Texas Public Policy Foundation

February 15, 2019

The Honorable Ken Paxton
Office of the Attorney General
ATTN: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

RE: Opinion Request #48487

Dear General Paxton,

The Texas Public Policy Foundation writes in response to the State Bar of Texas's January 22, 2019, Request for Opinion (# 48487) on the effect of the United States Supreme Court's recent decision in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, (2018) regarding the constitutionality of the State Bar's assessment of attorney dues used for political advocacy. This question is listed as Question 2 in the State Bar's Opinion Request. (Question 2) For reasons explained below, we respectfully request that you affirm that the use of mandatory bar dues for any political advocacy is unconstitutional under *Janus*.

INTRODUCTION

The United States Supreme Court has routinely held that forcing individuals to subsidize political advocacy with which they may disagree as a condition of employment is a violation of the First Amendment. *See, Elrod v. Burns*, 427 U.S. 347, 355 (1976). Starting in the late twentieth century, however, this general rule became subject to two narrow exceptions. First, in *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), the Court upheld compelled union dues for public sector employees. Second, in *Keller v. State Bar of California*, 496 U.S. 1, (1990), the Court relied on *Abood* to uphold compelled bar membership dues for attorneys. These two cases have historically formed the basis for the State Bar's claimed authority to use mandatory attorney bar dues to fund political advocacy.

These cases are no longer good law. This year, in *Janus*, 138 S. Ct. at 2464, the United States Supreme Court expressly overturned *Abood*. The Court then vacated and remanded *Fleck v. Wetch,*

a pending appeal seeking to overturn *Keller*, and ordered the lower court could to issue an opinion in that case consistent with *Janus*. [1]

The Supreme Court's decisions in *Janus* and *Fleck* eliminated the tenuous basis under which the Texas State Bar's system of using mandatory bar dues for political advocacy could have been held constitutional. Accordingly, it is unlawful to force attorneys to abandon their First Amendment rights in order to practice law. Therefore, the Attorney General should make clear that State Bar's current dues collection practices are unconstitutional.

BACKGROUND

As a condition of being licensed to practice law in Texas, each attorney must become of a member of the State Bar of Texas (the "Bar"). Tex. Gov. Code § 81.051. The Bar is both a government agency and a private political association. Tex. Gov. Code § 81.011(a).

When acting in a governmental capacity, the Bar acts as a supplement to the "judicial department's powers under the constitution to regulate the practice of law." Tex. Gov. Code § 81.011(b). In that capacity, the Bar aids in the administration of the Bar exam, record keeping as to admitted attorneys, and the processing of complaints against attorneys through the Court's grievance process. Tex. Gov. Code § 81.072.

In its private capacity, the Bar acts as a political advocacy organization that takes positions on a wide range of state legislation. For example, in the past year, the Bar has taken positions on laws involving confidentiality in divorce, funding for pro bono assistance, the use of certain gender pronouns in existing laws, the availability of attorney's fees in certain forms of litigation, a constitutional amendment to recognize same-sex marriage, child custody issues, the standards for child removal for abuse, access of grandparents to grandchildren, and rules regarding the creation of trusts.[2]

To be an actively licensed attorney, each attorney must submit annual dues to the Bar. These annual dues range from $68 for new attorneys to $235 for attorneys that have been in practice for more than five years.[3] Because money is fungible, these dues fund both the governmental and political advocacy activities of the Bar. In fact, because the Bar argues that its legislative advocacy "relates to the regulation of the legal profession, improving the quality of legal services, or the administration of justice," there is no limitation on the use of Bar dues for that purpose. Tex. Gov. Code § 81.034.

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[1] *See* Order vacating and remanding in *Fleck v. Wetch*, available at https://www.supremecourt.gov/orders/courtorders/120318zor_gfbh.pdf

[2] State Bar 2019 legislative proposals available at: https://www.texasbar.com/Content/NavigationMenu/AboutUs/GovernmentalRelations/2019Legislative.htm

[3] Fee schedule available at: https://www.texasbar.com/AM/Template.cfm?Section=Dues_and_Other_Fees1&Template=/CM/HTMLDisplay.cfm&ContentID=28988

A small number of states have similar requirements that attorneys join and subsidize a bar association. However, 19 states[4] have rejected these requirements and currently license and regulate the practice of law without requiring membership in a separate political advocacy organization. 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, 24 n.1 (2000).

SUPREME COURT PRECEDENT

The Supreme Court has repeatedly held that the "[f]reedom of association ... plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). Similarly, the freedom of speech presupposes a right to not to speak, and consequently, not to fund the speech of others with whom one may disagree. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). As Thomas Jefferson once noted, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical." *A Bill for Establishing Religious Freedom*, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950).

