



BACKGROUND

CROWE v. OREGON STATE BAR

Executive Summary

Mandatory state bar associations have a special privilege: The law allows them to collect money from people who would rather not give it. That special privilege should come with special responsibilities: to not spend that money on politics and other activities irrelevant to the group's purpose, and to have safeguards in place to make sure members aren't forced to pay for political speech with which they might disagree.

The Oregon State Bar (OSB) takes full advantage of its special privilege, but it has ignored its corresponding responsibilities. The OSB has violated the rights of its members by using their mandatory dues to publish political speech unrelated to regulating the practice of law and by lacking basic procedural protections the Constitution requires.

Two Oregon attorneys, Daniel Crowe and Lawrence Peterson, learned about the OSB's lack of safeguards when they saw that the OSB used their dues to publish an article harshly critical of an elected official in an issue of the OSB's *Bulletin* magazine. In other words, the OSB used their dues for political speech unrelated to the organization's supposed purpose of regulating lawyers.

After Mr. Crowe, Mr. Peterson, and other attorneys objected to the illegal use of their dues, the OSB gave each of them a partial refund in the unexplained amount of \$1.15. But the attorneys shouldn't have had to object; under the First Amendment and Supreme Court precedent, the OSB should have had safeguards in place to make sure they were never forced to pay for political speech in the first place.

In addition, there is no good reason why Oregon attorneys should be forced to join and pay a bar association at all. Making attorneys join a bar association violates their right to freedom of association, and, even with better procedures in place, it's virtually impossible to protect attorneys from having their bar dues used for political speech. The Supreme Court should therefore end mandatory bar association fees, just as it recently ended mandatory public-sector union fees for violating government workers' rights in *Janus v. AFSCME*.

The Goldwater Institute and attorney Luke Miller are representing Mr. Crowe, Mr. Peterson, and Oregon Civil Liberties Attorneys—a nonprofit organization dedicated to protecting Oregon attorneys’ First Amendment rights—to end the OSB’s misuse of its members’ compulsory dues and ensure that those members have the choice not to fund someone else’s political speech.

The Problem

In 32 states, an attorney must join and pay dues to the state’s bar association to be allowed to practice law.¹ A mandatory bar association is not merely a state agency or regulatory board that ensures that lawyers are following ethics rules and the law. Rather, it is a special-interest group with its own agenda that is also tasked with regulating attorneys. Regardless of whether an attorney agrees with the mandatory state bar association’s agenda, he or she must pay dues to the bar to continue earning a living as a lawyer in the state.

In fact, mandatory bar associations sometimes use members’ dues for things they shouldn’t, such as lobbying, advocating for and against ballot measures, and speaking out on political issues. And that means many lawyers are forced to pay for political speech with which they disagree—something the First Amendment doesn’t allow.

The U.S. Supreme Court has recognized that mandatory bar associations threaten attorneys’ First Amendment rights. In a 1990 case, it required mandatory bar associations to institute safeguards to make sure member dues are only used for their supposed purpose of regulating lawyers.² All other activities are considered “non-chargeable,” and mandatory member dues cannot be used to fund them. Unfortunately, mandatory bar associations do not always follow the law and often fail to employ sufficient safeguards.

The Oregon State Bar is one mandatory bar association that hasn’t lived up to its constitutional obligations. State law requires all attorneys who practice in Oregon to join and pay dues to the OSB—but the OSB has not made sure that those dues are only used for permissible purposes.

In February 2018, the OSB published statements in its official magazine, the *Bulletin*, criticizing President Donald Trump for allegedly “cater[ing] to th[e] white nationalist movement, allowing it to make up the base of his support,” and “espous[ing] racist comments,” among other things.³

One can agree or disagree with those criticisms, but one cannot deny that they’re political speech of a highly controversial nature. And they have nothing to do with ensuring that attorneys in the state provide high-quality legal services. Yet all Oregon attorneys were forced to pay for the statements’ publication whether they wanted to or not.

Daniel Crowe and Lawrence Peterson were two Oregon attorneys, among others, who objected to having their bar dues being used to fund the OSB’s political speech. In response to their

¹ 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 (2000).

² *Keller*, 496 U.S. at 14.

³ http://www.abajournal.com/images/main_images/Oregon_Bar.pdf.

objections, the OSB issued them and others who objected a partial dues refund of \$1.15 each—with no explanation of how it calculated that amount.

But a refund after the fact isn't good enough. The First Amendment should protect members from having their dues used to fund political speech in the first place. And the OSB should have procedures in place to ensure that it respects members' First Amendment rights—but it doesn't.

Also, there is no good reason why Mr. Crowe, Mr. Peterson, and other Oregon attorneys should be forced to give money to the OSB at all. In 18 states, attorneys aren't forced to join a bar association or pay money to a bar association to practice law—but the state still regulates attorneys, and attorneys still pay for the cost of that regulation. If those 18 states can regulate the practice of law without forcing attorneys to surrender their First Amendment rights, then so can Oregon and all the other states.

The Goldwater Institute has three goals in this case. First, we seek a judgment declaring that the OSB must cease using mandatory member dues on political speech and other non-chargeable activities and must employ procedures to protect attorneys' First Amendment rights. Second, we seek to establish legal precedent that would require mandatory associations to provide members with the opportunity to opt in to supplying funds for non-chargeable activities instead of forcing them to opt out or seek a refund after the fact. Third, we seek to eliminate the requirement that attorneys join a bar association to practice law.

The Law

The OSB's use of mandatory dues to publish political statements violated Oregon attorneys' First Amendment right to decide for themselves what political speech they will and won't support with their money. And mandatory bar association dues in general violate attorneys' First Amendment right to decide what organizations they will and won't associate with and what political speech they will and won't pay for.

The U.S. Supreme Court has allowed governments to require attorneys to pay dues to a bar association—but only to pay for the bar association's activities related to “regulating the legal profession and improving the quality of legal services.”⁴ And the Court has said that a bar association may not use mandatory dues to “fund activities of an ideological nature which fall outside those areas of activity,” which would violate attorneys' First Amendment right to freedom of speech.⁵

To protect attorneys' First Amendment rights, the Supreme Court has required mandatory bar associations to institute safeguards that provide: (a) notice to members, including an adequate explanation of the basis for the mandatory fee, including calculations of all non-chargeable activities; (b) a reasonably prompt decision by an impartial decision-maker if a member objects to the way his or her mandatory dues are being spent; and (c) an escrow for the amounts reasonably in dispute while such challenges are pending.⁶ Moreover, attorneys should have to

⁴ *Keller*, 496 U.S. at 13.

⁵ *Id.* at 14.

⁶ *Id.*; *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306–08 (1986).

affirmatively consent—that is, opt in—to paying for union political speech; they shouldn't be forced to opt out to avoid it.⁷ And giving members a refund after they object—as the OSB did after publishing its political statements—is not enough to protect First Amendment rights because, as the Supreme Court has said, “a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters’ funds may be used temporarily for an improper purpose.”⁸

That's the *minimum* Supreme Court case law requires. But the Court should go further and rule that the First Amendment prohibits states from forcing attorneys to join or pay money to a bar association at all. In *Janus v. AFSCME*, the Supreme Court recently ruled that governments cannot force their employees to pay union fees because unions inevitably use that money to engage in political speech when they bargain with the government on workers' behalf.⁹ The Court should now declare that mandatory bar association fees violate the First Amendment for the same reason: Even if bar associations focus on their core mission of regulating the legal profession, they inevitably engage in advocacy on issues of public policy that some members wouldn't voluntarily support. Besides, forcing people to join an organization violates their First Amendment right to freedom of association. And forcing attorneys to join and pay a union is especially unjustifiable given that 18 already manage to regulate the practice of law without violating attorneys' rights in this way.¹⁰

The OSB's procedures violate the First Amendment rights of its members. At a minimum, the OSB must implement proper safeguards and allow members to opt in to any non-chargeable spending. To fully protect Oregon attorneys' rights, however, the requirement that attorneys join and pay the OSB to practice law in Oregon should be eliminated.

Case Logistics

The plaintiffs in this case are two Oregon attorneys who have been forced to pay mandatory dues, Daniel Crowe and Lawrence Peterson, and a nonprofit organization dedicated to protecting Oregon attorneys' First Amendment rights, Oregon Civil Liberties Attorneys. The defendants are the Oregon State Bar and Oregon State Bar officials acting in their official capacity.

The case was filed in the United States District Court for the District of Oregon on December 13, 2018.

The plaintiffs seek an order ruling that the Oregon State Bar Association must stop spending mandatory bar dues on non-chargeable activities and institute constitutionally required safeguards to ensure that dues are not spent illegally in the future.

⁷ See *Janus v. AFSCME*, 138 S.Ct. 2448, 2486 (2018) (holding that the First Amendment prohibits collection of union fees used to fund political speech from government employees who have not affirmatively consented pay).

⁸ *Hudson*, 475 U.S. at 305.

⁹ *Janus*, 138 S. Ct. at 2463-86.

¹⁰ Brock, *supra* note 2, at 24.

The plaintiffs also seek an order declaring mandatory bar associations unconstitutional, which would require the U.S. Supreme Court to overturn its decision in *Keller v. State Bar of California*.¹¹

The Legal Team

Jacob Huebert is a Senior Attorney at the Goldwater Institute. Before joining Goldwater, he served as Director of Litigation for the Liberty Justice Center in Chicago. There, he successfully litigated cases to protect economic liberty, free speech, and other constitutional rights, including the landmark *Janus v. AFSCME* case, in which the U.S. Supreme Court upheld government workers' First Amendment right to choose for themselves whether to pay money to a union.

Adi Dynar is a Staff Attorney at the Goldwater Institute. He litigates cases across the United States relating to fundamental civil rights, free enterprise, freedom of speech and association, and freedom of information, among others. Before joining the Goldwater Institute, Adi worked in areas of constitutional law and immigration law.

Luke D. Miller is the owner of Military Disability Lawyer, LLC, where he represents active duty service members, reservists, National Guardsmen, and veterans in cases before Medical Evaluation Boards, Physical Evaluation Boards, and the Physical Disability Board of Review; in cases under the Servicemembers Civil Relief Act; and in VA Appeals. He began his career as a Marine Corps Officer and Naval Aviator, and he was medically retired as a Captain from the Marine Corps. He received his B.A. from the University of Pittsburgh and his J.D. from Willamette University College of Law.

The **Goldwater Institute** opened in 1988, with the blessing of its namesake. Its early years focused on defending liberty in Barry Goldwater's home state of Arizona. Today, the Goldwater Institute is a national leader for constitutionally limited government, with hundreds of legislative and court victories to its name. In 2018, the Goldwater Institute is celebrating 30 years of advancing freedom and defending liberty.

¹¹ 496 U.S. 1.