

WASHINGTON Examiner

SCOTUS could take up a case like Janus, but for lawyers

Elad Hakim

March 19, 2020

The U.S. Supreme Court recently refused to get involved in a case involving mandatory bar-association fees (Fleck v. Wetch). However, the court may have another opportunity to address this issue in the case of Jarchow v. State Bar of Wisconsin. Given the important constitutional questions presented, the court will hopefully agree to hear this case.

The general question involved in Jarchow is whether states may require all practicing lawyers to be members of a bar association. Wisconsin lawyer Adam Jarchow sued the Wisconsin Bar and its officers and sought declaratory and injunctive relief. Despite his effort, Jarchow was unsuccessful in the district court and in the Seventh Circuit Court of Appeals in light of the current Supreme Court precedent.

Specifically, in the 1961 case of Lathrop v. Donohue, the Supreme Court rejected the argument that such mandatory dues violated a lawyer's First Amendment right to freedom of association. However, the court did not rule on whether the lawyer's rights to free speech were violated.

Thereafter, in the 1990 case of Keller v. State Bar of California, members of the State Bar of California argued that the bar's "use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment." In Keller, the court addressed the free speech issue and relied on the case of Abood v. Detroit Board of Education. As explained in a 2018 Congressional Research Service article written by legislative attorney Valerie C. Brannon:

As in Abood, the court held that the bar could use mandatory member dues to "fund activities germane to those goals," but could not use mandatory dues to fund non-germane ideological activities. The court noted that while, for example, the bar could not use compulsory dues "to endorse or advance a gun control or nuclear weapons freeze initiative," it could spend funds "for activities connected with disciplining members...or proposing ethical codes for the profession." Abood and Keller therefore drew a line between germane and non-germane activities, raising questions regarding whether various expenditures were germane.

But then, in June 2018, the Supreme Court overruled Abood. In the case of Janus v. AFSCME, the court ruled that "States and public-sector unions may no longer extract agency fees from nonconsenting employees" unless the employee affirmatively agrees to pay.

Given the apparent contradictions between Lathrop, Keller, and Janus, Jarchow petitioned the Supreme Court to rectify this conflict. Specifically, Jarchow asked the court to extend its holding in Janus and to hold that mandatory bar dues are as unconstitutional as mandatory dues by public-sector unions.

As set forth in the Amicus Brief filed on Jarchos's behalf, "bars across the country engage in a wide range of political and ideological activities designed to implement the officials' view of a better society." As the Cato Institute notes Wisconsin's state bar association "is very politically active," supporting such ideological causes as mandated insurance coverage of abortion and the addition of "sexual orientation" and "gender identity" to the state's anti-discrimination laws.

Jarchow argues that he should not be forced/compelled to support certain activities or speech against his will and by way of mandatory membership and/or mandatory dues.

In light of the Janus decision, it will be interesting to see whether the Supreme Court eventually decides to hear this case. If it does, it will be equally as interesting to see whether the court is willing to extend its holding in Janus and to prohibit the state from coercing attorneys to associate with an integrated bar.