For most of U.S. history, it was assumed that the state could not require individuals to join or subsidize a private organization as a condition of employment without violating the First Amendment. *See*, *Knox v. Service Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012) (compelled memberships are presumptively unconstitutional and may only survive if justified by a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.").

In *Abood*, 431 U. S. at 235-36, the Court carved out a narrow exception from this tradition by holding that states could require payment to a public sector labor union as a condition of government employment, provided that the union segregated the dues collected from non-consenting employees from the funds it used for certain political advocacy. In its Opinion, the Court acknowledged that these mandatory arrangements restricted the freedom of speech and association, (*Id.* at 222-23) but nonetheless upheld mandatory union membership because it believed such arrangements were "necessary" to maintain "labor peace" and that unions could faithfully segregate political from operational funds. *Id.* at 235-36.

Thirteen years later in *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990), the Court held that State Bar associations are "subject to the same constitutional rule [established in *Abood*] with respect to the use of compulsory dues as are labor unions representing public and private employees." Looking to *Abood*, the Court made three holdings. First, it recognized that requiring individuals join or subsidize the political speech of a state bar association is a restriction on First Amendment rights. *Id.* at 14. Second, it held that mandatory membership in a state bar served a compelling government interest because state bars are necessary to achieve the "State's interest in

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[4] Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont.

regulating the legal profession and improving the quality of legal services." *Id.* at 13. And third, it held that mandatory dues requirements were narrowly tailored, provided that mandatory dues were not used to advocate for legislation that was not germane to the "State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13-14.

It was this third finding that relied most heavily on *Abood.* As the *Keller* Court explained, *Abood* established the concept that mandatory associations could survive scrutiny by distinguishing between germane and non-germane advocacy and distributing funds accordingly. *Keller*, 496 U.S. at 13. While the Court acknowledged the difficulty in "determining where the line falls" in the state bar context, its experience applying the *Abood* standard gave it confidence that such line drawing was possible. *See*, *id.* at 16-17 (responding to line-drawing objection by noting that "unions representing government employees have developed, and have operated successfully within the parameters of *Abood* procedures for over a decade.")

That reasoning has since been used to uphold the constitutionality of mandatory bar dues in the face of various First Amendment challenges. *See*, *Kingstad v. State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990).

However, in *Janus* 138 S. Ct. at 2459–60, the Court expressly overturned *Abood* and held that requiring public sector workers to join or "subsidize a union, even if they choose not to join and strongly object to the positions the union takes… violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." Essential to the Court's holding in *Janus* was the realization that it is virtually impossible for unions or courts to determine what sorts of political activities are germane to collective bargaining, and therefore may be paid for with compelled union dues, and what political activities cross the line and must be paid only with consenting union members' funds. *Id.* at 2481. Moreover, the Court noted that factual developments since *Abood* had eroded the Court's "unsupported empirical assumption" that mandatory union membership was necessary to maintain "labor peace." *Id.* at 2483-84. Without these factual assumptions, the Court held that *Abood's* departure from traditional First Amendment jurisprudence could no longer be justified. *Id.* at 2486.

At the time *Janus* was decided, a petition for certiorari was pending in *Fleck v. Wetch,* a case that sought to overturn the Supreme Court's prior opinion in *Keller* upholding mandatory bar dues for attorneys. Shortly after *Janus* was decided, the Supreme Court vacated and remanded the appellate court's decision in *Fleck* so that the lower court could issue a new opinion "in light of *Janus*."[5] Because the lower court in *Fleck* had upheld the forced Bar dues requirement in that case under *Keller*, the Supreme Court's vacatur and remand of that decision indicates, at a minimum, that the Court thinks its opinion in *Janus* may have undermined *Keller* as well.

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[5] *See* Order vacating and remanding in *Fleck v. Wetch*, available at https://www.supremecourt.gov/orders/courtorders/120318zor_gfbh.pdf

ANALYSIS

The Bar's current practice of using mandatory attorney bar dues to fund political advocacy cannot survive in light of the Supreme Court's rulings in *Janus* and *Fleck.* To survive review, any compelled association or group subsidy must be justified by a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 132 S. Ct. at 2289. There has never been any serious debate that forcing attorneys to subsidize a bar association that engages in political advocacy is a restriction on First Amendment rights. *See*, *Keller*, 496 U.S. at 14. The question was always whether such mandatory dues requirements serve a compelling state interest and are narrowly tailored to that end. *Id.*

As explained above, the Court in *Keller*, like the Court in *Abood*, based its decision on this latter question on two assumptions. First, it assumed that mandatory bar membership served a compelling government interest, because some form of mandatory bar association was necessary to the practice of law. *Id.* at 13. Second, it assumed that such a requirement was narrowly tailored because state bar associations could segregate political from operational funds, thus limiting any First Amendment injury. *Id.* at 16-17.

