IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

ARNOLD FLECK, Plaintiff, v. JOE WETCH, President of the State Bar Association of North Dakota; AUBREY FIEBELKORN-ZUGER, Secretary and Treasurer of the State Bar Association of North Dakota; TONY WEILER, Executive Director of the State Bar Association of North Dakota; and PENNY MILLER, Secretary-Treasurer of the State Board of Law Examiners, in their official capacities, Defendants.	)	**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Case No. 1:15-CV-00013

Plaintiff, Arnold Fleck, by and through his undersigned attorneys, respectfully moves pursuant to Fed. R. Civ. P. 56 for summary judgment. This motion is based on the accompanying statement of undisputed facts, memorandum of law, the exhibits attached thereto, and all pleadings and documents on file in this action. In short, the grounds for this motion are as follows:

1. On February 3, 2015, Plaintiff filed this action seeking declarative and injunctive relief to remedy Defendants' violation of his First and Fourteenth Amendment rights.

2. Defendants' enforcement of North Dakota statutes preconditioning the practice of law in the State on membership in SBAND and Defendants' imposition of mandatory dues as a condition of membership in SBAND violate Plaintiff's rights to freedom of speech and association protected by the First and Fourteenth Amendments to the United States Constitution.

3. Summary judgment is appropriate here because there is no dispute of material fact and the constitutional validity of a mandatory association's procedures for collecting dues is a legal question, rather than a factual one. See Laramie v. Cnty. of Santa Clara, 784 F. Supp. 1492, 1496 (N.D. Cal. 1992) ("questions regarding the adequacy of union notice and procedures are legal ones, and may be resolved on motions for summary judgment").

4. Plaintiff is entitled to summary judgment on his second claim for relief because Defendants fail to provide SBAND members with the opportunity to affirmatively consent to funding activities unrelated to SBAND's identified interest. Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2290–93 (2012). This failure to allow members to opt-in to such activities violates Plaintiff's First and Fourteenth Amendment rights.

5. Plaintiff acknowledges that binding precedent forecloses this Court from presently granting summary judgment on his third claim regarding compelled membership in SBAND. See Keller v. State Bar of Cal., 496 U.S. 1 (1990); Lathrop v. Donohue, 367 U.S. 820 (1961). In order to preserve Plaintiff's third claim for appellate review, Plaintiff also requests summary judgment on his third claim, enjoining Defendants' enforcement of statutes compelling membership in SBAND because mandated bar membership is not narrowly tailored to serve a compelling government interest. This request must be denied at this time. See Agostini v. Felton, 521 U.S. 203, 237 (1997).

WHEREFORE, Plaintiff respectfully asks this Court to grant summary judgment on Plaintiff's second claim, declaring that SBAND's failure to provide a constitutionally adequate opt-in procedure violates Plaintiff's First and Fourteenth Amendment rights and enjoining Defendants from collecting, distributing, receiving, or expending mandatory SBAND dues until such a time as a procedure permitting Plaintiff to affirmatively consent to funding SBAND's

non-chargeable activities is in place and operating. Summary judgment on Plaintiff's third claim must be granted in favor of Defendants at this time.

Dated this 20th day of November, 2015

/s/ *Jared Blanchard*
James Manley (Ariz. Bar No. 031820)
Jared Blanchard (Ariz. Bar No. 031198)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004
Ph: 602-462-5000
Fax: 602-256-7045
litigation@goldwaterinstitute.org
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of November, 2015, I filed the foregoing electronically through the CM/ECF system, and a copy was served on all counsel of record in the above-captioned matter by electronic means through the Court's ECF system:

Randall J. Bakke
Shawn A. Grinolds
Bradley N. Wiederholt
122 East Broadway Avenue
P.O. Box 460
Bismark, ND 58502-0460
rbakke@smithbakke.com
sgrinolds@smithbakke.com
bwiederholt@smithbakke.com

Douglas A. Bahr
Solicitor General
Office of Attorney General
500 N. 9th St.
Bismarck, ND 58501-4509
dbahr@nd.gov

/s/ *Jared Blanchard*
Jared Blanchard (Ariz. Bar No. 031198)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004
Ph: 602-462-5000
Fax: 602-256-7045
litigation@goldwaterinstitute.org
Attorneys for Plaintiff

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I. INTRODUCTION

Plaintiff, Arnold Fleck, by and through his undersigned attorneys, hereby moves for summary judgment, pursuant to Fed. R. Civ. P. 56, because the State Bar Association of North Dakota ("SBAND")'s practices and procedures do not provide Plaintiff with the minimum required safeguards as they require him to opt out of funding SBAND activities unrelated to the compelling government interest for which SBAND can mandate dues. Alternatively, Plaintiff moves for summary judgment, pursuant to Fed. R. Civ. P. 56, because Plaintiff should not be required to join and fund SBAND and thereby surrender his First Amendment rights in order to practice law.

The First Amendment to the United States Constitution protects the freedom of speech and the freedom of association. U.S. Const. amend. I. The First Amendment applies to the states

through the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. Because "the government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves," the First and Fourteenth Amendments also protect an individual's rights against compelled speech and association. Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2288–89 (2012). This includes the freedom to avoid subsidizing speech with which an individual disagrees. Id.

Under the laws of North Dakota, Plaintiff must join SBAND and subsidize its speech in order to earn a living practicing law. Because this requirement necessarily impinges upon Plaintiff's First Amendment rights, SBAND must provide Plaintiff with safeguards that are carefully tailored to protect his rights. See Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990); Knox, 132 S. Ct. at 2290–93. Procedures that do not afford Plaintiff with the opportunity to affirmatively consent to funding activities unrelated to SBAND's core purpose presume acquiescence of fundamental rights and are not carefully tailored to protect those rights. As such, SBAND's practices and procedures fail to comply with the First and Fourteenth Amendments and thus violate Plaintiff's rights against compelled speech and association.

For the reasons contained herein, Plaintiff respectfully requests entry of judgment declaring that SBAND's practices and procedures violate his First and Fourteenth Amendment rights as a matter of law, and thus he must be permitted to affirmatively consent to funding SBAND activities beyond those related to its compelling government interest in improving the practice of law through the regulation of attorneys. Keller, 496 U.S. at 14; Lathrop v. Donohue, 367 U.S. 820, 843 (1961); see also Harris v. Quinn, 134 S. Ct. 2618, 2643 (2014) (In Keller, "[w]e held that members of this bar could not be required to pay the portion of bar dues used for

political or ideological purposes but that they could be required to pay the portion of the dues used for activities connected with proposing ethical codes and disciplining bar members.")

Alternatively, Plaintiff should not be required to surrender his First Amendment rights to practice law through conditioning the practice on mandatory membership in and support of SBAND. Coerced association is permissible only in the rare instances when a compelling government interest cannot be achieved through less restrictive means. Knox, 132 S. Ct. at 2289. The sole compelling interest SBAND is intended to serve is improving the quality of legal services through the regulation of attorneys. Because 18 states effectively regulate attorneys without mandating bar association membership, see In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. 1018, 1022 (2013), it is undeniable that this interest can be readily achieved through less restrictive means. As such, preconditioning Plaintiff's ability to practice law in the State upon SBAND membership and paying SBAND dues is an ongoing violation of his constitutional rights.

However, Plaintiff acknowledges that this particular claim challenging the constitutionality of conditioning the practice of law upon SBAND membership and payment of SBAND dues is presently foreclosed by Keller, 496 U.S. 1 and Lathrop, 367 U.S. at 843. Plaintiff presents this argument here so as to reserve the issue to present in the proper forum. Accordingly, Plaintiff acknowledges that this Court must deny his motion for summary judgment as it relates this claim.[1]

[1] Plaintiff notes that Friedrichs v. California Teachers Association is pending before the United States Supreme Court and may resolve these claims. Friedrichs v. Cal. Teachers Ass'n, No. 13-57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014) cert. granted, 135 S. Ct. 2933 (June 30, 2015). See, infra, Part IV.C.

II. PLAINTIFF'S STATEMENT OF UNDISPUTED FACTS

SBAND is a mandatory bar association. N.D.C.C. §§ 27-11-22, 27-12-02. That means North Dakota compels attorneys to become members and pay association dues as a condition of practicing law in that jurisdiction. See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. at 1022; Plaintiff Arnold Fleck's Civil Rights Complaint for Declaratory and Injunctive Relief (Doc. 1) at ¶15; Defendant Penny Miller's Answer to Civil Rights Complaint for Declaratory and Injunctive Relief (Doc. 21) at ¶ 9. SBAND "was created by an Act of the Legislative Assembly. It was the first integrated Bar in the entire United States." Menz v. Coyle, 117 N.W.2d 290, 296 (N.D. 1962); Doc. 1 ¶ 16; Defendants' Jack McDonald, Aubrey Fiebelkorn-Zuger, and Tony Weiler's Answer and Jury Demand (Doc. 20) at ¶ XIII; Doc. 21 ¶ 9. It is unlawful for a person to practice law in the State of North Dakota without being a member of SBAND and subsidizing its speech. N.D.C.C. §§ 27-11-01, 27-11-22, 27-12-02.

SBAND acts under color of law. See Menz, 117 N.W.2d at 296 (holding SBAND is not a private group; "[t]he Bar Association was created and now exists under and by virtue of the laws of this State"). Defendant Miller, as Secretary-Treasurer of the State Board of Law Examiners, is charged with collecting mandatory dues from SBAND members and disbursing those dues to SBAND as proscribed by statute. N.D.C.C. §§ 27-11-22, 27-11-23, 27-12-04; Doc. 1 ¶ 14; Doc. 21 ¶ 8. Defendants Wetch,[2] Fiebelkorn-Zuger, and Weiler, as SBAND officers, enforce laws requiring membership in and funding of SBAND as a prerequisite to practicing law

[2] At the time this lawsuit was filed, Jack McDonald served as President of SBAND. Since that time, Joe Wetch has replaced Mr. McDonald as President. See State Bar Association of North Dakota, "Meet Joe Wetch – New SBAND President," THE GAVEL, Summer 2015, Vol. 62, No. 3. Accordingly, President Wetch is automatically substituted pursuant to Fed. R. Civ. Pro. 25(d).

in the State of North Dakota. N.D.C.C. §§ 27-11-24, 27-12-02, 27-12-04; see also N.D. R. LWYR. DISC. Rule 2.4; Doc. 1 ¶ 11–13; Thiel v. State Bar of Wis., 94 F.3d 399, 401-03 (7th Cir. 1996) overruled on other grounds by Kingstad v. State Bar of Wis., 622 F.3d 708 (7th Cir. 2010) (State Bar of Wisconsin officials were appropriate parties to sue for constitutional injuries pursuant to Ex Parte Young, 209 U.S. 123, 159–60 (1908)). Pursuant to N.D.C.C. § 27-12-04, SBAND must receive $75 out of each member's mandatory dues for the operation of the lawyer discipline system and receive 80 percent of the remaining amount of the mandatory dues paid by SBAND members for the purpose of administering and operating the association. SBAND Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction (Doc. 25) at 3.

Plaintiff is a duly licensed attorney under the laws of North Dakota and is compelled by North Dakota law to join SBAND and subsidize its speech in order to earn a living practicing law in the State. N.D.C.C. §§ 27-11-01, 27-11-22, 27-12-02; Doc. 1 ¶ 10.

SBAND engages in non-chargeable activities, Notice Concerning State Bar Dues Deduction and Mediation Process (Doc. 42-2), that is, all activities other than those related to its compelling government interest in improving the practice of law through the regulation of attorneys. Keller, 496 U.S. at 14; Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 310 (1986). SBAND conducts a variety of activities that include lobbying on bills pending before the North Dakota State Legislature. Doc. 25 at 3–4. For instance, SBAND expended $30,000 in compelled member dues opposing North Dakota Initiated Statutory Measure 3, a 2006 ballot measure. Affidavit of Tony Weiler, Executive Director of SBAND (Doc. 26) at ¶ 23. SBAND's activities are funded, in large part, by mandatory member dues. Doc. 25 at 3.

SBAND also expended compelled member dues on another non-chargeable activity, opposing North Dakota Initiated Statutory Measure No. 6 ("Measure 6"). Doc. 42-2 at 3. Plaintiff strongly supported Measure 6, which appeared on the North Dakota ballot on November 4, 2014. Fleck Declaration in support of his Motion for Preliminary Injunction (Doc. 4-1) at ¶8. Measure 6 proposed to "amend section 14-09-06.2 of the North Dakota Century Code to create a presumption that each parent is a fit parent and entitled to be awarded equal parental rights and responsibilities by a court unless there is clear and convincing evidence to the contrary." Official Ballot Language for Measures Appearing on the Election Ballot, North Dakota Secretary of State (https://vip.sos.nd.gov/pdfs/measures%20Info/2014%20General/Official_Ballot_Language_2014_General.pdf) (last accessed on Nov. 19, 2015). Plaintiff not only contributed $1,000 to a ballot measure committee in support of Measure 6, he participated in the campaign—even appearing on television and radio to debate the merits of the measure. Doc. 4-1 ¶¶ 9–10.

