No. 24-1025

IN THE

Supreme Court of the United States

DANIEL Z. CROWE, *et al.*,

Petitioners,

v.

STATE BAR OF OREGON, *et al.*,

Respondents.

ON PETITION FOR A 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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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Constitutional Provisions

Other Authorities

INTEREST OF AMCUS 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 Mackinac Center is a 501(c)(3) organization founded in 1987.

The Mackinac Center Legal Foundation, a subdivision of the Mackinac Center for Public Policy, has represented an attorney in Michigan who challenged her mandatory bar membership and mandatory dues. *Taylor v. Heath, appeal docketed sub nom. Taylor v. Buchanan*, 4 F.4th 406 (2021), *cert denied*, 142 S.Ct. 1441 (2022). The Mackinac Center has also published a study 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*, 585 U.S. 878 (2018). Its *amicus curiae* brief in *Janus* was cited in the majority opinion, 585 U.S. at 896, n. 3. Petitioners and *amicus curiae* contend that *Janus* requires the application of at least the "exacting standard" of scrutiny in a First Amendment analysis of mandatory membership and dues, and requiring that dues be paid to Respondent Oregon State Bar cannot meet that standard.

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1. 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. Smith and Falk, The Limits of Compulsory Professionalism: Does a Unified Bar Make Sense for Michigan? Available here: https://www.mackinac.org/S1994-05, last accessed April 10, 2025.

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." However, the majority of lawyers practicing in the 50 states practice in states where bar membership is voluntary.

Lathrop v. Donohue, 367 U.S. 820 (1961), has 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 mandatory members to pay 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 their own profession and lives, but could not be compelled to fund speech for controversial matters that were, perhaps, further afield and not directly related to their profession—like gun control or nuclear disarmament. But *Keller* did not apply exacting scrutiny.

Contrary to the Ninth Circuit opinion from which certiorari is sought here, the Respondent's position is not

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

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 there 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 applied.

After *Janus*, the proper standard for evaluating such First Amendment matters is to apply the "exacting scrutiny" or strict scrutiny. Even under the lesser exacting scrutiny, integrated bars are unable to command mandatory dues for the purpose of speaking on public matters if the same government interest could be served through means that are less restrictive. 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 cannot be said that mandatory dues are necessary for the states' interest to be met.

ARGUMENT

I. A brief summary of the opinions connecting union dues and attorneys' dues and fees to integrated bars.

The first opinion that mentioned state bars and whether the First Amendment was violated by compelled association, *Railway Employes' v. Hanson*, 351 U.S. 225 (1956), compared railway employees who were compelled to pay dues or fees to attorneys who were required to join

a bar. Without analysis, *Hanson* just assumed that there was no First Amendment violation in requiring lawyers to pay dues to an integrated bar.

Lathrop, *supra*, in 1961, was the first opinion of this Court to directly address integrated bars and mandatory membership. *Lathrop* 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 842-843 (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*. Mandatory dues for lawyers were allowable without violating the First Amendment if these were spent on advocacy germane to the integrated bar's function.

> *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 private care recipients and paid by the state.

Harris, 573 U.S. at 621. These 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 638-639. Neither the public employees of *Abood* nor the attorneys of *Keller* were analogous to these home-care workers.

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 review at exacting scrutiny for compelled dues and fees cases.

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

Here, the Ninth Circuit relied on dicta from *Harris* to conclude 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. See 573 U.S. at 655-656. The Ninth Circuit seemingly acknowledged that *Harris*' discussion of *Keller* was dicta, noting that this Court "observed" that *Keller*'s germaneness requirement fit within the exacting scrutiny framework and "indicates" that such compelled association survives exacting scrutiny. See Opinion of the United States Court of Appeals for the Ninth Circuit filed August 28, 2024, Page 34a of Petitioners' Appendix A. Therefore, the Ninth Circuit held, based on the *Harris* dicta, that such mandatory dues can survive exacting scrutiny, since that is the standard *Harris* applied.

But "observes" and "indicates" does not have the same precedential certitude as "held," and the lower court's reliance on *Harris* is misplaced. In part III(B)(2) of *Harris,* this Court held that *Abood* did not apply to the quasi-public employees at issue. *Harris*, 573 U.S. at 646-647. That was the central holding of this Court. Later, in part V, this Court addressed additional arguments of the respondents and dissent. It was here the Court stated that its holding 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.
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> * * *
>
> [*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." *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 attorneys' dues and membership in fulfilling a state's 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

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 the uses of mandatory fees 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

that attorneys in their state, as a condition of practicing law, belong to an integrated bar. But while this majority of states, including Oregon, require membership and payment to an integrated bar, these mandatory states only include a *minority* of the nation's lawyers. A *majority*, approximately 59% of the United States' lawyers in 2024, practice in states that are free from a requirement of mandatory membership and dues paid to an integrated bar.[5] This is because many of the most populous states do not have mandatory integrated bars. Out of the 1,279,884

> 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).

