No. 22-95

IN THE
Supreme Court of the United States

SCHUYLER FILE,

Petitioner,

v.

MARGARET HICKEY, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE STATE BAR OF WISCONSIN, LARRY MARTIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE STATE BAR OF WISCONSIN, AND CHIEF JUSTICE ANNETTE ZIEGLER AND JUSTICES PATIENCE ROGGENSACK, ANN WALSH BRADLEY, REBECCA BRADLEY, REBECCA DALLET, BRIAN HAGEDORN, AND JILL KAROFSKY, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WISCONSIN SUPREME COURT,

Respondents.

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

BRIEF OF RESPONDENTS MARGARET HICKEY AND LARRY MARTIN IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Petitioner has chosen to limit the question presented to the applicable standard of review, rather than the ultimate question of whether a mandatory bar is constitutional. The decision below did not break new ground on the standard of review, but merely held that Petitioner's free speech claim was foreclosed by this Court's precedent. As a result, the only question presented by the petition is as follows:

Whether membership in a mandatory state bar is subject to heightened scrutiny under the First Amendment.

RULE 29.6 STATEMENT

Because Respondents are not corporations, a Rule 29.6 disclosure is not required.

STATEMENT OF RELATED PROCEEDINGS

United States Court of Appeals for the Seventh Circuit, No. 20-2387, *File v. Brost et al.*, judgment entered April 29, 2022.

United States District Court for the Eastern District of Wisconsin, No. 19-cv-1063, *File v. Kastner et al.*, judgment entered June 29, 2020.

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RESPONSE TO PETITION FOR CERTIORARI

The State Bar of Wisconsin ("State Bar") is a state-created, mandatory association of all lawyers licensed to practice law in Wisconsin, funded largely by membership dues. Such arrangements are generally referred to as "integrated bars." For almost 75 years, the State Bar has been central to Wisconsin's framework for regulating the practice of law. Over the years, the State Bar and Wisconsin Supreme Court, which established the State Bar and its governing structure, have developed and refined mechanisms for assessing mandatory and voluntary dues while also protecting members' First Amendment rights. The Wisconsin Supreme Court and State Bar have relied on this Court's decisions in *Lathrop v. Donohue*, 367 U.S. 820 (1961), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), for guidance in crafting these mechanisms. The resulting regime has been refined over the years and withstood challenges in both state and federal courts.

Petitioner challenges the constitutionality of integrated bar arrangements generally, and specifically that of the State Bar of Wisconsin, arguing that the Wisconsin Supreme Court rules which require them to join and pay dues to the State Bar violate their First Amendment rights. He asserts that, by overturning *Abood v. Detroit Board of Education*, 431 U.S. 208 (1977), this Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), fatally undermined the reasoning in *Lathrop* and *Keller* that justifies requiring lawyers to join and fund integrated bars. In light of *Janus*, Petitioner claims that the State Bar and other integrated bars cannot distinguish between

"chargeable" and "non-chargeable" activities sufficiently to prevent members' mandatory dues from being used to fund bar activities to which they object. Petitioner further asserts that mandatory membership in an integrated bar is itself a violation of his First Amendment rights.

Petitioner is hardly the first to try to get these issues before the Court. Indeed, this Court has denied *certiorari* seven times in the last two years in cases involving integrated bars. This petition should suffer the same fate. Petitioner did not raise a distinct freedom of association claim and thus did not develop a record establishing the impact on his associational interests or the inadequacy of the State Bar's dues-reduction procedures or efforts to separate out non-chargeable activities. Moreover, the petition does not even squarely present the ultimate issues of whether integrated bars are constitutional or whether *Lathrop* and *Keller* remain good law, but instead artificially limits the question to the standard-of-review, an issue on which the court below broke no new ground.

More fundamentally, contrary to Petitioner's assertions, *Lathrop* and *Keller* remain in line with this Court's First Amendment precedents, and *Janus* did not alter their vitality. *Lathrop* and *Keller* are well-established decisions and, as recently as 2014, this Court reaffirmed the core holdings of those decisions in *Harris v. Quinn*, 573 U.S. 616 (2014), plainly stating that *Lathrop* and *Keller* are valid independent of *Abood*. The precedents Petitioner cites to support his alleged First Amendment claims are readily distinguishable when applied to integrated bars generally and the Wisconsin State Bar in particular.

Further, the principles of *stare decisis* counsel against overturning *Lathrop* and *Keller*, particularly because both cases have established a workable framework for the operation of integrated bars in a majority of states.

STATEMENT OF THE CASE

I. The State Bar of Wisconsin

The State Bar of Wisconsin is an "association" "of persons licensed to practice law in [Wisconsin]." Supreme Court Rule ("SCR") 10.01(1).[1] The State Bar was created by the Wisconsin Supreme Court as an "exercise of the court's inherent authority over members of the legal profession as officers of the court." SCR 10.02(1). This exercise is, as this Court has recognized, an "exertion[ ] of the State's law-making power." *Lathrop v. Donohue*, 367 U.S. 820, 824–25 (1961). The Wisconsin Supreme Court created the State Bar to "promote the public interest by maintaining high standards of conduct in the legal profession and by aiding in the efficient administration of justice." SCR 10.01(2). To further those purposes, the State Bar is charged by the Wisconsin Supreme Court to:

> Aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence

[1] Full text versions of the Wisconsin Supreme Court Rules and State Bar By-Laws are available at: https://www.wicourts.gov/supreme/sc_rules.jsp.

> and public service and high standards of conduct; to safeguard the proper professional interests of the members of the bar; to encourage the formation and activities of local bar associations; to conduct a program of continuing legal education; to assist or support legal education programs at the preadmission level; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform and the relations of the bar to the public and to publish information relating thereto; to carry on a continuing program of legal research in the technical fields of substantive law, practice and procedure and make reports and recommendations thereon within legally permissible limits; to promote innovation, development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged.

Id. To advance these purposes, the Supreme Court Rules "permit the State Bar to engage in and fund 'any activity that is reasonably intended' to further the State Bar's purposes." SCR 10.03(5)(b).

