No. 20-1678

In The
Supreme Court of the United States

DANIEL Z. CROWE; LAWRENCE K. PETERSON;
and OREGON CIVIL LIBERTIES ATTORNEYS,
an Oregon nonprofit corporation,

Petitioners,

v.

OREGON STATE BAR, a Public Corporation, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Mackinac Center for Public Policy is a Michigan-based, non-partisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1987.

The Mackinac Center Legal Foundation, a subdivision of the Mackinac Center for Public Policy, is representing an attorney in Michigan who is challenging her mandatory bar membership and mandatory dues. This matter, *Taylor v. Barnes, appeal docketed sub nom. Taylor v. Buchanan*, is currently before the Sixth Circuit, Appeal No. 20-2002, from the U.S. Western District of Michigan, Case No. 1:19-cv-00670. The Mackinac Center has also studied issues related to mandatory bar dues and membership.[2] Further, the Mackinac Center played a role as *amicus curiae* in the relevant matter of *Janus v. AFSCME*, 138 S. Ct. 2448 (2018). Its *amicus curiae* brief in that matter was cited in the majority opinion, *Janus*, *id*. 2466, n. 3. Petitioners and *amicus curiae* contend that *Janus* requires the

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[1] This brief is filed with the consent of the parties, who have filed blanket consents to such *amicus curiae* briefs. No counsel for a party authored the brief in whole or in part, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. The parties were given ten days' notice of the filing of this brief.

[2] See, e.g., Bradley A. Smith and Alan Falk, The Limits of Compulsory Professionalism: Does a Unified Bar Make Sense for Michigan? https://www.mackinac.org/S1994-05.

application of at least the "exacting standard" of scrutiny in a First Amendment analysis of mandatory membership and dues, and that requiring dues be paid to Respondent Oregon State Bar cannot meet that standard.

SUMMARY OF ARGUMENT

The First Amendment protects free speech, the right to refrain from speaking, and the right to be free from compelled speech. It similarly protects a right to free association, and a right to be free from compelled association. A majority of states, approximately 30, require that attorneys in their states, as a condition of practicing law, belong to a state bar and pay membership dues to that state bar.[3] These mandatory associations are called "integrated bars."

Lathrop v. Donohue, 367 U.S. 820 (1961), had been read to say that integrated-bar-membership requirements did not violate free-association rights. Similarly, *Keller v. State Bar of California*, 496 U.S. 1 (1990) held that the integrated bars could require members to pay mandatory fees without violating the First Amendment, but that such fees could only be used for public speech and advocacy on matters which were related to the regulation and disciplining of the profession. In other words, lawyers could be required to support speech and an organization which directly affected

[3] Nebraska is somewhat difficult to categorize and will be discussed below.

their own profession and lives, but could not be compelled to fund speech for controversial matters that were, perhaps, not directly related to their profession – like gun control or nuclear disarmament. But *Keller* did not apply exacting scrutiny, which in *Janus* clearly become the proper review standard.

Respondents' position in support of integrated bars is not helped by *Harris v. Quinn*, 573 U.S. 616 (2014). In *Harris*, this Court refused to extend *Keller* and its precedent *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) to the quasi-public employees at issue in that case because these were not like the public employees of *Abood* or the lawyers in *Keller*. *Harris* implied that to the extent attorneys subject to integrated bars were more akin to full-fledged public employees, *Keller* still stood.

With the deciding of *Janus*, the proper standard for evaluating such First Amendment matters is to apply either strict scrutiny, or, at a minimum the "exacting scrutiny" standard. Under either standard, integrated bars would be unable to command mandatory dues for the purpose of speaking on public matters if the same government interest could be accomplished by less restrictive means. As this brief will show, the majority of practicing lawyers in the United States practice in states that do not compel membership in and payment to an integrated bar. Since the states' interests in regulating the legal profession are still met in these voluntary-bar-association states, it necessarily

cannot be said that mandatory dues are needed for the states' interest to be met.

ARGUMENT

I. A brief summary of the opinions connecting union dues and integrated bars dues.

The first opinion that mentioned state bars and whether the First Amendment was violated by compelled association, *Railway Employees' v. Hanson*, 351 U.S. 225 (1956), compared railway employees who were compelled to pay dues to attorneys who were required to join a bar. In an off-hand way, *Hanson* simply assumed that there was no First Amendment violation in requiring lawyers to pay dues to an integrated bar.

Lathrop, *supra*, in 1961, summarized *Hanson*'s holding in this way:

> In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*]. We there held that . . . the Railway Labor Act . . . did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments. . . . In rejecting Hanson's claim of abridgment of his rights of freedom of association, we said, 'On the present record, there is no more an infringement or impairment of

> First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.'

Lathrop, 367 U.S. at 842-43 (plurality opinion).

After *Lathrop*'s holding on bar membership, the matter of compelled financial support returned to the courts again, this time concerning public-sector employees and labor unions in *Abood*, *supra*. *Abood* employed a deferential standard which looked to whether or not the state legislature had a basis for requiring mandatory nonmember payments to the union: "such interference [with First Amendment rights] as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Abood*, 431 U.S. at 222.

Twenty-three years later, *Keller*, *supra*, would again consider integrated bars. This time, the question was whether lawyers' First Amendment rights were violated when they were required to fund advocacy, through mandatory dues, on public-policy issues with which they disagreed. In evaluating the California bar's functioning, the *Keller* court compared the bar's status to that of a labor union, rather than that of a state agency. *Keller* explicitly drew upon *Abood*, and analogized the attorneys in *Keller* to the public employees in *Abood*. As such, the Court determined that mandatory dues for lawyers were allowable under the First Amendment if they were germane to a function which supported the government's interest:

> *Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services.

Keller, 496 U.S. at 13.

Harris, *supra*, involved home-care workers who were employed by a private care recipient and paid by the state. *Harris*, 573 U.S. at 621. These workers were deemed to be unlike the public employees of *Abood*, *supra*. "If we allowed *Abood* to be extended to those who are not full-fledged public employees, it would be hard to see just where to draw the line, and we therefore confine *Abood*'s reach to full-fledged state employees." *Harris*, 573 U.S. at 638-39. Neither the public employees of *Abood* nor the attorneys of *Keller* were analogous to these home-care workers.

Shortly after *Harris*, the question of compelled financial support by public employees was revisited four years later in *Janus*, *supra*, which explicitly overturned *Abood* and set the minimum standard of scrutiny at exacting scrutiny for compelled dues and fees cases. *Janus*, 138 S.Ct. at 2465.

II. *Harris v. Quinn* did not decide whether integrated bars and mandatory dues could survive exacting scrutiny.

Respondents have argued that having an integrated state bar serves Oregon's compelling interest in regulating the state's attorneys, improving access to the legal system, and improving the quality of legal services. Respondents rely on dicta from *Harris*, 573 U.S. at 655-56, to the effect that the regulatory framework for lawyers, including detailed ethics rules, provides the states with a strong interest in allocating that expense to members of the bar and yet the court in *Harris* suggested that *Keller* was unaffected by its decision**.** *Harris***,** 573 U.S. at 656.

Such reliance on *Harris* is misplaced. The key to *Harris* is the refusal to extend *Abood* to quasi-public employees. This Court then stated failure to extend *Abood* did not undermine *Keller*:

> Respondents contend, finally, that a refusal to extend *Abood* to cover the situation presented in this case will call into question our decisions in *Keller v. State Bar of Cal*., 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), and *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000). Respondents are mistaken.
>
> In *Keller*, we considered the constitutionality of a rule applicable to all members of an "integrated" bar, i.e., "an association of attorneys in which membership and dues are required as a condition of practicing law." 496

> U.S., at 5, 110 S.Ct. 2228. We held that members of this 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. *Id*., at 14, 110 S.Ct. 2228.
>
> This decision 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." *Ibid*. 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. *Harris* did not contradict *Keller*, because the type of employees at issue in *Harris* were not analogous to attorneys subject to integrated bars in *Keller*.

Further, it does not appear that *Harris* had a record before it as to the necessity of mandatory dues by attorneys to fulfill a state's compelling interest. And as we will see in the next section, mandatory membership and dues cannot be said to be necessary to a state's interest in regulating the legal profession.

III. The empirical evidence shows that integrated bars with mandatory dues are not necessary to regulate the legal profession.

A majority of attorneys in the United States are not required to be members of an integrated bar. It is true that a majority of states, approximately 29 or 30,[4] require that attorneys in their states, as a condition of practicing law, belong to an integrated bar. While this majority of states, including Oregon, require membership and payment to an integrated bar, these

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[4] There may be some disagreement about the number of states that have an integrated bar because Nebraska, while technically having a mandatory bar, has, by order of its supreme court, reduced fees from approximately $300 to $100 and ended mandatory funding for certain activities. While it did not abolish the integrated bar, it restricted what mandatory fees can be used for to a greater extent than did *Keller*, and it is more in accord with the practice of voluntary-membership states where lawyers only pay for licensing, ethics, and disciplinary functions. The Nebraska Supreme Court declined to make their state bar a fully voluntary bar, but held:

> In our view, the best solution is to modify the court's rules creating and establishing the Bar Association (and other related rules) to limit the use of mandatory dues, or assessments, to the regulation of the legal profession. This purpose clearly includes the functions of (1) admitting qualified applicants to membership in the Bar Association, (2) maintaining the records of membership, (3) enforcing the ethical rules governing the Bar Association's members, (4) regulating the mandate of continuing legal education, (5) maintaining records of trust fund requirements for lawyers, and (6) pursuing those who engage in the unauthorized practice of law.

In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. 1018, 1035 (2013).

mandatory states only include a minority of the nation's lawyers. As of 2021, approximately 60.1% of the United States' lawyers are in states that do not have an integrated bar.[5] This is because many of the most populous states do not have mandatory integrated bars. Out of the 1,281,199 lawyers in the 50 states[6] in the ABA's survey, 769,886 practice in a voluntary-bar state.

Number of lawyers, by integrated and voluntary bars, in each state per the ABA National Lawyer Population Survey

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[5] This data comes from a state-by-state census from the American Bar Association's 2021 National Lawyer Population Survey. https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf Last accessed June 18, 2021.

