



BACKGROUNDER
POMEROY v. UTAH STATE BAR

Executive Summary

In Utah and most other states, attorneys are required to join and pay dues or fees to a bar association to be allowed to practice law. All too often, those bar associations don't just use members' mandatory fees to make sure lawyers are qualified and behave ethically; they also use members' money for political and ideological advocacy.

That violates lawyers' First Amendment right to freedom of association and their right to choose what political speech they will and won't support with their money. And it's totally unnecessary. In 20 states, attorneys aren't forced to pay dues or fees to a bar association that can use their money for political or ideological speech—but the state still regulates attorneys, and attorneys still pay for the cost of that regulation. If those states can regulate the practice of law without forcing attorneys to surrender their First Amendment rights, then so can the others.

In *Pomeroy v. Utah State Bar*, the Goldwater Institute is representing Utah attorney Amy Pomeroy in a lawsuit challenging: (1) the constitutionality of Utah's requirement that attorneys join and pay fees to the Utah State Bar as a condition of practicing law; (2) the Utah State Bar's failure to adopt safeguards to protect attorneys' First Amendment rights; and (3) Utah's requirement that attorneys become members of the Utah Bar Foundation.

The Problem

In 30 states, an attorney must join and pay dues or fees 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

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). This article identifies 32 states with a mandatory bar association. Since its publication, however, California and Nebraska have adopted bifurcated systems under which lawyers only pay for purely regulatory activities and are not forced to fund a bar association's political or ideological speech, eliminating most if not all of the First Amendment problems. Plaintiffs object to here. See *In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013); Marilyn Cavicchia, *Newly Formed California Lawyers Association Excited to Step Forward*, ABA Journal (Apr. 30, 2018), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2017-18/mayjune/born-by-legislative-decision-california-lawyers-association-excited-to-stepforward/.

mandatory state bar association's agenda, he or she must pay fees to the bar to continue earning a living as a lawyer in the state.

In fact, there is no good reason why Amy Pomeroy and other Utah attorneys should be forced to give money to the Utah State Bar at all. In at least 20 states, attorneys aren't forced to join a bar association or pay money to a bar association that can engage in political speech—but the state still regulates attorneys, and attorneys still pay for the cost of that regulation. If those other states can regulate the practice of law without forcing attorneys to surrender their First Amendment rights, then so can Utah and all the other states.

In this case, the Goldwater Institute seeks to (1) eliminate the requirements that attorneys join and pay fees to the Utah State Bar and become members of the Utah Bar Foundation as a condition of practicing law; or at least (2) obtain an injunction prohibiting the Utah State Bar from collecting mandatory fees until it enacts better safeguards to ensure that such fees aren't used for political and ideological speech that isn't germane to improving the quality of legal services and regulating the legal profession, as Supreme Court precedent requires.

This case follows four other Goldwater Institute lawsuits that have challenged mandatory membership and dues: (1) *Fleck v. Wetch*, challenging North Dakota's mandatory bar²; (2) *Crowe v. Oregon State Bar*, challenging Oregon's mandatory bar³; (3) *Schell v. Gurich*, challenging Oklahoma's mandatory bar⁴; and (4) *Boudreaux v. Louisiana State Bar Association*, challenging Louisiana's mandatory bar.⁵

The Law

Requirements that lawyers join and pay fees to a bar association 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 states to require attorneys to join a bar association⁶, but it has also held that bar associations violate attorneys' First Amendment rights when they use bar dues to pay for political and ideological activities that aren't related to "regulating the legal profession and improving the quality of legal services."⁷

Now, 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 Court 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.⁸ The Court should now declare that mandatory bar association fees violate the First Amendment for the same

² <https://goldwaterinstitute.org/fleck-v-wetch/>.

³ See *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021) (allowing First Amendment challenge to mandatory Oregon State Bar membership to proceed). See also <https://goldwaterinstitute.org/standing-up-for-attorneys-free-speech-rights-crowe-v-oregon-state-bar/>.

⁴ <https://goldwaterinstitute.org/ending-mandatory-bar-association-fees-schell-v-williams/>.

⁵ <https://goldwaterinstitute.org/defending-lawyers-first-amendment-rights-boudreaux-v-louisiana-state-bar-association/>.

⁶ *Lathrop v. Donohue*, 367 U.S. 820 (1961).

⁷ *Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990)

⁸ *Janus v. AFSCME*, 138 S.Ct. 2448, 2463-86 (2018).

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 bar association is wholly unjustifiable given that 20 states already manage to regulate the practice of law without violating attorneys' rights in this way.⁹

At a minimum, federal courts should order the Utah State Bar to stop collecting mandatory fees until it enacts better safeguards to protect attorneys' First Amendment rights. In *Keller v. State Bar of California*, the Supreme Court held that certain safeguards are essential to ensure that mandatory bar associations don't use attorneys' mandatory fees for political speech and other activities that are not germane to improving the quality of legal services and regulating the legal profession.¹⁰ Although that precedent has been on the books for nearly 30 years, Utah has still failed to comply with it—and is therefore making attorneys subsidize political speech they shouldn't have to pay for.

Case Logistics

The plaintiff in this case is Amy Pomeroy, a Utah attorney who has been forced to join and pay fees to the Utah State Bar. The defendants are the Utah State Bar and its board members, sued in their official capacities.

The case was filed in the United States District Court for the District of Utah on April 13, 2021.

Ms. Pomeroy's lawsuit seeks to: (1) eliminate the requirements that attorneys join and pay fees to the Utah State Bar and become members of the Utah Bar Foundation as a condition of practicing law; or at least (2) obtain an injunction prohibiting the Utah State Bar from collecting mandatory fees until it enacts better safeguards to ensure that such fees aren't used for political and ideological speech that isn't germane to improving the quality of legal services and regulating the legal profession, as Supreme Court precedent requires.

The Legal Team

Jacob Huebert is a Senior Attorney at the Goldwater Institute.

Timothy Sandefur is Vice President for Litigation and holds the Duncan Chair in Constitutional Government at the Goldwater Institute.

⁹ Brock, *supra* note 1, at 24.

¹⁰ *Keller*, 496 U.S. at 14.