"[M]embership" in the State Bar is "a condition precedent to the right to practice law in Wisconsin." SCR 10.01(1). Therefore, under SCR 10.03, the Wisconsin Supreme Court requires "[e]very person

who becomes licensed to practice law in [Wisconsin]" to "enroll in the state bar by registering." SCR 10.03(2). All active State Bar members—that is, those members authorized to practice law in Wisconsin, SCR 10.03(4)—must pay "annual membership dues," which in turn fund, *inter alia*, essential functions of the State Bar, including its numerous functions in support of the state's attorney regulatory system. *See, e.g.,* SCR 21.03, 21.06, 21.08, 22.10, 22.23, 22.30; *see also In re State Bar of Wisconsin: Membership*, 485 N.W.2d 225, 228 (Wis. 1992) (Bablitch, J., concurring); Memorandum of Court Commissioner, Rule Petition 11-04, Petition for Voluntary Bar at 22 (Oct. 25, 2011) https://www.wicourts.gov/supreme/docs/1104commissionermemo.pdf. Failure to pay required dues can result in a member being "suspended" from the practice of law. SCR 10.03(6). A state bar association like Wisconsin's, in which "membership and dues are required as a condition of practicing law," is referred to as an "integrated bar." *Keller*, 496 U.S. at 5; *see also Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 713 n.3 (7th Cir. 2010) ("integrated," "mandatory," or "unified" bar).

While, as noted above, the Wisconsin Supreme Court has generally provided that the State Bar may "engage in and fund any activity that is reasonably intended for the purposes of the association" as defined in SCR 10.02(2), it has also clearly stated that "[t]he State Bar may *not* use the compulsory dues of any member who objects . . . for activities that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services." SCR 10.03(5)(b)(1) (emphasis added). This is consistent with the

standard set by this Court in *Keller*. 496 U.S. at 14 ("The State Bar may therefore constitutionally fund activities germane to [regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity."); *see also id.* at 15 (quoting *Lathrop*, 367 U.S. at 843) ("[T]he guiding standard must be whether the challenged expenditures 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.'"). Those activities, according to the Wisconsin Supreme Court, "may be funded only with voluntary dues, user fees or other sources of revenue." *Id.*

The State Bar has gone one step further than required by SCR 10.03 and *Keller*, however, and includes in the category of activities that may not be funded by mandatory dues "*all* direct lobbying activity on policy matters before the Wisconsin State Legislature or the United States Congress ... , even lobbying activity deemed germane to regulating the legal profession and improving the quality of legal services." State Bar of Wisconsin, *Maintaining Your Membership* (2022), https://www.wisbar.org/formembers/membershipandbenefits/Pages/Maintaining-Your-Membership.aspx (under "State Bar of Wisconsin Dues Reduction and Arbitration Process (Keller Dues Reduction)" tab).

To effectuate the standard set by this Court in *Keller* and incorporated in SCR 10.03, each year, along with an annual dues statement, the State Bar sends

to each member a "written notice of the activities that can be supported by compulsory dues and the activities that cannot be supported by compulsory dues." SCR 10.03(5)(b)2; *see generally* SCR Ch. 10, App'x, State Bar Bylaws, art. I, § 5. This notice is often referred to as the "*Keller* Dues Reduction Notice." This notice is sent "[p]rior to the beginning of each fiscal year" (SCR 10.03(5)(b)2) and is based on data from the most recent fiscal year for which there is an audit report available (*see, e.g.*, Brief in Support of Motion to Dismiss, Exhibit A, *File v. Kastner*, No. 2:19-cv-01063-LA (E.D. Wis. Nov. 22, 2019) ("Fiscal Year 2020 *Keller* Dues Reduction Notice"); *Keller*, 496 U.S. at 16–17). The notice "indicate[s] the cost of each activity, including all appropriate indirect expense[s], and the amount of dues to be devoted to each activity" (SCR 10.03(5)(b)2). The State Bar then voluntarily rounds up from a "strict calculation" (*e.g.* Fiscal Year 2020 *Keller* Dues Reduction Notice). The Notice provides each member the opportunity to "withhold" from their "annual dues statement" "the pro rata portion of dues budgeted for [the] activities that cannot be supported by compulsory dues." SCR 10.03(5)(b)2. This pro rata dues reduction is often referred to as the "*Keller* Dues Reduction."

The Wisconsin Supreme Court's Rules also provide a procedure for a member who "contends that the state bar incorrectly set the amount of dues that can be withheld" to challenge the amount of the *Keller* Dues Reduction through a timely demand for arbitration. SCR 10.03(5)(b)3. The State Bar must then "promptly submit the matter to arbitration before an impartial arbitrator." SCR 10.03(5)(b)4. If the arbitrator concludes that an increased pro rata

dues reduction is required, "the state bar shall offer such increased pro rata reduction to members first admitted to the state bar during that fiscal year and after the date of the arbitrator's decision." SCR 10.03(5)(b)5. "The costs of arbitration shall be paid by the state bar." SCR 10.03(5)(b)4. During the pendency of the challenge, the objecting member(s) pay no dues to the State Bar. SCR 10, App'x, Bylaws art. I, § 5(B).

The constitutionality of the State Bar's integrated structure has been affirmed by this Court,[2] the Seventh Circuit,[3] and the Wisconsin Supreme Court[4] against numerous challenges over the past 75 years.

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[2] *Lathrop v. Donohue*, 367 U.S. 820 (1961).

[3] *Jarchow v. State Bar of Wisconsin*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019); *Kingstad v. State Bar of Wis.*, 622 F.3d 708 (2010); *Thiel v. State Bar of Wis.*, 94 F.3d 399 (7th Cir. 1996); *Crosetto v. State Bar of Wis.*, 12 F.3d 1396 (1993); *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988).

