990)." No. 16-1564, Appellant Br. i n.1 (8th Cir. Apr. 29, 2016); *see also id.* at 8 ("Fleck acknowledges that this alternative claim challenging the constitutionality of mandatory bar association membership is foreclosed by *Keller* and *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961), and that this Court must affirm the lower court's judgment on this claim."); *id.* at 15 ("Fleck acknowledges that binding precedent forecloses this Court from holding compelled membership and funding of SBAND unconstitutional. *See Keller*, 496 U.S. at 1; *Lathrop*, 367 U.S. at 843.").

Like the district court, the Eighth Circuit accepted Fleck's concession that *Keller* controlled and thus never addressed the merits of the freedom-of-association claim, nor even the question whether *Keller* actually foreclosed the claim. *See* Pet. App. 16a. ("Second, Fleck alleged that an integrated bar violates his freedoms not to associate and to avoid subsidizing speech with which he disagrees. . . . Fleck concedes we are bound by *Keller*, so we need not further address this issue.").[2]

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[2] The Eighth Circuit later summarized *Keller* by stating that it concluded "that an integrated bar can, consistent with the First Amendment, use a member's compulsory fees to fund activities germane to 'regulating the legal profession and improving the quality of legal services,' but not to fund non-germane activities the member opposes. 496 U.S. at 13-14." Pet. App. 18a. But that summary of *Keller*'s holding was made in the context of addressing Fleck's opt in/opt out claim, not his freedom-of-association claim.

Although a court is not bound by a party's concession on a point of law, *see*, *e.g.*, *Goodwin v. United States*, 869 F.3d 636, 639 (8th Cir. 2017), here both the district court and the Eighth Circuit accepted the concession. The concession and the lower courts' acceptance of it therefore defined the path of this litigation through multiple stages, stifling and delaying the respondents from developing a factual record on the merits of the freedom-of-association claim, or from developing legal arguments against the claim.[3]

When this Court remanded the case to the Eighth Circuit, Fleck reversed course, arguing for the first time that *Keller* did not control his freedom-of-association claim. No. 16-1564, Appellant Br. 3-4 (8th Cir. Feb. 15, 2019) ("*Keller* never actually decided the constitutionality of mandatory bar association membership, and is therefore not directly controlling on this question."). The Eighth Circuit declined to address Fleck's arguments because they were being raised for the first time on remand, "on a district court summary judgment record that did not address this issue, an issue a majority of the Court treated as highly fact intensive in *Lathrop*." Pet. App. 7a.

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[3] It is entirely appropriate for a concession—even on a legal issue—to thereafter bind a party to prevent him from "gaining an improper advantage by withdrawing or distorting an earlier concession[.]" *Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264, 266 (4th Cir. 2004) (rejecting the argument that "because [ERISA fiduciary] status is a legal conclusion, the district court could not properly accept such a concession").

> Based on Fleck's concession, defendants did not place in the summary judgment record the types of detailed information discussed by the Supreme Court in *Lathrop* concerning the legislative decision to adopt an integrated bar in North Dakota, the extent to which this method of licensing and regulating the profession burdens associational rights of North Dakota lawyers, and whether, if exacting scrutiny is the governing standard, North Dakota can serve its "compelling state interests . . . through means [that are] significantly less restrictive of associational freedoms."

Id. at 8a-9a (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 680 (2000)). Found the court, "the record is inadequate as the result of Fleck forfeiting the issue in the district court and on appeal." *Id.* at 9a.

Fleck maintains that it was "odd[]" for the Eighth Circuit to deem his new argument forfeited since the prior proceedings had arisen before *Janus*. Pet. at 9 n.3. But *Janus* did not speak to whether or not *Keller* directly foreclosed Fleck's freedom-of-association claim, permitted it, or was ambiguous. *Keller* either spoke to the validity of mandatory bar membership or it did not; *Janus* has nothing to say on the issue. Fleck could have pressed the point about *Keller*'s ambiguity throughout these proceedings, as the alleged ambiguity upon which he relies existed when *Keller* was decided. It was not "odd" of the Eighth Circuit to bar Fleck from asserting a fundamentally new argument three years into the litigation that was entirely available to him from the outset.

Fleck is likewise wrong in contending that this Court should grant review because the question whether *Keller* should be overruled is a question of pure law that needs no factual development. Again, the Eighth Circuit disagreed on that point and noted the "highly fact intensive" treatment of the issue in *Lathrop*, and the lack of an adequate factual record in this case. Pet. App. 7a, 9a.

Fleck may have preserved his argument that this Court should overrule *Keller*. But his petition only fleetingly refers to that argument, not even stating the words *stare decisis*. The argument Fleck forfeited rests at the heart of his petition, making it a poor vehicle through which to address the freedom-of-association issue. Similar freedom-of-association claims are being litigated in Texas, Louisiana, Oklahoma, Oregon, Michigan, and Wisconsin. *See*, *e.g.*, *Jarchow, et al. v. State Bar of Wisconsin, et al.*, (No. 19-831). In the event the Court is inclined to consider *Keller*'s post-*Janus* vitality, those cases may provide better vehicles for the Court's review than a case decided by the Eighth Circuit on forfeiture grounds.

