



BACKGROUND

SCHELL v. WILLIAMS

Executive Summary

In Oklahoma and 31 other states, attorneys are required to join and pay dues to a bar association to be allowed to practice law. All too often, those bar associations don't just use members' mandatory dues 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 19 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 states can regulate the practice of law without forcing attorneys to surrender their First Amendment rights, then so can the others.

In *Schell v. Williams*, the Goldwater Institute is representing Oklahoma attorney Mark E. Schell in a lawsuit asking the federal courts to declare that mandatory bar association membership and fees violate the First and Fourteenth Amendments of the U.S. Constitution.

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, there is no good reason why Mark E. Schell and other Oklahoma attorneys should be forced to give money to the Oklahoma Bar Association (OBA) 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 other states can regulate the practice of law without forcing attorneys to surrender their First Amendment rights, then so can Oklahoma and all the other states.

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 from 2000 identifies 18 such states, but in 2013, Nebraska amended its rules to require the state's mandatory bar association to use mandatory dues only for specified regulatory activities, not political or ideological speech. *In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 173 (Neb. 2013).

In this case, the Goldwater Institute seeks to (1) eliminate the requirement that attorneys join and pay dues to a bar association as a condition of practicing law, particularly in Oklahoma, or at least (2) establish legal precedent that would require mandatory bar associations to provide members with an opportunity to opt in to paying for nonchargeable activities rather than requiring them to object after the fact.

This case follows two other Goldwater Institute lawsuits currently challenging mandatory membership and dues: (1) *Fleck v. Wetch*, challenging North Dakota’s mandatory bar, which the U.S. Supreme Court has ordered the U.S. Court of Appeals for the Eighth Circuit to reconsider in light of the Supreme Court’s decision ending mandatory public-sector union fees in *Janus v. AFSCME*²; and (2) *Crowe v. Oregon State Bar*, challenging Oregon’s mandatory bar.³

The Law

Requirements that lawyers join and pay dues 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 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

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.⁶ 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 wholly unjustifiable given that at least 18 states already manage to regulate the practice of law without violating attorneys’ rights in this way.⁷

Case Logistics

The plaintiff in this case is Mark E. Schell, an Oklahoma attorney who has been forced to join and pay dues to the Oklahoma Bar Association. The defendant is John Morris Williams, in his official capacity as Executive Director of the Oklahoma Bar Association.

The case was filed in the United States District Court for the Western District of Oklahoma on March 26, 2019.

Mr. Schell seeks an order declaring mandatory bar membership and dues unconstitutional or, at a minimum, an order declaring that a bar association may not spend member dues on political speech without receiving a member’s clear, affirmative consent in advance.

² *Fleck v. Wetch*, 139 S. Ct. 590 (2018); further information available at <https://goldwaterinstitute.org/fleck-v-wetch/>.

³ <https://goldwaterinstitute.org/standing-up-for-attorneys-free-speech-rights-crowe-v-oregon-state-bar/>.

⁴ *Keller*, 496 U.S. at 13.

⁵ *Id.* at 14.

⁶ *Janus v. AFSCME*, 138 S.Ct. 2448, 2463-86 (2018).

⁷ Brock, *supra* note 1, at 24.

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.

Anthony Dick is an Associate at Jones Day in Washington, D.C., where his practice focuses on constitutional, appellate, and complex civil litigation, with a particular focus on challenges to government regulation. Anthony has worked on several high-profile First Amendment matters, including cases involving free speech and anti-SLAPP laws. Before joining Jones Day, Anthony served as a law clerk to Justice Samuel A. Alito of the United States Supreme Court and Judge Thomas B. Griffin of the U.S. Court of Appeals for the D.C. Circuit.

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 celebrated 30 years of advancing freedom and defending liberty.