[4] *Integration of Bar Case*, 11 N.W.2d 604 (Wis. 1943); *In re Integration of the Bar*, 25 N.W.2d 500 (Wis. 1946); *In re Integration of the Bar*, 77 N.W.2d 602 (Wis. 1956); *In re Integration of the Bar*, 93 N.W.2d 601 (Wis. 1958); *Lathrop v. Donohue*, 102 N.W.2d 404 (Wis. 1960); *In re Reg. of the Bar of Wis.*, 81 Wis.2d xxxv (1978); *State ex rel. Armstrong v. Board of Governors*, 273 N.W.2d 356 (Wis. 1979); *In re Discontinuation of the State Bar of Wis. as an Integrated Bar*, 286 N.W.2d 601 (Wis. 1980); *Report of Comm. to Review the State Bar*, 334 N.W.2d 544 (Wis. 1983); *In re Amend. of State Bar Rules*: SCR 10.03(5), slip op. (Wis. Jan. 21, 1986); *In re Petition to Review State Bar Bylaw Amends.,* 407 N.W.2d 923 (Wis. 1987); *In re State Bar of Wisc.: Membership*, 485 N.W.2d 225 (Wis. 1992); *In re Amend. of Sup. Ct. Rules*: *10.03(5)(b) – State Bar Membership Dues Reduction*, 174 Wis. 2d xiii (1993); *In re Petition to Amend SCR 10.03(5)(b)1*, No. 09-08 (Wis. Nov. 17, 2010); *In re Petition for a Voluntary Bar*,

II. Proceedings Below

Petitioner, a licensed Wisconsin attorney and member of the State Bar, initiated this action against officers of the State Bar and the justices of the Supreme Court of Wisconsin on July 25, 2019. *File*, Civil Docket No. 2:19-cv-01063-LA, Dkt. 1 (E.D. Wis. filed Jul. 25, 2019); Petitioner's Appendix ("Pet. App.") 29.

The Complaint identified three activities of the State Bar that Petitioner alleged involve "direct lobbying" or are "ideologically charged." Pet. App. 33–34. Petitioner alleged that these three activities "illustrate the simple reality that virtually everything the State Bar does takes a position on the law and matters of public concern." Pet. App. 35. He asserted that these activities are akin to the public-sector collective bargaining which this Court, in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), held cannot be funded by compulsory agency fees. Count I of the Complaint alleged that "[t]he actions of Defendants" in compelling Petitioner to pay dues to the State Bar "constitute" a violation of Mr. File's First Amendment rights to free speech and freedom of association to not join or subsidize an organization without his affirmative consent" because "defendants lack a compelling state interest to justify their action" and "Defendants' actions are not narrowly tailored to the means least restrictive of Mr. File's freedoms." Pet.

No. 11-01 (Wis. July 6, 2011); *In re Petition to Review Change in State Bar Bylaws*, No. 11-05, slip op. (Wis. Oct. 7, 2011); *In re Petition to Repeal and Replace SCR 10.03(5)(b) with SCR 10.03(5)(b)-(e) and to Amend SCR 10.03(6)*, No. 17-04, slip op. (Wis. Apr. 12, 2018).

App. 37. Petitioner sought declaratory and injunctive relief declaring that "the Wisconsin Supreme Court's rules requiring Mr. File to belong to the State Bar of Wisconsin are unconstitutional" and enjoining Defendants from enforcing the Supreme Court Rules relating to State Bar membership against him. Pet. App. 37–38.

On November 22, 2019, Respondents moved to dismiss Petitioner's claims on various grounds, including that those claims are foreclosed by *Keller*. Brief in Support of Motion to Dismiss, *File*, Civil Docket No. 2:19-cv-01063-LA, Dkt. 20 (E.D. Wis. filed Nov. 22, 2019). The District Court granted Respondents' motion, holding that Petitioner's claims are foreclosed by *Keller*, and that *Janus* did not implicitly overturn the holding in *Keller*. Pet. App. 14.

The Seventh Circuit affirmed the District Court's decision, holding that *Keller* remains binding and that it foreclosed Petitioners' claim. Pet. App. 2. The Seventh Circuit did not separately address the standard of review applicable to Petitioner's free-speech claim, but rather rejected it as squarely controlled by *Keller*. This Petition followed.

THE PETITION SHOULD BE DENIED

Over the past two years, this Court has declined seven opportunities to reconsider its decisions in *Lathrop* and *Keller*, including as they apply to the State Bar in *Jarchow*. Petitioner fails to offer any reason why the Court should treat this case differently. No legal issues have arisen in this case that were not addressed in previous cases seeking

certiorari from this Court. Because Petitioner's claim was dismissed at the pleading stage, there is no factual record to set this case apart from the others.

Petitioner's primary contention is that in deciding whether public unions can require dues from non-members, *Janus* also casually eviscerated two decades-old opinions on a wholly different issue: whether states may choose to regulate the legal profession by creating an integrated bar association, a model that has existed in this country for over a century. Indeed, Petitioner believes not only that *Janus* fundamentally undermined *Lathrop* and *Keller*, but also that it *sub silentio* discarded the views expressed just four years earlier in *Harris* that *Keller* is fully consistent with the First Amendment—a part of *Harris* that Petitioner notably fails to mention, despite otherwise relying on that decision throughout his petition.

Petitioner's position has little to recommend it. As *Harris* correctly recognized, the state interest in regulating the legal profession, and in holding attorneys themselves rather than the general public responsible for the costs of that regulation, easily distinguishes the integrated bar from the public unions addressed in *Janus*. And the cases on which Petitioner relies for his mandatory association claim are even further afield, as they address the limited First Amendment right of a private association to *exclude* certain unwanted members, not an individual's purported right to avoid being labeled a "member" of a state-created professional organization.

In short, *Lathrop* and *Keller* are fully consistent with this Court's First Amendment jurisprudence. They are also fully supported by the weight of *stare decisis*, including more than a century of experience with integrated bar associations and the reliance interests of more than half of the states.

However, even if this Court had reason to reexamine *Lathrop* and *Keller*, this would not be the case to do it. This case comes before the Court on nothing but the allegations in Petitioner's complaint. Because Petitioner opted not to challenge any specific germaneness determination or the adequacy of the State Bar's procedures or raise a compelled association claim separate from the obligation to pay dues, there is no detailed factual record on how the State Bar's opt-out procedures operate in practice, how the State Bar actually allocates and uses its funds, or any other relevant issue. As this Court recognized decades ago in *Lathrop*, that kind of sparse record simply does not provide adequate context for judicial review of the fact-intensive First Amendment issues Petitioner is attempting to raise. Finally, Petitioner seeks review only on the applicable standard of review, rather than squarely raising the ultimate constitutionality of the integrated bar. The petition should be denied.

I. *Lathrop* and *Keller* Remain Consistent With This Court's Precedents.

a. The controlling law in this area has not changed materially since *Jarchow*.

There has been no change in the state of controlling law regarding the constitutionality of integrated bars since this Court denied another challenger's petition for writ of *certiorari* in *Jarchow*. Every court of appeals to address the issue since then has, as they must, affirmed the ongoing validity of *Keller* and *Lathrop*. *Schell v. Chief J. and JJ. Of Oklahoma Sup. Ct.*, 11 F.4th 1178, 1190 (10th Cir 2021); *Boudreaux v. Louisiana State Bar Ass'n*, 3 F.4th 748, 755 (5th Cir. 2021); *Taylor v. Buchanan*, 4 F.4th 406, 409 (6th Cir. 2021); *Boudreaux v. Louisiana State Bar Ass'n*, 3 F.4th 748, 755 (5th Cir. 2021); *McDonald v. Longley*, 4 F.4th 229, 243–44 (5th Cir. 2021); *Crowe v. Oregon State Bar*, 989 F.3d 714, 724 (9th Cir. 2021). Moreover, this Court has declined no fewer than six opportunities to reconsider its holdings in *Keller* and *Lathrop* since it declined to review the constitutionality of the State Bar of Wisconsin in *Jarchow*.[5] Petitioner makes no attempt to argue that his request for this Court to say "[w]hether membership in a mandatory state bar is subject to heightened scrutiny under the First Amendment" is any different from the prior petitions or more worthy of review. To the contrary, other cases, from which

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[5] *Taylor v. Heath*, 142 S. Ct. 1441 (2022); *Firth v. McDonald*, 142 S. Ct. 1442 (2022); *McDonald v. Firth*, 142 S. Ct. 1442 (2022); *Schell v. Darby*, 142 S. Ct. 1440 (2022); *Gruber v. Oregon State Bar*, 142 S. Ct. 78 (2021); *Crowe v. Oregon State Bar*, 142 S. Ct. 79 (2021).

this Court has denied *certiorari*, were arguably better vehicles for determining the constitutionality of integrated bars. For example, the District Court and the Fifth Circuit in *McDonald*, from which this Court denied competing petitions on April 4, 2022, had the benefit of full discovery and summary judgment briefing before rendering their decisions on the constitutionality of Texas's integrated bar. 4 F.4th at 241. The same is true of *Crowe*, in which this Court declined to review the Ninth Circuit's decision following the district court's denial of summary judgment to the plaintiff. *See* 989 F.3d at 723–24.

Nor does the Seventh Circuit's decision in this case create a split of authority between courts of appeals that this Court must resolve. One *amicus* in support of the Petition incorrectly asserts that the Seventh Circuit's decision below created a circuit split by holding that *Keller* forecloses a freestanding freedom of association claim, contradicting the court of appeals' decisions in *McDonald*, *Crowe*, and *Schell*. Brief of Goldwater Institute as Amicus Curiae in Support of Petitioner at 3–4. To the contrary, the panel explicitly stated that Petitioner does not "raise[] a free-standing compelled-association claim distinct from his compelled speech claim challenging the compulsory dues." Pet. App. 11. It is simply not the case that the Seventh Circuit created a circuit split when it declined to rule on a claim it did not believe was properly before it.

Recent district court decisions in challenges to integrated bars, on the merits and following discovery, only reinforce the ongoing validity of *Keller* and *Lathrop*. In *Boudreaux*, a member of the Louisiana

State Bar Association ("LSBA") raised three claims challenging the constitutional validity of the LSBA and its procedures: (1) "that compelled membership in the LSBA violated his First and Fourteenth Amendment rights, even if the LSBA engages only in germane activities"; (2) "that compelled membership in the LSBA violates his First and Fourteenth Amendment rights because the LSBA engages in non-germane activities"; and (3) "that the LSBA's objection procedures fail to ensure that his mandatory dues are used only for germane activities, in violation of the First and Fourteenth Amendments". *Boudreaux v. Louisiana State Bar Ass'n*, Civil Action No. 19-11962, 2022 WL 3154190, at *5 (E.D. La. Aug. 8, 2022). Following a bench trial, the court entered judgment in favor of the defendants on each of these claims. *Id.* at *15. The court noted the Fifth Circuit's holding in *McDonald* that "'compelled membership in a bar association that engages in non-germane activities … fails exacting scrutiny'" but also held that *McDonald* did not specify the degree of non-germane activity necessary to give rise to a constitutional violation. *Id.* at *10. The court also held that the LSBA's *Hudson* dues opt-out procedures were sufficient to prevent attorneys' dues from being spent on non-germane activities without their consent. *Id.* at *13-*14. This result only reinforces the continued validity and applicability of *Lathrop* and *Keller*.

b. *Janus* did not implicitly overrule or undermine *Keller* and *Lathrop*.

Petitioner's core argument is that *Lathrop* and *Keller*—which together approved the longstanding practice of state regulation of the legal profession

through state-created integrated bar associations—were tacitly overruled by this Court's decision in *Janus*. That argument is meritless. On the contrary, *Lathrop* and *Keller* remain fully in line with this Court's First Amendment precedents. Petitioner concedes this point, admitting that "a strong argument could be made that applying exacting scrutiny to mandatory bar compelled speech and association claims does not require overruling *Keller* and *Lathrop*." Pet. at 22.

Lathrop (like this case) involved a First Amendment challenge to the integrated State Bar of Wisconsin, brought shortly after the State Bar was established. The Court rejected that challenge. Although no one opinion commanded a majority, a plurality of the Court concluded that Wisconsin law imposed no cognizable burden on attorneys beyond the obligation to pay mandatory annual dues, implicitly rejecting the view that merely calling attorneys "members" of the State Bar imposed some First Amendment injury. 367 U.S. at 827–28, 842–43 (plurality opinion). The plurality declined to decide whether an attorney might have a First Amendment claim if required dues were used to pay for political speech with which the attorney disagreed, holding that the factual record was insufficient to address that claim—because, among other things, it lacked facts showing "the way in which and the degree to which funds compulsorily exacted from [bar] members are used to support . . . political activities," "how political expenditures are financed and how much has been expended for political causes to which appellant objects," and "what portions of the expenditure of funds to propagate the State Bar's views may be

properly apportioned to [the plaintiff's] dues payments." *Id.* at 846.[6]

In *Keller*, the Court considered whether an integrated bar association could use a member's dues to finance political activities over the member's objection. The Court unanimously held that while "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar," 496 U.S. at 4, the bar could not use a member's dues for ideological or political speech that is not germane to regulating the legal profession or improving the quality of legal services. *Id.* at 13-14. In reaching that holding, the Court made clear that the First Amendment did not prohibit states from using integrated bars for appropriate regulatory purposes, emphasizing that (for instance) attorneys "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." *Id.* at 16.