Amicus Curiae's review of this state-by-state data indicates that 60% of lawyers practice in a state without an integrated bar. These 19 voluntary bar states are: Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont. See Petitioners' Brief at 18. Nebraska is considered a voluntary bar state by Petitioners. However, as it is still an integrated bar that is essentially constrained to the functions of a voluntary bar, *amicus curiae* has included it with the integrated bar states. The overall percentage of lawyers in voluntary bar states stays essentially unchanged whether or not Nebraska is included as a voluntary state. According to this Survey, this percentage has stayed roughly the same in 2021, 2020, and 2019.

[6] The ABA survey also includes lawyers in American Samoa, the District of Columbia, North Mariana Islands, Puerto Rico, and the Virgin Islands. But as we are looking specifically at state bars here, these have been excluded.

Integrated bar states	2021	2020	2019
Alabama	14,897	14,897	14,821
Alaska	2,340	2,324	2,324
Arizona	15,688	15,081	15,081
Florida	77,223	79,328	78,448
Georgia	33,158	32,584	32,409
Hawaii	4,184	4,270	4,270
Idaho	4,029	3,967	3,911
Kentucky	13,570	13,570	13,570
Louisiana	21,414	20,568	20,568
Michigan	35,453	35,453	35,453
Mississippi	6,845	6,866	6,886
Missouri	24,369	24,369	24,369
Montana	3,183	3,167	3,184
Nebraska	5,546	5,546	5,555
New Mexico	5,612	5,612	5,612
North Carolina	24,253	24,253	24,253
North Dakota	1,696	1,697	1,687
Oklahoma	13,713	13,549	11,678
Oregon	12,158	12,196	12,274
Rhode Island	4,071	4,071	4,071
South Carolina	10,853	10,798	10,568
South Dakota	1,985	1,907	1,995
Texas	93,821	92,833	91,244

Utah	8,581	8,473	8,362
Virginia	24,020	24,230	24,230
Washington	26,701	26,316	26,182
West Virginia	4,770	4,770	4,770
Wisconsin	15,488	15,482	15,512
Wyoming	1,692	1,773	1,773
Total lawyers in integrated Bar States	511,313	509,950	505,060
Total Lawyers	1,281,199	1,282,263	1,277,108
Percentage in Integrated Bars	39.9%	39.8%	39.5%
Voluntary bar states	2021	2020	2019
Arkansas	6,808	6,299	6,693
California	167,709	168,569	170,117
Colorado	22,802	22,802	22,802
Connecticut	21,036	21,036	21,036
Delaware	3,058	3,058	3,058
Illinois	62,720	62,720	62,720
Indiana	15,802	15,761	15,845
Iowa	7,452	7,306	7,306
Kansas	7,932	8,045	8,045
Maine	3,995	3,995	3,995
Maryland	40,800	40,800	40,800

Massachusetts	42,720	42,908	42,788
Minnesota	26,065	25,823	25,823
Nevada	7,482	7,509	7,030
New Jersey	40,137	41,152	41,152
New York	185,076	184,662	182,296
Ohio	38,189	38,189	38,189
Pennsylvania	49,087	49,249	50,039
Tennessee	18,818	18,818	18,702
Vermont	2,198	3,612	3,612
Total lawyers in voluntary bar states	769,886	772,313	772,048
Total Lawyers	1,281,199	1,282,263	1,277,108
Percentage in voluntary bars	60.1%	60.2%	60.5%

Source: Mackinac Center and ABA National Lawyer Population Survey

Even if it there was not a clear majority of practicing attorneys in voluntary bar states, the existence of a single voluntary bar state would still make clear that the payment of mandatory dues to an integrated bar are not necessary, even if justified by a compelling state interest. In *Janus*, it was noted that only 28 states were "right to work" states which did not require mandatory fees, and yet unions were still able to function and fulfill what the government claimed was its compelling interest:

> Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can readily be achieved "through means significantly less restrictive of associational freedoms" than the assessment of agency fees. *Harris*, *supra*, at ___, 134 S.Ct., at 2639 (internal quotation marks omitted).

Janus, 138 S.Ct. at 2446 (footnote omitted).

Further, there is no indication that states with integrated bars and mandatory dues do a better job at regulating the profession. See, for example, Levin, The End of Mandatory State Bars, 109 Geo. L.J. Online 1 (2020).[7] Prof. Levin examines both voluntary and integrated bar states and considers, among other things, effective lawyer regulation, public benefits, quality of legal services, continuing education, and access to the law programs. Levin concludes that "[T]here is no reason to think that states with mandatory state bars are better at administering lawyer regulations than states with voluntary bars." *Id*. at 18.

[7] https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/04/Levin_The-End-of-Mandatory-State-Bars.pdf (Last visited June 23, 2021.)

CONCLUSION

Keller has become inconsistent with this Court's most recent First Amendment jurisprudence related to compelled financial support. Mandatory bar dues violate the First Amendment just as mandatory agency fees were held unconstitutional in *Janus*. This Court should grant certiorari and overturn *Keller*.

Respectfully submitted,

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