SENT VIA ELECTRONIC MAIL

June 25, 2019

Chief Justice Mary Fairhurst
WSBA Bar Structure Work Group

Re: Proposed Revisions to WSBA Structure

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Washington

901 Fifth Ave, Suite #630
Seattle, WA 98164
(206) 624-2184
aclu-wa.org

Dear Chief Justice Fairhurst and Members of the Bar Structure Work Group:

Thank you for inviting the ACLU of Washington to provide input on the contemplated revisions to the Washington State Bar Association in light of the U.S. Supreme Court's recent decision in *Janus v. AFSCME*. The ACLU has a long history of advocating for First Amendment rights, and in working to protect against government compelled speech in particular, dating back to the seminal cases of *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard*, 430 U.S. 705 (1977).

The Work Group has asked us to focus in particular on whether First Amendment doctrine as recently interpreted in *Janus* requires Washington state to dissolve the WSBA and/or to shift WSBA functions to the Washington Supreme Court. It does not.

This letter will not address the number of other reasons—having to do with practicability, stability, and equitable access for all Washingtonians to the legal profession and justice system—not to dissolve the WSBA. It will instead focus First Amendment doctrine and the U.S. Supreme Court's unmistakable guidance on this very issue.

Background

As the members of this Work Group well know, the argument that *Janus* requires dissolution of the WSBA is: the Supreme Court's decision in *Keller v. State Bar of California*, 496 US 1 (1990), which upheld the validity of mandatory bar dues as long as they were not used for political or ideological purposes, relied upon *Abood*, and because *Janus* overruled *Abood*, *Keller* is no longer good law.

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), as you also know, held that public sector unions could charge mandatory fees to cover union expenditures germane to the union's collective bargaining activities, but could not charge such fees to cover union expenditures on political and ideological projects.

Janus overturned *Abood*. Two aspects in particular of *Janus* are worth highlighting: (1) the Court found that the articulated state interest in *Abood*, that some mandatory fees were permissible to promote labor peace and to avoid a free rider problem, was not compelling; and (2) the Court found the distinction between chargeable and non-chargeable fees in the public union context to be wholly unworkable.

As a final matter of background, we assume for the purposes of the analysis below that strict scrutiny applies, meaning that the government interest in maintaining compulsory bar dues must be significant, and that the payment of such dues must be the least restrictive means necessary to achieve that interest.

1. The U.S. Supreme Court Has Recently Made Clear Mandatory State Bar Dues Are Constitutional Even Absent *Abood*

The U.S. Supreme Court has already directly addressed the very issue presented to the Work Group and plainly stated that mandatory bar dues are constitutional even absent *Abood*. In *Harris v. Quinn*, 573 U.S. 616 (2014), Justice Alito (the same justice who authored *Janus*) specifically noted the validity of mandatory state bar dues—and he did so in an opinion that presaged *Janus*'s overruling of *Abood* and in the context of addressing the particular concern of the impact of limiting *Abood* on such dues. In so doing, Justice Alito relied in particular on the state interest in collecting bar dues, both in "regulating the legal profession and improving the quality of legal services," and "in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Id.* at 655–56.

Although the *Harris* case involved the Court's refusal to extend *Abood*, and the Court did not then overrule *Abood*, there is simply no reason to believe that Justice Alito has changed his mind about the nature of the state interest implicated by mandatory bar dues—and even if he had, both Chief Justice Roberts and Justice Thomas would also need to change their minds, and then bring along Justices Gorsuch and Kavanaugh.

Simply put, the language at the end of the *Harris* opinion itself should be enough to persuade the Work Group that *Janus* requires neither dissolution nor transfer of the WSBA and its functions.

2. *Keller* Remains Good Law

Even if one were unwilling to take Justice Alito, and the four other justices who signed onto his opinion in *Harris*, at their word, well-settled Supreme

Court doctrine provides guidance in the specific situation the Work Group confronts: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decision, [one] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Quill Corp. v. North Dakota*, 504 U.S. 298 at 321 (1992) (Scalia, J., concurring) (quoting *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)) (emphasis added).

Here, *Keller* has direct application to this situation; some have argued it rests on reasons rejected in *Janus*; but *Keller* remains controlling unless and until the Supreme Court itself decides otherwise.

Critically, for this doctrine even to apply, one would need to accept that *Keller* relies upon a reason rejected in *Janus*. Careful reading of *Janus* reflects that it does not: both *Keller* and *Harris* underscore the significance of the government interests at stake in the bar context—in contrast to the *Janus* Court's wholesale rejection of the government interests asserted in *Abood*. Indeed, *Keller* is itself progeny to *Lathrop v. Donahue*, 367 U.S. 820 (1961), in which the Court described at length the state interest in the bar and its weight:

> Both in purport and in practice, the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. *Id*. at 842.

Much of what drives the Court's decision in *Janus* boils down to its skepticism that even the first and most basic requirement of First Amendment scrutiny was met, *i.e.* the nature and importance of the articulated government interest. Indeed, members of the Court had already begun to call into question the government interests upon which *Abood* relied some years before *Janus*, including in *Harris*. But the Court has never similarly called into question the interests underpinning mandatory bar dues—and in *Harris* went out of its way to directly reiterate the importance of those interests.

3. Applying *Janus* to the State Bar Context is Unworkable and Transferring Functions to the State Supreme Court Would Result in Less Accountability and Transparency

Janus involved the payment of mandatory agency fees to public sector unions vested with sole bargaining authority to represent government

employees vis a vis their government employers. The Court makes clear at every turn that the nature of the unions at issue is critical. *See, e.g.*, *Janus* 585 U.S. at 2 (describing at length the authority of public sector unions); *id.* at 24, 27-29 (describing the budgetary impact of public sector union bargaining); *id.* at 29-31 (describing the political nature of the speech engaged in by public sector unions).

Janus rests on two key findings, that the government interests articulated in *Abood* are unsatisfactory *and* that the distinction between chargeable and non-chargeable fees that forms the foundation of the *Abood* system is unworkable—because everything public sector unions do is necessarily political. 585 U.S. at 38-40. These findings are wholly inapplicable to the state bar context, in which the Court has reiterated the importance of the government interest and never expressed concern that all bar activities are inherently political.

Further, transferring WSBA functions to Supreme Court would mean bar fees could be spent on anything the Court wished to spend them on because forced contributions to government speech are permissible—presumably the doctrinal workaround underpinning the proposal to transfer functions in the first place. It would be ironic indeed if in a purported attempt to prevent members of the bar from spending money on speech they disagreed with, the Work Group made it harder for bar members to object.

First Amendment doctrine requires no such result. As described above, the appropriate framework has already been provided by *Keller*, which properly distinguishes between ideological and non-ideological speech, remains good law, and continues to be squarely applicable.

Conclusion

First Amendment doctrine does not require dissolution of the WSBA or transfer of WSBA functions to the Washington Supreme Court. Indeed, transfer of those functions would likely have the perverse effect of reducing transparency and accountability in how bar member dues are spent because it would obviate the longstanding *Keller* distinction between ideological and non-ideological speech.

Sincerely,

Emily Chiang
Legal Director