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August 31, 2015

Supreme Court of Arizona
1501 W. Washington Street, #411
Phoenix, AZ 85007

Re: Mission and Governance Task Force Comments

Dear Members of the Court:

While we commend the Arizona Supreme Court for taking this opportunity to review the State Bar's role and governance, the Goldwater Institute disagrees with the conclusions of the Task Force. Namely, we believe that the Task Force's recommendation that "the State Bar of Arizona continue to be integrated and supervised by the Arizona Supreme Court and that membership in the integrated bar be a requirement for practicing law in this state," Mission and Governance Task Force, *Report of the Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona*, at 6 (2015), should be rejected because mandatory bar associations violate the First Amendment to the United States Constitution. Because of this, we urge the Supreme Court to no longer precondition the practice of law on bar membership in Arizona.

It is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014). That is because "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." *Id.* at 2639; *see also id.* at 2656 (Kagan, J. dissenting) ("[T]he 'difference between compelled speech and compelled silence' is 'without constitutional significance.'" (quoting *Riley v. National Federal of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).

There is no question the State Bar's mandatory dues are "a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2289 (2012), *quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees, 466 U.S. 435, 455 (1984).* In *Knox*, the U.S. Supreme Court clearly articulated the test for compulsory subsidies like

500 East Coronado Rd., Phoenix, AZ 85004
Phone (602) 462-5000 | *Fax* (602) 256-7045

mandatory bar dues. This test holds compulsory subsidy schemes to "exacting First Amendment scrutiny" and few schemes can survive it. *Id*.

Compulsory subsidies for private speech "cannot be sustained unless two criteria are met." *Id*. First, all coerced association must be justified by a "'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id*. (*quoting Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). Second, even in the "rare case" where coerced association is found to be justified, compulsory fees "can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Knox*, at 2289, *quoting US v. United Foods, Inc.*, 533 U.S. 405, 414 (2001). Although the U.S. Supreme Court has found mandatory bar associations to be one of the rare cases that permit compelled association, *Keller v. State Bar of California*, 496 U.S. 1 (1990); *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961), it has not revisited this conclusion in light of its holdings in *Knox* and *Harris* that mandatory associations must meet strict scrutiny.

The State Bar of Arizona, like all mandatory bar associations, simply cannot satisfy these criteria. The sole compelling state interest the U.S. Supreme Court has found to justify coercive bar association membership is improving the practice of law through the regulation of attorneys. *Keller*, 496 U.S. at 14; *Lathrop*, 367 U.S. at 843. Yet 18 states—Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont—have already found ways of regulating attorneys without compelling membership at all. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 286 Neb. 1018, 1022 (2013); Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 Tex. Tech J. Tex. Admin. L. 23, at 24 (2000). To say that this interest cannot be achieved through less restrictive means flies in the face of reality. Mandating membership in the State Bar therefore crosses "the limit of what the First Amendment can tolerate," *Knox*, 132 S. Ct. at 2291, and should no longer be tolerated in Arizona.

With less restrictive means readily available, compelling Arizona attorneys to join the State Bar in order to practice law in the State cannot survive exacting First Amendment scrutiny and accordingly violates attorneys' rights of free speech and free association. Because coercing Arizona attorneys to join the State Bar is unconstitutional, compulsory membership fees are likewise not "a necessary incident of the larger regulatory purpose which justified the required association." *Knox*, 132 S. Ct. at 2289. As such, the State Bar fails to satisfy the two criteria described by the U.S. Supreme Court; preconditioning the practice of law on joining and funding the State Bar should end.

This is not a radical proposition for the very reason mandatory bar membership is unconstitutional: the continued success of the 18 states that already regulate attorneys without conditioning the practice of law on bar association membership demonstrates how Arizona can effectively regulate attorneys without violating their First Amendment rights. Indeed, the Court need look no further than our neighbor Colorado to find an exemplary model for attorney regulation. Like attorneys in mandatory bar association states, attorneys in voluntary states still have to be licensed to practice law, they still must adhere to ethical standards, and they still must

pay the court for the cost of attorney regulation. If they wish to join a bar association, they may, but if their views diverge with the bar association, attorneys are free to leave and disassociate themselves from the bar association's speech, but continue practicing law. Moreover, these 18 voluntary bar states beg the question: if it is not necessary to impinge upon attorneys' First Amendment rights to regulate the practice of law, why do it?

Instituting a regulatory arrangement that reflects the wisdom that "[t]he mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights," *Lathrop*, 367 U.S. at 876 (Black, J., dissenting), will not prevent the State of Arizona from achieving high levels of practice or lead to any lapse in the regulation of attorneys, just as it has not in the 18 voluntary bar states. Indeed, given that this Court repeatedly has held that our Constitution affords even greater protection for free speech than does the First Amendment, *see, e.g., Coleman v. City of Mesa*, 230 Ariz. 352, 361 (2011); *State v. Stummer*, 219 Ariz. 137, 143 (2008); *Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354-55 (1989), we hope the Court will follow the lead of those states that have chosen the path of voluntarism over coercion.

For these reasons, the Goldwater Institute urges the Court to reject the Task Force's recommendation that Arizona attorneys continue to be forced to join and fund the State Bar of Arizona in order to earn a living practicing law in the State.

Sincerely yours,

Jared Blanchard
Attorney
Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute