GOLDWATER INSTITUTE

February 20, 2019

*Via Email*

Hon. Ken Paxton
Office of the Attorney General
Attn: Opinion Committee
PO Box 12548
Austin, TX 78711-2548
opinion.committee@oag.texas.gov

FILE # RQ-0265-KP
I.D. # 48505

Re: Opinion Request 48487

Dear Mr. Paxton:

The Goldwater Institute submits this letter in response to the Texas Bar's January 22 request for opinion regarding the effect of the Supreme Court's decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), on the constitutionality of the state bar's use of state bar dues for purposes that do not fit within the regulatory functions of the state bar.

The Goldwater Institute is currently litigating legal challenges to mandatory state bar associations in Oregon and North Dakota. The Oregon case, *Crowe v. Oregon State Bar* (D. Or. 3:18-cv-02139) was filed in December. The North Dakota case, *Fleck v. Wetch* (8th Cir. No. 16-1564), was recently remanded by the U.S. Supreme Court for consideration in light of *Janus*, and our opening brief, filed this month, can be read online at: https://goo.gl/DXEpqw.

For the reasons outlined in that brief and below, the Texas State Bar's use of dues for purposes other than the bar's regulatory functions is not constitutional and should be ended.

Although *Janus* concerned compulsory support for a public employee union, the principles of that case are equally applicable to the question of compulsory bar membership and the use of mandatory annual dues from bar members. *Janus* reiterated that public employees cannot be compelled to join a union against their will, because that would violate the First Amendment's protections for freedom of association. 138 S. Ct. at 2463. It also made clear that the constitutionality of compelling workers to *fund* the union, even if they choose not to join, must be determined by asking whether the state's legitimate interests can be "achieved through means significantly less restrictive of associational freedoms." *Id.* at 2465.

The Court found that forcing workers to subsidize the union failed this test, and its reasoning shows that compulsory support for the Texas bar must also fail that test. The state argued in *Janus* that compelling public-sector workers to subsidize the union served the state's interest in maintaining "labor peace," because the union was designated as workers' sole bargaining representative, and without compulsory funding, it would be unable to discharge this duty, which would lead to "pandemonium" caused by conflicts between different unions. *Id.* But the Court found that this was "simply not true," *id.*, because, in fact, several federal entities and states already designated exclusive representatives but did *not* compel nonmembers to pay fees, and no "pandemonium" had resulted. It was therefore "undeniable that 'labor peace' can readily be achieved 'through means significantly less restrictive of associational freedoms' than the assessment of agency fees"—which meant that the fee requirement could not survive exacting scrutiny. *Id.* at 2466 (citation omitted).

The rule forcing Texas lawyers to fund the state mandatory bar must fail for the same reason: the state can achieve its goal of regulating the legal profession without mandating either bar membership or dues. It is obvious as a *theoretical* matter how the state can regulate attorneys' professional conduct without compelling membership: by *acting as a regulator*, penalizing those who break the rules, and providing educational services to ensure that practitioners know the rules. The state already does this for countless other trades.

And, as noted in the letter filed by the Texas Public Policy Foundation, as a *factual* matter, some 19 states and Puerto Rico already do regulate the practice of law without requiring membership. This includes states with such large populations of lawyers as Massachusetts, New York, and New Jersey—as well as states with some of the smallest bars, such as Vermont and Delaware.[1] *See* 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 n.1 (2000).

This means the answer to question 2 in this matter must be no. The state's interest in *regulating* the legal profession is obviously not served by compelling attorneys to fund programs that are not within the bar's *regulatory* functions. And the fact that many states already do effectuate their legitimate interest in regulating the legal profession without forcing lawyers to join state bars proves that compulsory support for the state bar is not necessary to accomplish a regulatory purpose.

We therefore agree with the letter submitted by the Texas Public Policy Foundation that the Attorney General should opine that the collection of mandatory dues from attorneys violates the First Amendment because there are ways to effectuate the state's legitimate interest in regulating the legal profession that are "significantly less restrictive of associational freedoms." *Janus*, 138 S.Ct. at 2465.

[1] There are 2,978 lawyers in Delaware and 2,227 in Vermont. American Bar Association, *National Lawyer Population Survey 2018*, https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_by_State_2018.pdf.

Sincerely,

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at the Goldwater Institute