Petitioner's bid to overturn *Lathrop* and *Keller* hinges on the notion that the holdings in both cases are fatally undermined by this Court's decision in *Janus*. That notion is incorrect. *Janus* said nothing whatsoever about *Lathrop*, *Keller*, or whether attorneys could be required to join and pay dues to an integrated bar. Instead, *Janus* addressed a wholly different issue: whether the First Amendment permits

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[6] Three Justices thought the factual record was adequate to decide these issues, and would have found no First Amendment violation. *See id.* at 848–65 (Harlan, J., joined by Frankfurter, J., concurring in the judgment); *id.* at 865 (Whitaker, J., concurring in the judgment).

a public union (i.e., one representing public-sector workers) to charge mandatory dues to non-members. 138 S. Ct. at 2459–60. The Court held that such arrangements violate the First Amendment, overturning *Abood v. Detroit Board of Education*, 431 U.S. 208 (1977). Naturally, the *Janus* Court explained at length why *Abood* was incorrect, and why *stare decisis* did not warrant keeping it. *See Janus*, 138 S. Ct. at 2463–86. Nothing in *Janus*, however, addressed whether those same arguments would have any application in the integrated bar context, especially given the unique state interest in regulating the legal profession (and imposing the costs of that regulation on practicing attorneys themselves) and the longstanding history of the integrated bar as a means of carrying out that regulation. Put simply, *Janus* overruled *Abood*, not *Lathrop* and *Keller*.

The lack of any reference to *Lathrop* or *Keller* is unsurprising, as this Court reaffirmed *Keller* and its underlying reasoning just four years earlier in *Harris v. Quinn* at the same time it questioned the soundness of *Abood*. 572 U.S. 616, 655–56 (2014). In *Harris*, this Court refused to extend *Abood* to apply to home care personal assistants, holding that the personal assistants who did not join a public-sector union could not be compelled to pay agency fees. *Id.* at 645–47. This Court held that *Abood* did not apply, in part, because the compelling state interests that *Abood* held supported compulsory agency fees did not apply to the personal assistants, who were not fully-fledged state employees. *Id.* at 645–46. Respondents in that case argued that refusal to extend *Abood* to require agency fees from the personal assistants would call into question the holding in *Keller*. *Id.* at 655. This

Court held that Respondents were "mistaken" because "[*Keller*] fits comfortably within the framework applied in the present case." *Id.* Further, this Court reaffirmed the validity of the "State's interest in regulating the legal profession and improving the quality of legal services." *Id.* "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 [*Harris*] is wholly consistent with our holding in *Keller*." *Id.* at 655–56. The dissent, too, agreed that the holding in *Harris* "reaffirmed [*Keller*] as good law." 579 U.S. at 670 (Kagan, J., dissenting). Thus, in *Harris*, the Court unanimously confirmed the continuing validity of *Keller*.

This Court's statements in *Harris*, which Petitioner does not even mention, were not questioned by the holding in *Janus*. On the contrary, *Janus* itself relied extensively on *Harris* in reaching its decision to overrule *Abood*. *See* 138 S. Ct. at 2463, 2465–66, 2468, 2471–72, 2474, 2477, 2479–80. If, as Petitioner asserts, *Keller* has increasingly become an anomalous outlier in this Court's First Amendment jurisprudence, then this Court would not have so clearly reaffirmed *Keller's* essential holding as recently as 2014 in the same opinion that criticized *Abood*. Rather, the very different treatment of *Keller* and *Abood* in *Harris* illustrates that *Keller* and the compelling state interests it recognized not only differ significantly from the public unions question, but remain in line with the modern understanding of the First Amendment. Indeed, *Harris*' reaffirmation of *Keller* contradicts Petitioner's argument that *Keller's* holding is dependent on *Abood,* because *Harris*

reaffirmed the core holdings of *Keller* after criticizing *Abood* and deciding that it did not apply there. Thus, *Harris* confirms that *Keller* stands independent from *Abood*, and *Janus* did not mention, much less question, that conclusion.

c. "Membership" in the State Bar alone does not implicate First Amendment rights.

Petitioner's argument that Wisconsin's integrated bar violates his First Amendment associational rights is also unavailing. *Janus* does not alter the law regarding associational rights because the issue did not even arise there, as the plaintiffs were non-members, challenging the requirement that they pay dues to the union. Thus, the question of membership was not at issue.

As an initial matter, and as the Seventh Circuit noted below, Petitioner has not "raised a free-standing compelled-association claim distinct from his compelled speech claim challenging the compulsory dues." Pet. App. 11; *see also* Pet. App. 36. Accordingly, Petitioner's arguments that mandatory bar membership violated his First Amendment rights regardless of how his dues are spent by the State Bar are not properly before this Court.

Regardless, Petitioner has not shown that there is a cognizable First Amendment injury merely because the State describes all lawyers admitted to practice in Wisconsin as "members" of the State Bar. "Member of the bar" is an historical term of art which in this context simply means that a lawyer is licensed

to practice in Wisconsin, as opposed to identification as a member of a political party or interest group, which implies that a person agrees with the group's views. If the Wisconsin Supreme Court chose to refer to such individuals only as "licensed attorneys," and called State Bar mandatory membership dues "license fees," there would clearly be no argument as to the constitutionality of such designations. Petitioner cannot conjure a constitutional injury from a mere choice of long-accepted terminology.

Wisconsin lawyers are familiar with the idea that affiliation does not imply endorsement, as the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys plainly state that "[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." SCR 20:1.2(b). Just as association with a client does not imply a lawyer's identification with the client's views, association with the State Bar does not imply identification with the State Bar's positions. *See Lathrop*, 367 U.S. at 859 (1961) (Harlan, J., concurring in the judgment) ("[E]veryone understands or should understand that the views expressed [by the State Bar] are those of the State Bar as an entity separate and distinct from each individual." (quotation marks omitted).). Because all practicing lawyers in the State must become members of the State Bar, the only common thread between them, and the only reasonable implication from their association with the State Bar, is their authorization to practice their shared profession.