A few weeks before the election, Plaintiff discovered—through a third party—that SBAND staunchly opposed Measure 6 and threw its weight behind the opposition, expending member dues in the process. Doc. 4-1 ¶ 11. SBAND contributed $50,000 in compelled member dues to "Keeping Kids First," a committee that opposed Measure 6. Keeping Kids First's Pre-General Report and two 48-hour reports received by the North Dakota Secretary of State (Doc. 4-2); Doc. 1 ¶ 51; Doc. 20 ¶ XXXII; Doc. 42-2 at 3. Ultimately, Keeping Kids First returned some funds and SBAND's final contribution totaled $46,525.85. Doc. 20 ¶ XXXII. However, SBAND's support did not end there. Defendant Weiler, the Executive Director of SBAND, expended $3,694 worth of his time supporting Keeping Kids First. Doc. 42-2 at 3. In addition, SBAND provided Keeping Kids First with support by allowing the ballot committee to utilize

SBAND's email system and establish an email address with SBAND's domain name: keepingkidsfirst@sband.org. Doc. 1 ¶ 53; Doc. 20 ¶ XXXIV.

Plaintiff was not the only SBAND member who did not want his compelled dues used to fund opposition to Measure 6. Sally Howela, on behalf of the North Dakota Court System and the attorneys for which it pays dues, requested a refund of the proportionate share of dues used to advocate on Measure 6. See Exhibit 1, SB 612–614. This request for refunded dues included the dues of all North Dakota Supreme Court Justices sitting at the time as well as Defendant Miller's dues. Id. North Dakota District Court Judge Douglas Mattson requested a refund of his dues as related to SBAND's Measure 6 activities because, as a District Court Judge, he did not wish to support or oppose Measure 6. See Exhibit 2, SB 615.

III. PROCEDURAL BACKGROUND

On February 3, 2015, Plaintiff filed a Complaint for Declaratory and Injunctive Relief, alleging three claims for relief against Defendants: (1) lack of minimum safeguards required under Keller, 496 U.S. 1; (2) violation of the right to affirmatively consent to non-chargeable expenditures; and (3) the unconstitutionality of a mandatory bar association. Doc. 1 ¶¶ 70–89. On the same day, Plaintiff filed a Motion for Preliminary Injunction with respect to his first and second claims for relief. Plaintiff's Motion for Preliminary Injunction (Doc. 3). On May 14, 2015, this Court ordered the parties to conduct settlement discussions under the supervision of a Magistrate Judge. Order Scheduling Settlement Conference (Doc. 38).

On May 27, 2015, the parties conducted settlement discussions as ordered and agreed to negotiate a resolution of the case. Joint Stipulation of Partial Case Resolution and Briefing Schedule regarding Dispositive Motions (Doc. 42) ¶4; Transcript of Settlement Negotiations held on May 27, 2015 (Doc. 41). All deadlines in the case were stayed. Id. Between August 7

and September 18, 2015, the parties exchanged documents in an attempt to resolve the dispute. Doc. 42 ¶ 5.

On September 24, 2015, SBAND Defendants submitted final drafts of the revised policies of the State Bar Association of North Dakota to Plaintiff. Id. ¶ 6. These revised policies adequately addressed the constitutional injury that Plaintiff asserted in his First Claim for relief and Plaintiff agreed to withdraw his Motion for Preliminary Injunction. Id. ¶¶ 8–9.

Prior to implementing these revised policies, SBAND failed to provide members with adequate notice, a reasonably prompt decision by an impartial decision maker if a member objects to the way his or her mandatory dues are being spent, or an escrow for the amounts reasonably in dispute while such objections are pending. Plaintiff's Memorandum in Support of his Motion for Preliminary Injunction, Doc. 4 at 12–16. SBAND's revised procedures address those failings. However, the revised Statement of License Fees Due, (Doc. 42-1), only provides SBAND members with an opportunity to opt *out* of funding SBAND activities beyond those related to its compelling government interest in improving the practice of law through the regulation of attorneys. By failing to allow members to opt *in* to this spending, SBAND still presumes that members acquiesce to the impingement of their fundamental rights.

