

REVIEW & OUTLOOK

After *Janus*, Free the Lawyers

By one recent report some 210,000 Americans across two government unions have stopped paying “agency fees,” once compulsory payments that the Supreme Court ruled last year violate the First Amendment. Keep an eye on a new case out of Wisconsin that aims to end another example of forced speech and association, this time involving state bar associations.

Two lawyers in Wisconsin earlier this month filed suit against the state bar association that takes positions on policy issues from immigration to the death penalty. Fair enough, except that joining the bar isn’t voluntary in the Badger State. Paying dues to the bar is a precondition of practicing law in Wisconsin, and some 30 or so states have similar requirements.

In other words, the bar is not merely a professional organization that sets ethical standards and disciplines lawyers. It is a quasi-government enforcement body. The plaintiffs argue that forcing them to fund the bar’s political speech infringes on their First Amendment rights by compelling them to subsidize views they disagree with.

The challenge has become more potent because of the Supreme Court’s 2018 ruling in *Janus v. Afscme*. The Court in that case struck down compulsory public union fees that forced individuals to underwrite “private speech on matters of substantial public concern.” The Justices overturned the 1977 precedent *Abood v. Detroit Board of Education*, which Justice Samuel Alito called “a deferential standard that finds no support in our free speech cases.”

This is a problem for state bar associations be-

cause the prime case upholding mandatory bar collection, *Keller v. State Bar of California* (1990), relied on *Abood*. The question is what happens to mandatory dues now that the Court has removed this foundational Jenga block.

Keller held that bar associations can only enforce dues for costs “reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services,” not for political activities. But this is a nearly impossible line to draw in practice. For example, judicial selection is important to the legal profession but also to the public interest and is inherently political. As the Court found in *Janus*, the best way to protect against compelled speech is to consider that all dues to the bar could fund political activity.

First Amendment jurisprudence typically requires that any infringement on speech serve a compelling state interest, and the least restrictive means for accomplishing that end. Yet the complaint notes that “eighteen states regulate the practice of law without requiring attorneys to join and pay dues to a bar association,” which means there are less restrictive means to regulate the legal profession.

Similar suits on mandatory dues are winding through the courts, and one may reach the Supreme Court. In the majority opinion in *Janus*, Justice Alito invoked Thomas Jefferson in arguing that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.” The Court may soon have an opportunity to root out another such unconstitutional case of compelled speech.