As was true in *Janus*, history has proved these assumptions were misplaced. First, mandatory bar associations are not necessary to the practice of law. States as diverse as New York and Nebraska have voluntary bar systems that do not force their attorneys to subsidize and join a bar association that engages in political advocacy. 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, 24 n.1 (2000). There is no evidence that suggests that those states are unable to effectively regulate the practice of law.

Second, as the Court recently recognized in *Janus*, the "line between chargeable and non-chargeable [political] expenditures has proved to be impossible to draw with precision." *Janus,* 138 S. Ct. at 2481. This is no less true for the Bar's advocacy than it is for that of public sector unions. Under *Keller*, 496 U.S. at 13-14, a state bar's political advocacy must be germane to the "State's interest in regulating the legal profession and improving the quality of legal services," yet the Bar's current list of supported legislation includes laws involving confidentiality in divorce, funding for pro bono assistance, the use of certain gender pronouns in existing laws, the availability of attorney's fees in certain forms of litigation, child custody issues, a constitutional amendment to recognize same-sex marriage, the standards for child removal for abuse, access of grandparents to grandchildren, and rules regarding the creation of trusts.[6]

Even if you could divide the Bar's legislative advocacy into clear categories of germane vs. non-germane legislation, separating the funding would be difficult. For example, there were certainly meetings of the Bar's legislative committee where non-germane legislation was discussed along

[6] State Bar 2019 legislative proposals available at: https://www.texasbar.com/Content/NavigationMenu/AboutUs/GovernmentalRelations/2019Legislative.htm

with other legislation that may be more germane to the practice of law. Would those whole meetings now be challengeable under *Keller*, or just the minutes spent discussing the non-germane legislation? If only the latter, how would one quantify or prorate the cost of those discussions? Does the Bar track every discussion down to the minute by topic? The Bar's website likewise advocates for both germane and non-germane topics. How does a court apportion the cost of running the website? Is the non-germane topic a poison pill, making the whole website non-chargeable?

The result of this sort of ambiguity has been a host of "give-it-a-try" litigation. *See, e.g. Kingstad v. State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990). But this "give-it-a-try" approach is exactly what forced the Court in *Janus* to hold that the germane vs. non-germane standard was unworkable with regard to public unions. *Janus*, 138 S. Ct. at 2481. As the Court explained in *Janus*, such an approach is unfair to objecting members who have no means to determine their rights "without launching a legal challenge and retaining the services of attorneys and accountants." *Id.* at 2448. Indeed, "even with such services, it would be a laborious and difficult task" figure out what was spent on permissible versus impermissible activities. *Id.*

Accordingly, as was true with public sector union dues in *Janus*, subsequent developments in facts and law have shown that the assumptions underlying the Court's opinion in *Keller* upholding mandatory bar dues are unworkable. Accordingly, mandatory bar dues are unconstitutional as long as the Bar is engaged in political advocacy.

CONCLUSION

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

Twenty-nine years ago in *Keller*, the Supreme Court allowed an anomaly in First Amendment jurisprudence—it granted states the authority to force attorneys to subsidize the speech of state bar association that they disagreed with as a condition of practicing law in the state. The Court did so because it believed it was bound by the reasoning of its prior decision in *Abood*, and because it believed that such mandatory associations were necessary to maintain an orderly and competent legal profession.

The passage of time has proved both assumptions false. The Court has since overturned its opinion in *Abood*, and the proliferation of states with no mandatory bar association requirement have shown that states need not require that attorneys waive their First Amendment rights in order to maintain a quality legal profession. The Texas Attorney General should therefore issue its opinion consistent with current Supreme Court jurisprudence - the Bar's mandatory dues requirement violates the First Amendment.

In particular, the Attorney General should opine in response to question two of the State Bar of Texas's January 22, 2019, Request for Opinion (Id.# 48487) by holding that: in light of *Janus*, the State Bar's collection of mandatory Bar dues from attorneys violates the First Amendment because those dues are used for political advocacy. The Attorney General should explain further that because it is difficult to draw the line between germane and non-germane political advocacy, any political advocacy by the Bar triggers First Amendment protections and renders the Bar's requirement of mandatory Bar dues unconstitutional.

Respectfully submitted,

Robert Henneke