Because the Dues Notice is not carefully tailored to limit impingement of his First Amendment rights and because conditioning the practice of law on membership in SBAND violates his First and Fourteenth Amendment rights, Plaintiff now brings this Motion for Summary Judgment.

IV. ARGUMENT

A. STANDARD OF REVIEW

Summary judgment should be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986). To prevail, Plaintiff must demonstrate the absence of a genuine dispute of material fact. Id. at 323. The burden then shifts to the nonmoving party to show that there is a dispute for trial. Id. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), but must identify specific facts in evidentiary materials revealing a genuine issue for trial. Celotex, 477 U.S. at 323. The issues here are appropriate for summary judgment.

The constitutional validity of a mandatory association's procedures for collecting dues is a legal question, rather than a factual one. See Laramie v. Cnty. of Santa Clara, 784 F. Supp. 1492, 1496 (N.D. Cal. 1992) ("questions regarding the adequacy of union notice and procedures are legal ones, and may be resolved on motions for summary judgment"); see also Knox, 132 S. Ct. at 2291–92 (holding a union's failure to provide adequate Hudson notice violated dues-payers' constitutional rights as a matter of law on appeal from dues-payers' motion for summary judgment); Tierney v. City of Toledo, 917 F.2d 927 (6th Cir. 1990) (deciding whether a union's procedures complied with Hudson on summary judgment); Mitchell v. Los Angeles Unified Sch. Dist., 739 F. Supp. 511, 514 (C.D. Cal. 1990) (finding as a matter of law that a union's financial disclosures to dues-payers were deficient under Hudson).

Here, there is no dispute of material fact that would prevent this Court from deciding that

SBAND's practices and procedures are not carefully tailored to limit impingement of Plaintiff's First Amendment rights and are thus below constitutional minimum required. On their face, SBAND's practices and procedures do not provide Plaintiff with the opportunity to affirmatively consent to funding SBAND activities beyond those related to regulation of attorneys. Plaintiff submits SBAND's opt-out procedure is constitutionally deficient and SBAND submits it is not.[3] Doc. 42 ¶¶ 12–13.

Additionally, the constitutionality of preconditioning the practice of law in the State of North Dakota upon membership in and funding of SBAND is a legal question appropriate for summary judgment. There is no factual dispute that the practice of law in the State of North Dakota is preconditioned upon membership in and the funding of SBAND.

B. SBAND VIOLATES PLAINTIFF'S FIRST AND FOURTEENTH AMENDMENT RIGHTS BY FAILING TO PROVIDE MEMBERS WITH THE OPPORTUNITY TO AFFIRMATIVELY CONSENT TO FUNDING NON-CHARGEABLE ACTIVITIES

Although Defendants have revised SBAND's procedures to meet the minimum requirements of the Hudson/Keller safeguards,[4] there still remains a glaring unconstitutional hole: Plaintiff is presumed to assent to funding SBAND's non-chargeable activities unless he opts out of all such expenditures by subtracting the non-chargeable portion of his dues from his dues total on the Statement of License Fees Due. Doc. 42-1 at 2–3. Because "acquiescence in

[3] For that reason, although the parties were able to settle Plaintiff's first claim, the remaining claims are not appropriate for mediation.

[4] The Hudson/Keller safeguards mandatory bar associations must provide are: (a) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-chargeable activities, verified by an independent auditor; (b) a reasonably prompt decision by an impartial decision maker if a member objects to the way his or her mandatory dues are being spent; and (c) an escrow for the amounts reasonably in dispute while such objections are pending. Keller, 496 U.S. at 14; Hudson, 475 U.S. at 310.

the loss of fundamental rights" should not be presumed, College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) (internal quotation marks and citation omitted), Plaintiff must be allowed to affirmatively consent to non-chargeable expenditures. Without the addition of affirmative consent, SBAND's recently revised policies and procedures are not carefully tailored to limit impingement of Plaintiff's First Amendment rights and are therefore below the baseline necessary to permit SBAND to enjoy the "remarkable boon" of receiving compelled dues. Knox, 132 S. Ct. at 2290–93.

To overcome Plaintiff's challenge, Defendants must show that SBAND's opt-out procedure is the least restrictive means of achieving SBAND's purported compelling state interest. Gibson v. Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986) ("All [F]irst [A]mendment challenges are analyzed under a two-part test that requires a 'compelling interest' and the 'least restrictive means' of achieving that interest. Abood did nothing more than identify a proper 'compelling interest' . . . Abood did not vitiate the 'least restrictive means' criterion; the Court merely defined one exceptional circumstance when compelled fees may be used to advocate views inimical to the beliefs of some union members.") (internal citations omitted).