The alternative, finding a First Amendment injury in being identified as a member of *any* expressive organization with which a person might disagree on some issues, would mean that every integrated bar since the first integrated bar in the United States, created over a century ago, has been unconstitutional. Undoubtedly, any professional association will have at least one member who disagrees with a position the association takes. Nonetheless, this Court unanimously held in *Keller* that attorneys can be compelled to join an integrated bar. *Keller*, 496 U.S. at 4 ("We agree that the State lawyers admitted to practice in the State may be required to *join* and pay dues to the State Bar.") (emphasis added).

Further, there is no precedent to support the kind of forced-association claim Petitioner asserts. Petitioner relies on references in the *Janus* decision to the "freedom not to associate" identified in *Roberts v. U.S. Jaycees* and *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.* to support his forced-association claim. However, the "freedom not to associate" described in *Jaycees* and *Hurley* has little in common with mandatory bar membership. In *Jaycees*, this Court identified a "freedom not to associate" when considering the question of whether a private association could exclude unwanted members. 486 U.S. 608 (1984). Similarly, *Hurley* addressed the question of whether a private group organizing a parade could exclude a group espousing positions with which it disagreed. 515 U.S. 557 (1995). In both cases, the exclusionary practices were challenged as violations of state anti-discrimination laws, highlighting tensions between those laws and First

Amendment associational rights. *Jaycees*, 486 U.S. at 615, 618; *Hurley*, 515 U.S. at 564.

The question of whether a fully-private association can exclude groups otherwise protected by anti-discrimination laws as an exercise of their First Amendment associational rights has little bearing on whether a state can require members of a regulated profession to join a state-created, quasi-governmental professional association. Nothing in *Jaycees* or *Hurley* undermines the assumption in *Lathrop* and *Keller* that the State can describe all practicing lawyers as "members" of the State Bar or suggests that mere "membership" in the State Bar communicates a personal endorsement by members of statements made or positions taken by the State Bar.

d. Integrated bars are materially different from the unions discussed in *Janus*.

Petitioner's assertion that *Keller's* holding is no longer valid rests heavily on *Janus*. However, integrated bars in general, and the State Bar of Wisconsin in particular, are readily distinguishable from the public-sector unions discussed in *Janus*. This is, in part, because public-sector unions are wholly-private organizations, while integrated bars are state-created entities that fill quasi-governmental roles. This alone places integrated bars outside the direct scope of this Court's *Janus* holding. As Justice Harlan noted in his concurrence in *Lathrop*, "[a] federal taxpayer obtains no refund if he is offended by what is put out by the United States Information Agency." *Lathrop*, 367 U.S. at 857 (Harlan, J., concurring in the judgment).

While speech by a state-created integrated bar has not been thought of as full-blown government speech, *see Keller*, 496 U.S. at 10–13, it is "part of a broader collective enterprise in which [one's] freedom to act independently is already constrained by the regulatory scheme," the statewide regulation of the legal profession. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997); *see also U.S. v. United Foods*, 533 U.S. 405, 414–15 (2001). This Court has found that compelled contributions to entities that are part of a broader regulatory scheme do not violate the First Amendment. *Id.* As discussed more fully below, *see infra* pp. 30–31, the activities of the State Bar and other integrated bars across the country are inextricably intertwined with their respective states' regulatory schemes for attorneys. Thus, not only is the holding in *Janus* not directly applicable to the payment of mandatory bar dues, but integrated bars fall squarely within a category of entities for which compelled funding is generally permissible.

Further, unlike the union in *Janus*, the State Bar is not the exclusive representative of Wisconsin lawyers under any circumstances. In *Janus*, by contrast, the union was the exclusive bargaining representative of government employees within the bargaining unit, whether or not they were union members. *Janus*, 138 S. Ct. at 2467–68. As a result, compelled funding of union speech limited government employees' ability to speak in a concrete way. This is hardly the case with the State Bar and other integrated bars. The State Bar does not purport to speak directly for Wisconsin lawyers on any particular issue. State Bar members are free to espouse their own views on any issue on which the

State Bar speaks, even where the two views are directly contradictory. Moreover, State Bar members are uniquely positioned to appreciate First Amendment values and exercise their rights to avoid dues that are directed to chargeable activities to which they object.

In short, *Keller* and *Lathrop* remain in line with this Court's First Amendment precedents, even in light of *Janus*.

II. *Lathrop* And *Keller* Should Not Be Overruled.

Keller and *Lathrop* remain good law, wholly consistent with this Court's First Amendment precedents, so this Court need not resort to *stare decisis* to avoid overturning them. *See Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015). However, the principles of *stare decisis* also counsel against overturning *Keller* and *Lathrop*. "'Overruling precedent is never a small matter.'" *Kisor v. Wilkie*, __ U.S. __, 139 S. Ct. 2400, 2422 (2019) (quoting *Kimble*, 135 S. Ct. at 2409). "Adherence to precedent is 'a foundation stone of the rule of law." *Id.* (quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014)). "To be sure, *stare decisis* is not an 'inexorable command' ... [b]ut any departure from the doctrine demands 'special justification'—something more than 'an argument that the precedent was wrongly decided.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Petitioners fail to meet this standard.

This Court's reasoning in *Keller* and *Lathrop* was not flawed, nor has it been undermined by *Janus*. As noted above, this Court has recently reaffirmed the core reasoning of *Keller* and *Lathrop*. Part I, *supra*. This Court's decision in *Harris* plainly stated that the interests which support integrated bar arrangements and the mechanism for assessing mandatory dues established in *Keller* "fit[ ] comfortably" within the modern First Amendment framework, independent of *Abood*. *Harris*, 572 U.S. at 655. Further, *Harris* confirmed that *Keller* and *Lathrop* are not wholly dependent on agency fee cases such as *Abood*. *Id.* Even though courts have drawn comparisons between integrated bars and public unions in the past, the underlying reasoning supporting integrated bar arrangements is not inexorably tied to the fate of public union agency fees. Thus, *Janus* did not disturb the reasoning of *Harris*, just as it did not mention, much less overturn or criticize, *Keller* or *Lathrop*.