B. *Harris v. Quinn* signaled *Keller*'s continuing vitality, creating reliance interests.

The petition also contends that the line between germane and non-germane expenses is vague—similar to the line between nonchargeable and chargeable union expenses in *Abood* that *Janus* found difficult to

draw—and that this Court should review *Keller*'s alleged ambiguity for that reason. Pet. at 18-23. In *Harris v. Quinn*, however, the Court expressly declined to equate integrated bars and unions in this respect. *Harris* applied exacting scrutiny to the issue whether nonunion home health care workers could be compelled to pay public union dues. In doing so, the Court rejected the argument that its refusal to extend *Abood* to such "quasi-public" employees would "call into question our decision[] in *Keller*," stating instead that *Keller*

> fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the quality of legal services." 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. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

Harris, 573 U.S. at 655-56 (internal citations omitted).

By signaling strong support for *Keller*'s continued vitality, *Harris* affected the reliance factor relevant to the doctrine of *stare decisis*. When considering whether public unions' settled reliance on *Abood* justified leaving it intact despite its reasoning, *Janus* held that "reliance does not carry decisive weight" in part "because

public-sector unions have been on notice for years regarding this Court's misgivings about *Abood*." *Janus*, 138 S. Ct. at 2484. The Court then referred specifically to its decision in *Harris* in which it "cataloged *Abood*'s many weaknesses." *Id.* In that very same decision, however, the Court sent the exact opposite message to integrated bar associations. The reliance factor therefore supports retaining *Keller* even assuming tension exists between some of its reasoning and *Janus*.

II. Certiorari is not warranted on the second question presented.

A. There is no circuit split on the second question presented.

This Court's limited resources are generally reserved for those rules of law on which a circuit split has formed. Consequently, the Court's general practice is to wait for multiple lower courts to address issues left unanswered in its decisions. *See Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). Yet Fleck does not even suggest that the lower courts are divided on the second question presented—whether the clear and affirmative consent requirements outlined in *Janus* apply to, and are violated by, the voluntary payments North Dakota attorneys choose to make into an integrated bar. And for good reason. The Eighth

Circuit's decision does not conflict with any decision by another circuit that has addressed a similar billing procedure in another state.

In addition, not every integrated bar is uniform in how it implements *Keller* in its operations or in collecting fees from members. *See* No. 16-1564 Amicus Curiae Brief of the Integrated State Bars of Alaska, Arizona, Kentucky, Michigan, South Dakota, and Wyoming in Support of Appellees and Affirmance 6-13 (8th Cir. April 9, 2019) (demonstrating the "variety of diverse ways" that "*Keller*'s limitations on integrated bar activity have been internalized in the integrated-bar states"). The Eighth Circuit's decision below is fact-bound to the specific manner in which North Dakota collects fees from attorneys. The Eighth Circuit's ruling upholding the North Dakota State Bar's specific procedure for informing attorneys how to deduct non-chargeable expenses from their fees will have little impact beyond that state.

B. The Eighth Circuit's decision is sound even if *Janus* applies.

Finally, review is not warranted here because the Eighth Circuit's decision is consistent with the First Amendment. Notwithstanding Fleck's best attempts to suggest this case involves a compulsory fee which he must affirmatively opt out of paying, the affirmative act of paying funds *into* the State Bar is wholly within the control of Fleck and other attorneys when they receive their annual license fee statement. An attorney

remains free to write a check that includes the greater amount funding non-germane expenses, or to write a check that reflects only the amount of his or her annual license to practice law.

Thus, this case differs in critical respects from the situation addressed in *Janus*, as well as *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and *Knox*. *Hudson* involved deductions automatically taken from a teacher's paycheck absent the affirmative act of a timely objection made by the teacher. 475 U.S. at 295-96. And *Knox* and similar public sector union cases involved "a collectively bargained dues checkoff procedure [whereby] the employer transfers money the employee has earned directly to the union, unless the protesting employee affirmatively 'opts out.' " Pet. App. 24a.

The simple and dispositive factual difference in this case is that "North Dakota attorneys pay the annual license fee themselves." *Id.* There are no automatic transfers completed by an employer or other third party that require North Dakota attorneys to affirmatively opt out of paying. Instead, North Dakota attorneys control their own purse strings and voluntarily make payments *into* the State Bar.

Fleck seems to attach constitutional significance to a difference between subtraction and addition. *See* Pet. at 31-32 (noting that the State Bar's billing procedure lists a "total" license fee that includes non-germane expenses that must therefore be subtracted by an attorney who chooses not to fund the State Bar's

political expense, and implying that the Constitution requires instead that an attorney engage in addition by adding an amount that includes non-germane expenses). Which of two mathematical calculations an attorney must perform is irrelevant, however, where the amount of the payment the attorney ultimately makes is always wholly within his or her control. And, as the Eighth Circuit observed, these attorneys are "sophisticated and trained to understand and appreciate legal communications." Pet. App. 11a.

All told, the Eighth Circuit correctly concluded that *Janus* did not alter its prior decision because attorneys in North Dakota exercise full control over their "right to pay or refuse to pay dues to subsidize nonchargeable expenses [as] clearly explained on the fee statement and accompanying instructions[.]" Pet. App. 12a. And the choice to pay or refuse to pay is provided to North Dakota attorneys *in advance* of them delivering a payment. *Id.* Thus, the clear and affirmative consent requirements outlined in *Janus* are present here even assuming those requirements apply with respect to voluntary payments made by an attorney in full control of his or her own purse strings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES E. NICOLAI
Counsel of Record
OFFICE OF ATTORNEY GENERAL
500 N. 9th Street
Bismarck, ND 58501
(701) 328-3640
jnicolai@nd.gov

Attorney for Respondent
Petra Mandigo Hulm, Secretary/
Treasurer of State Board of Law Examiners