The Supreme Court has signaled that Defendants cannot justify their opt-out policy. See Knox, 132 S. Ct. at 2291. The recent case, Knox v. Serv. Employees Int'l Union, Local 1000, involved a California public union that abused its extraordinary power to compel dues to extract an additional special assessment from employees to oppose several ballot measures. Employees were given no opportunity to object or opt out of the assessment. Id. at 2285–86. In response to the union's brazen actions, the Supreme Court not only held that the union had to supply employees with notice of the special assessment, the union had to allow them to affirmatively

consent to the special assessment in order to provide constitutionally adequate safeguards. Id. at 2291–93.

While the Supreme Court has only addressed the necessity of affirmative consent for non-chargeable expenditures in the context of union special assessments, in doing so, the Court reaffirmed that "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." Id. at 2291. Just as an opt-out system for special assessments failed that standard in Knox, it would fail that standard here because there is no state interest—let alone a compelling one—in "shift[ing] the advantage of . . . inertia," South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966), away from members who wish to exercise their First Amendment rights and onto SBAND, which has "no constitutional entitlement to the fees" it compels from members. Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 185 (2007); see also Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co., 335 U.S. 525, 529–31 (1949).

The safeguards afforded by Hudson and Keller are designed to minimize the infringement of First Amendment rights necessarily caused by compelled-fee schemes and ensure compelled fees are only used for chargeable expenditures. See Hudson, 475 U.S. at 303 (the collection of compelled fees burdens rights to freedom of speech and association, and "the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement."); Seidemann v. Bowen, 499 F.3d 119, 124 (2d Cir. 2007) (holding that a union's burden includes adopting procedures "that least interfere with an objecting employee's exercise of his First Amendment rights") (quoting Shea v. Int'l Ass'n of Machinists & Aerospace Workers, 154 F.3d 508, 515–17 (5th Cir. 1998)). But safeguards designed to limit First Amendment infringement that begin with a presumption that all those compelled to pay fees

to a group also want to fund the group's non-chargeable activities are not carefully tailored and cannot possibly afford adequate protection.[5]

There is no compelling government interest that can justify the inherent First Amendment burden of collecting compelled dues for non-chargeable expenditures; only funds given voluntarily are constitutionally permitted to fund such expenditures. In Knox, the Supreme Court found that forcing public employees to opt out of subsidizing non-chargeable activities "creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." 132 S. Ct. at 2290. Just as that risk was not acceptable in Knox, it is not acceptable here. SBAND's opt-out procedure cannot be found to be "'carefully tailored to minimize the infringement' of free speech rights." Id. at 2291. Only affirmative consent through an opt-in procedure creates a sufficient barrier between compelled dues and voluntary funds.

The Supreme Court has observed that "acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." Id. at 2290. Defendants cannot rely upon this "historical accident" to continue to vitiate the constitutional rights of Plaintiff and all other SBAND members. SBAND's opt-out system for non-chargeable activities is necessarily broader than can be justified by any interests served by SBAND. SBAND would be able to achieve its compelling interest—improving the practice of law through the regulation of attorneys—if it adopted a procedure that allowed SBAND members to affirmatively consent to funding non-chargeable

[5] Modern social science indicates that an opt-out procedure "nudges" individuals to acquiesce because "people have a strong tendency to go along with the status quo or default option." Richard H. Thaler & Cass R. Sunstein, NUDGE (2008). A procedure that encourages individuals to acquiesce to the violation of their constitutional rights cannot be carefully tailored to limit impingement of those rights and is therefore unacceptable.

activities, because SBAND members would still be compelled to fund SBAND's chargeable activities. Moreover, even if an opt-in procedure somehow reduced the amount of chargeable dues which SBAND can compel—which opt-in would not do—given the choice between SBAND members being compelled to pay too much or too little, this Court must err on the side of protecting SBAND members' First Amendment rights. Id. at 2295 (recognizing that, if dues-payers pay "less than their proportionate share, no constitutional right of the union is violated because the union has no constitutional right to receive any payment").

Only through allowing Plaintiff and all SBAND members to affirmatively consent to funding non-chargeable activities will members' First and Fourteenth Amendment rights be adequately walled off from impingements purportedly justified by SBAND's regulation of attorneys. Because SBAND's procedures do not provide Plaintiff with the opportunity to affirmatively consent to funding non- chargeable expenditures in violation of his First and Fourteenth Amendment rights, Plaintiff is entitled to entry of summary judgment and declaratory and injunctive relief on his second claim.