Close to 75 years of litigation have shown that the holdings in *Lathrop* and *Keller* continue to be workable. Every challenge to State Bar activities funded with mandatory dues has found that the State Bar correctly applies *Keller*'s mechanism for protecting members' First Amendment rights. Petitioner claims that *Keller* calls for an "impossible" line-drawing exercise like the one this Court invalidated in *Janus*, but he has never availed himself of the procedure adopted to permit challenges to an expenditure the State Bar considers chargeable.[7]

[7] To the extent Petitioner claims the State Bar's procedures are inadequate to protect his First Amendment rights, his claims are not ripe, much less properly addressed on a petition for *certiorari*, as Petitioner has not developed a factual record on this issue and

Petitioner cannot point to an instance of the State Bar using mandatory dues to fund activities that are not properly chargeable under *Keller*; indeed, he has not even pointed to any actual use of mandatory fees with which he disagrees. Nor has he shown an instance of the State Bar's dues arbitration process failing to properly resolve a disputed use of mandatory dues.

This is perhaps because the State Bar has, voluntarily, been over-inclusive in deciding which of its activities to designate as non-chargeable. As noted above, State Bar policy prohibits charging members even for activities allowed under *Keller* such as "*all* direct lobbying activity on policy matters before the Wisconsin State Legislature or the United States Congress ... , even lobbying activity deemed germane to regulating the legal profession and improving the quality of legal services." *Supra* at 7. Similarly, the State Bar does not charge members for the overhead and administrative costs associated with non-chargeable activities, and it rounds up the final reduction amount to give members the benefit of any calculation errors. *See* Fiscal Year 2020 *Keller* Dues Reduction Notice. In short, the State Bar does not attempt to draw the line between germane and non-germane expenditures "with precision." *Janus*, 138 S. Ct. at 2481. Rather, unlike the unions in *Janus*, the State Bar has a policy of being over-inclusive in designating activities as non-chargeable, steering well clear of the germaneness line drawn by *Keller*. By following the guidance in *Keller*, the State Bar has developed an effective, workable mechanism for

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has not availed himself of the State Bar's *Keller* procedures. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

ensuring that members do not fund speech of which they disapprove. Moreover, because of their legal training, bar members are uniquely positioned to opt out and ensure that their First Amendment rights are being vindicated.

Finally, there is a strong reliance interest in upholding *Keller* and *Lathrop*. A majority of states have chosen an integrated bar as their vehicle of choice for regulating the practice of law. Pet. at 3. Overturning *Keller* and *Lathrop* would require those states to quickly develop new institutions to perform the disciplinary and educational functions for which they have molded their integrated bars over decades. Petitioner makes light of this prospect, asserting that "'[s]tates can keep their [bar] systems exactly as they are—only they cannot' force attorneys to engage in compelled speech and association. Pet. at 33 (quoting *Janus*, 138 S. Ct. at 2485 n.27).

The reality is far more complex than they make it out to be, as the regulatory functions and the day-to-day operations of integrated bars are inextricably intertwined. Perhaps most importantly, the State Bar handles all of the administrative activities and costs to collect the assessments that support the Board of Bar Examiners and Office of Lawyer Regulation, which Petitioner concedes perform core regulatory functions (Pet. at 12), as well as Wisconsin Lawyers' Fund for Client Protection and WisTAF (Wisconsin Trust Account Foundation.) Memorandum of Court Commissioner, *supra* pp. 5–6 at 22. State Bar dues also fund the State Bar Ethics Hotline, Lawyer Dispute Resolution, Fee Arbitration, ethics training and counseling, the Wisconsin Lawyers Assistance

Program, and registration of law firms and attorney trust accounts on behalf of the courts. Memorandum of Court Commissioner, *supra* pp. 5–6 at 25–28. Other integrated bars around the country are similarly intertwined with their state's framework for regulating the legal profession, playing integral roles in attorney discipline, enforcement of rules against unauthorized practice of law, ethics training, and attorney licensing. "Many if not most" of these services "are not self-supporting and are not capable of being subject to user fees." *In re State Bar of Wisconsin: Membership,* 485 N.W.2d at 228 (Wis. 1992) (Bablitch, J., concurring)

The Supreme Court of Wisconsin cannot independently levy taxes to replace State Bar funding, and thus would be unable to readily absorb the regulatory functions of the State Bar if Petitioner gets his way. Instead, the Supreme Court would have to rely on the Wisconsin State Legislature to levy additional taxes (on attorneys or on the public at large) to fund regulatory activities once funded primarily by State Bar dues. Especially in light of the continued vitality of the holdings in *Keller* and *Lathrop* and their demonstrated workability, particularly in Wisconsin, the widespread reliance on these precedents weighs heavily in favor of upholding *Keller* and *Lathrop*.

III. This Case Is Not A Good Vehicle To Review *Keller* and *Lathrop*.

This case is not a good vehicle to review *Keller* and *Lathrop* in any event. In his eagerness to take issue with *Keller*, Petitioner narrowed his challenge

and failed to develop an adequate record for this Court to review. The proceedings below feature little more than a motion to dismiss in the District Court and an affirmance in the Court of Appeals. Petitioner did not develop a record by challenging any particular germaneness determination or the adequacy of the State Bar's procedures. Nor did he raise a freestanding compelled association claim, or attempt to develop a record in support of such a claim. Nor have the issues raised in this case, as applied to the State Bar, been thoroughly litigated by the lower courts since *Janus* was decided. Further testing in the lower courts is essential because each integrated bar engages in its own unique activities and assesses mandatory dues differently. Reviewing in this case now, without a more developed record, would risk an overly broad ruling that does not account for the variety of integrated bar arrangements.

To begin with, Petitioner's claims—which revolve heavily around the proper interpretation of *Janus*—cry out for further percolation in the lower courts, or at least for a vehicle in which the courts below have been able to develop a record and examine the relevant issues in the context of concrete adversarial presentations. Petitioner and *amici* brush those problems aside, with Petitioner asserting that this Court will never have the advantage of any other court's views on these issues because the lower courts are bound by *Lathrop* and *Keller*. But the public record proves otherwise: while the State Bar does not believe that mandatory membership in the State Bar represents a First Amendment injury (*see* Part I,

supra), the Eighth Circuit suggested in *Fleck v. Wetch*[8] that a mandatory association claim is not necessarily foreclosed by *Keller* or *Lathrop* and could be litigated in the lower courts. *Fleck v. Wetch*, 937 F.3d 1112, 1115–16 (2019), *cert. denied*, No. 19-670 (U.S. Mar. 9, 2020) ("assum[ing] without deciding that *Keller* 'left the door open' to pursue this freedom of association claim"). More recently, the Fifth Circuit has held that, under certain circumstances, a mandatory association claim could proceed without overturning *Keller* or *Lathrop*, and remanded to the trial court for further proceedings on the merits. *McDonald*, 4 F.4th at 247; *Boudreaux*, 3 F.4th at 756.