5. This data comes from a state-by-state census from the American Bar Association's 2023-2024 National Lawyer Population Survey. https://www.americanbar.org/content/dam/aba/administrative/market_research/2024-aba-nlps.pdf Last accessed April 10, 2025.

Amicus Curiae's review of this state-by-state data indicates that 59% 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. Nebraska is an anomaly in that it is an integrated bar that is essentially constrained to the functions of a voluntary bar, but *amicus curiae* has included it with the integrated bar states. The overall percentage of lawyers in voluntary bar states stays essentially unchanged whether Nebraska is included as a voluntary state. According to this survey, this percentage has stayed roughly the same in 2024, 2023, and 2022.

lawyers in the 50 states[6] in the American Bar Association's most-recent survey, 755,685 practice in a voluntary-bar state.

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

Integrated bar states	2024	2023	2022
Alabama	12,414	12,195	12,054
Alaska	2,294	2,268	2,118
Arizona	15,885	15,506	15,805
Florida	80,080	84,594	77,223
Georgia	34,307	33,890	33,729
Hawaii	4,139	4,122	4,184
Idaho	4,076	4,098	4,047
Kentucky	13,632	13,600	13,672
Louisiana	19,524	19,566	19,714
Michigan	34,366	34,577	35,139
Mississippi	6,699	6,736	6,814
Missouri	24,679	24,613	24,674
Montana	3,603	3,201	3,191
Nebraska	5,839	5,689	5,689
New Hampshire	3,461	3,451	3,495
New Mexico	5,404	5,411	5,634
North Carolina	26,515	26,274	25,735

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

North Dakota	1,663	1,694	1,685
Oklahoma	12,245	13,415	13,415
Oregon	12,233	12,196	12,285
Rhode Island	3,815	4,081	4,081
South Carolina	11,090	11,090	11,003
South Dakota	2,042	2,027	2,026
Texas	98,345	96,827	95,196
Utah	8,537	8,581	8,581
Virginia	24,120	23,855	23,923
Washington	26,318	26,300	26,428
West Virginia	4,600	4,673	4,673
Wisconsin	15,172	15,192	15,384
Wyoming	1,726	1,673	1,704
Total lawyers in integrated-bar states	518,823	521,395	513,301
Total lawyers	1,279,884	1,281,171	1,278,869
Percentage in Integrated Bars	41%	41%	40%

Voluntary bar states	2024	2023	2022
Arkansas	6,808	6,808	6,808
California	175,883	170,959	170,306
Colorado	23,249	22,802	22,802
Connecticut	18,028	21,036	21,036
Delaware	3,058	3,058	3,058
Illinois	62,093	62,201	62,720
Indiana	15,485	15,485	15,794
Iowa	7,190	7,258	7,405
Kansas	7,845	7,858	7,918
Maine	3,693	4,002	3,669
Maryland	26,020	26,020	40,800
Massachusetts	40,075	42,635	42,635
Minnesota	26,065	26,065	26,065
Nevada	7,563	7,498	7,484
New Jersey	39,311	40,078	40,078
New York	187,656	188,341	187,246
Ohio	36,488	37,717	34,692
Pennsylvania	47,519	48,174	49,412
Tennessee	19,458	19,583	18,818
Vermont	2,198	2,198	2,198
Total lawyers in voluntary-bar states	755,685	759,776	770,944
Total lawyers	1,279,884	1,281,171	1,278,869
Percentage in voluntary bars	59%	59%	60%

Source: Mackinac Center and ABA 2023-24 National Lawyer Population Survey

Even if there were not a clear majority of practicing attorneys in voluntary bar states, the existence of a single voluntary bar state would still make clear that mandatory dues to an integrated bar are not necessary. A voluntary bar arrangement fulfills the state's interest in regulating the profession with less First Amendment infringement. If even just one such state existed and it fulfilled the state's interest, that would be enough to show that it could be done. 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, 585 U.S. at 896 (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]

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 accessed April 11, 2025.)

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." Levin 18.

CONCLUSION

This Court should grant certiorari and overturn *Keller*.

Respectfully submitted,

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