C. MANDATORY BAR MEMBERSHIP IS NOT NARROWLY TAILORED TO A COMPELLING INTEREST

While immediate relief is appropriately granted by this Court for his second claim, Plaintiff acknowledges that binding precedent forecloses this Court from presently granting such relief for his third claim for the moment. See Keller, 496 U.S. at 1; Lathrop, 367 U.S. at 843. While Lathrop and Keller hold that a State can mandate bar membership as a condition of practicing law, they are irreconcilable with basic First Amendment principles and subsequent decisions, and thus should be overruled. See, e.g., Knox, 132 S. Ct. at 2291 ("By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they

do not cross, the limit of what the First Amendment can tolerate."). In order to preserve Plaintiff's third claim for further review, Plaintiff explains why those decisions "rest on reasons rejected in some other line of decisions" and why Plaintiff is therefore likely to ultimately prevail. Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (citation omitted). Accordingly, Plaintiff acknowledges that his motion for summary judgment on his third claim must be denied.

The First Amendment to the United States Constitution protects the individual rights of free speech and free association. This includes the right to not support causes and activities that conflict with one's beliefs, see, e.g., United States v. United Foods, Inc., 533 U.S. 405, 410 (2001) ("[T]he [First] Amendment may prevent the government from . . . compelling certain individuals to pay subsidies for speech to which they object.") (citations omitted)); and the right to not be compelled into unwanted associations, see, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) ("Freedom of association . . . plainly presupposes a freedom not to associate."). Indeed, it is a "bedrock principle that, except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support." Harris v. Quinn, 134 S. Ct. 2618, 2644 (2014). That is because "compelled funding of the speech of other private speakers or groups presents the same dangers as compelled speech." Id. at 2639 (citation omitted); see also id. at 2656 (Kagan, J. dissenting) ("[T]he 'difference between compelled speech and compelled silence' is 'without constitutional significance.'" (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 796 (1988)).

There is no question SBAND's mandatory dues are "a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" Knox, 132 S. Ct. at 2289, quoting Ellis v. Bhd. of Ry., Airline and S.S. Clerks, Freight Handlers, Express and Station Emps., 466 U.S. 435, 455 (1984). In Knox, the Supreme Court most clearly articulated the test for compulsory subsidies like mandatory bar dues. This test holds compulsory subsidy schemes to "exacting First Amendment scrutiny" and few schemes can survive it. Knox, 132 S. Ct. at 2289. Compulsory subsidies for private speech "cannot be sustained unless two criteria are met." Id. First, all coerced association must be justified by a "'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" Id. (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)). Second, even in the "rare case" where coerced association is found to be justified, compulsory fees "can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" Knox, 132 S. Ct. at 2289, quoting United Foods, 533 U.S. at 414. Although the Supreme Court has found mandatory bar associations to be one of the rare cases that permit compelled association, Keller, 496 U.S. at 14; Lathrop, 367 U.S. at 843, it has not revisited this conclusion in light of its holdings in Knox and Harris that mandatory associations must meet exacting First Amendment scrutiny. Harris, 134 S. Ct. at 2639 (quoting Knox, 132 S. Ct. at 2289).

SBAND cannot satisfy these criteria. The sole compelling state interest found to justify coercive bar association membership is improving the practice of law through the regulation of attorneys. Keller, 496 U.S. at 14; Lathrop, 367 U.S. at 843. Yet 18 states—Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont—have already

found ways of regulating attorneys without compelling membership at all. See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. at 1022; 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, at 24 (2000).

Instituting regulatory arrangements that reflect the wisdom that "[t]he mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights," Lathrop, 367 U.S. at 876 (Black, J., dissenting), has not prevented any of these states from achieving high levels of practice or led to any lapse in the regulation of attorneys. It would be absurd to say that a state with a voluntary bar association like New York, one of largest economies in the world[6] and home to some of the United States' most esteemed jurists and practitioners, has failed in its efforts to improve the quality of legal services through the regulation of attorneys. As such, finding that improving the practice of law through the regulation of attorneys cannot be achieved through less restrictive means than compulsory bar membership would fly in the face of reality. Mandating membership in SBAND therefore crosses "the limit of what the First Amendment can tolerate." Knox, 132 S. Ct. at 2291.