The Court of Appeals in this case found that Petitioner had not raised a freestanding compulsory-association claim and therefore had no opportunity to weigh in on these issues. Petitioner thus has not even preserved an argument that this Court could decide in his favor without overruling two of its precedents. In short, not only have the issues here had no opportunity to percolate in the lower courts, but they have not even had an opportunity to be fully aired in this case itself. That should counsel strongly against granting *certiorari* here. *See, e.g.*, *Byrd v. United States,* 138 S. Ct. 1518, 1527 (2018) (as "a court of review, not of first view," this Court finds it "generally unwise to consider arguments in the first instance" that the lower courts "did not have occasion to address.").

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[8] Petitioner in *Fleck* attempted to raise this issue, but was found to have waived it in earlier proceedings.

The problem also exists with respect to Petitioner's claim that his obligation to pay mandatory dues to the State Bar violates the First Amendment, since there is no detailed record on the question of how mandatory dues are actually determined and used. Because Petitioner did not challenge the specifics of any of the State Bar's germaneness determinations or procedures, his complaint was dismissed at the threshold, and there has been no discovery and no summary judgment proceeding (let alone a full-blown trial) to develop the meaningful factual record that this Court has seen as critical for proper review of the fact-intensive issues Petitioner raises. While Petitioner has generally alleged that all State Bar speech touches on the law, and therefore on matters of public interest, and that he is compelled to support such speech (Pet. App. 36), his allegations provide no facts (let alone evidence) showing exactly what particular State Bar speech is funded by mandatory dues and to what extent, how the State Bar decides what instances of its speech are to be funded by mandatory dues, or that the State Bar has funded any particular speech with which Petitioner disagrees through mandatory dues.

Put simply, here as in *Lathrop*, "there is no indication in the record as to how [State Bar] political expenditures are financed and how much has been expended for political causes to which [Petitioners] object[]." *Lathrop*, 367 U.S. at 847 (plurality opinion). That leaves this Court with no factual basis on which to assess Petitioner's claim that the State Bar has used his dues in ways that violate the First Amendment, or that the State Bar is incapable of

limiting the expenditure of mandatory dues to germane activities.

Further, the State Bar has well-developed mechanisms for differentiating chargeable and non-chargeable activities which have been tested by decades of pre-*Janus* litigation. Petitioner has not availed himself of those mechanisms and has avoided directly attacking them in a way that would allow this Court to determine their sufficiency for protecting members' First Amendment rights.

In fact, the State Bar's *Keller* Dues Reduction process is comprehensive and differs notably from the agency fee procedures in *Janus* to which Petitioners seek to compare them. In *Janus*, the agency fees were automatically deducted from the wages of public employees without their consent. *Janus*, 138 S. Ct. at 2461. Only after the amount of the agency fee was set for the year did employees receive a notice detailing the union activities to which their agency fees were applied. *Id.* This meant that employees could only challenge the amount of the agency fee after the State had already begun to deduct it from their paychecks. *Id.* Thus, the state employees in *Janus* had no choice as to which union activities they funded.

By contrast, State Bar members voluntarily opt-in to funding the State Bar's non-chargeable activities. When State Bar members pay their dues each year, they are given the option of paying only those dues which support the State Bar's chargeable activities, or paying additional dues to fund the State Bar's non-chargeable activities. *See supra* p. 8. To make this decision, members can refer to the *Keller*

Dues Reduction Notice, which spells out which activities are chargeable and which are not, based on the most recent financial data available. *Id.* Only if members affirmatively choose to pay the additional amounts do they fund the State Bar's non-chargeable activities. Alternatively, if they choose to challenge the dues reduction, they pay no bar dues at all until the challenge has been heard by an impartial arbitrator.

The Eighth Circuit in *Fleck*, reviewing the State Bar Association of North Dakota's ("SBAND") similar *Keller* procedures, held that by allowing members to deduct amounts for non-chargeable activities from their dues in advance, SBAND had created an opt-in procedure easily distinguishable from the opt-out procedure overturned in *Janus*. *Fleck*, 937 F.3d at 1117–18 ("SBAND's revised fee statement and procedures clearly do not force members to pay non-chargeable dues over their objection.").

> The member's right to pay or refuse to pay dues to subsidize non-chargeable 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*. Doing nothing may violate a member's obligations to pay dues, but it does not result in the member paying dues that he or she has not affirmatively consented to pay.

Id. at 18. As with SBAND, the State Bar's *Keller* procedures ensure that members fully consent when they choose to pay dues to fund non-chargeable activities. Additionally, because the State Bar has a policy of being over-inclusive in calculating the annual *Keller* Dues Reduction (*see* Part II, *supra*), there is little risk that members unknowingly pay for non-chargeable activities even when they take the *Keller* Dues Reduction.[9] Other circuit courts have also held that *Hudson*/*Keller* dues reduction procedures are sufficient to ensure that attorneys' mandatory dues are not used for non-germane expenditures without the attorneys' consent. *Boudreaux*, 3 F.4th at 758–59; *Crowe*, 989 F.3d at 726–27.

Thus, even if *Keller* and *Lathrop* were undermined by *Janus* (and they are not, for the reasons discussed above), the sparse record in this case and the unique nature of the State Bar's mandatory dues procedures makes this case a poor vehicle for review of those cases. The issues Petitioner presents should be left to further litigation in the lower courts for a more thoroughly-developed case to emerge.

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[9] In fact, at least one challenger to an integrated bar in another state has expressly recommended Wisconsin's procedures as a model to be followed to ensure protection of members' constitutional rights. *See* Response to NSBA Report, Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, No. S-36-120001 (Neb. 2013) https://cdn.ymaws.com/www.nebar.com/resource/resmgr/NSBA_Litigation/Lautenbaugh_Response_NSBAReport.pdf.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully submitted,

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