With less restrictive means readily available, compelling Plaintiff to become a member of SBAND in order to practice law in the State cannot survive exacting First Amendment scrutiny and accordingly violates Plaintiff's rights of free speech and free association. Because coercing

[6]According to the Bureau of Economic Analysis, the State of New York's gross domestic product was $1,404.5 billion in 2014, the third largest in the United States. *See* http://www.bea.gov/regional/bearfacts/action.cfm?geoType=3&fips=36000&areatype=36000. Moreover, New York is the 16th largest economy in the world. See H. Joseph Drapalski III, The Viability of Interstate Collaboration in the Absence of Federal Climate Change Legislation, 21 Duke Envtl. L. & Policy Forum 469, 493 n.46 (2011).

Plaintiff to join SBAND is unconstitutional, compulsory fees are likewise not "a necessary incident of the larger regulatory purpose which justified the required association." Knox, at 2289 (internal quotations omitted). As such, SBAND fails to satisfy the two criteria described in Knox and continuing to condition Plaintiff's practice of law upon SBAND membership and payment of dues violates his First and Fourteenth Amendment rights.

The Supreme Court is presently revisiting its earlier limits on the compelled speech prohibition. The plaintiffs in Friedrichs v. Cal. Teachers Association argue that forcing public school teachers to fund teachers' unions as a condition of employment in public schools violates teachers' First Amendment, directly challenging the Supreme Court's holding in Abood v. Detroit Bd. Of Ed., 431 U.S. 209, 232 (1977), which permitted such a compelled-speech arrangement. Brief for the Petitioners, Friedrichs v. Cal. Teachers Ass'n, 135 S. Ct. 2933 (2015) (No. 14-915), at 11–34. The Court of Appeals for the Ninth Circuit rejected the plaintiffs' challenge, holding that the challenge was foreclosed by controlling Supreme Court and Ninth Circuit precedent. Friedrichs v. Cal. Teachers Ass'n, No. 13-57095, 2014 WL 10076847, (9th Cir. Nov. 18, 2014). The Friedrichs plaintiffs filed a petition for writ of certiorari which the Supreme Court has granted. 135 S. Ct. 2933 (2015).[7]

Therefore, Plaintiff should prevail at the Supreme Court on the merits of his third claim; however, given the Supreme Court's decisions in Keller and Lathrop, Plaintiff's motion for summary judgment on his third claim should be denied.

[7] The Friedrichs petitioners argue, in the alternative, that the Supreme Court should rule that California's procedures, which only allow public school teachers to opt-out of funding non-chargeable union activities, should be found unconstitutional. Brief for the Petitioners, Friedrichs, 135 S. Ct. 2933 (2015) (No. 14-915), at 34–36. Accordingly, Friedrichs may directly impact Plaintiff's second claim as well.

V. CONCLUSION

For the foregoing reasons, summary judgment should be entered for Plaintiff Arnold Fleck and against Defendants, declaring that SBAND's failure to provide an opt-in procedure violates Plaintiff's First and Fourteenth Amendment rights and enjoining Defendants from collecting, distributing, receiving, or expending mandatory SBAND dues until such a time as a procedure for opting-in to SBAND's non-chargeable activities is in place and operating.

Dated this 20th day of November, 2015

/s/ *Jared Blanchard*
James Manley (Ariz. Bar No. 031820)
Jared Blanchard (Ariz. Bar No. 031198)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004
Ph: 602-462-5000
Fax: 602-256-7045
litigation@goldwaterinstitute.org
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of November, 2015, I filed the foregoing electronically through the CM/ECF system, and a copy was served on all counsel of record in the above-captioned matter by electronic means through the Court's ECF system:

Randall J. Bakke
Shawn A. Grinolds
Bradley N. Wiederholt
122 East Broadway Avenue
P.O. Box 460
Bismark, ND 58502-0460
rbakke@smithbakke.com
sgrinolds@smithbakke.com
bwiederholt@smithbakke.com

Douglas A. Bahr
Solicitor General
Office of Attorney General
500 N. 9th St.
Bismarck, ND 58501-4509
dbahr@nd.gov

/s/ *Jared Blanchard*
Jared Blanchard (Ariz. Bar No. 031198)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004
Ph: 602-462-5000
Fax: 602-256-7045
litigation@goldwaterinstitute.org
Attorneys for Plaintiff