United States Court of Appeals
For the Eighth Circuit

No. 16-1564

Arnold V. Fleck

Plaintiff-Appellant,

v.

Joe Wetch, President of the State Bar Association of North Dakota, et al.

Defendants-Appellees.

Pacific Legal Foundation

Amicus on Behalf of Appellant

State Bar of California; The Missouri Bar; State Bar of Alaska; State Bar of Arizona; State Bar of Kentucky; State Bar of Michigan; State Bar of South Dakota; State Bar of Wyoming

Amici on Behalf of Appellees

Texas Legal Ethics Counsel

Amicus Curiae.

Appeal from United States District Court for the District of North Dakota – Bismarck.

Submitted: June 13, 2019.
Filed: August 30, 2019

Before LOKEN, COLLOTON, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

To practice law in North Dakota, every resident lawyer must maintain membership in and pay annual dues to the State Bar Association of North Dakota (SBAND). *See* N.D.C.C. §§ 27-11-22; 27-12-02, -04. When attorney Arnold Fleck learned that SBAND was using his compulsory dues to oppose a state ballot measure he supported, Fleck commenced this action against SBAND and various state officials in their official capacities, asserting First Amendment claims. The district court[1] granted summary judgment for the defendants. Fleck appealed; we affirmed. *Fleck v. Wetch*, 868 F.3d 562 (8th Cir. 2017). Almost one year later, the Supreme Court issued its decision in *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018). The Court then granted Fleck's petition for a writ of certiorari, summarily vacated our decision, and remanded "for further consideration in light of *Janus*." 139 S. Ct. 590 (2018). We reopened the case and directed the parties to submit supplemental briefs addressing the issues on

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[1] The Honorable Daniel L. Hovland, Chief Judge, United States District Court for the District of North Dakota.

remand. Having considered the supplemental briefs, the record on appeal, and the Supreme Court's decision in *Janus*, we again affirm the decision of the district court.

I. Framing the Issues on Remand.

A. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the Supreme Court held that public-sector unions may collect compulsory "agency fees" from non-members within the bargaining unit to fund activities germane to collective bargaining, but may not use those fees to fund non-germane political or ideological activities that a nonmember employee opposes. In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986), the Court held that the procedure a union adopts to implement this distinction must "be carefully tailored to minimize the infringement" of a nonmember's First Amendment rights. This includes, the Court declared, "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id*. at 310.

In *Keller v. State Bar of California*, 496 U.S. 1, 13-15 (1990), the Court held that an integrated bar such as SBAND can, consistent with the First Amendment, use a *member's* compulsory fees to fund activities germane to "regulating the legal profession and improving the quality of legal services," but not to fund "activities

having political or ideological coloration which are not reasonably related to the advancement of such goals" that the member opposes (non-germane activities). Lacking an adequate record to address procedural alternatives in detail, the Court stated that "an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." *Id*. at 17.

In *Janus*, the Supreme Court overruled *Abood* and held that public-sector unions may not deduct agency fees or "any other payment to the union" from the wages of *nonmember* employees unless the employees waive their First Amendment rights by "clearly and affirmatively consent[ing] before any money is taken from them." 138 S. Ct. at 2486. On remand, Fleck argues that *Janus* "requires reversal of the district court decision" because Keller's theoretical underpinnings have been undercut by *Janus* and by *Harris v. Quinn*, 573 U.S. 616 (2014).

Like *Keller*, this case involves a mandatory bar association, not a public-sector union. The majority in *Janus* did not discuss *Keller* nor respond to the dissent's assertion that *Keller* was a "case[] involving compelled speech subsidies outside the labor sphere [that] today's decision does not question." 138 S. Ct. at 2498 (Kagan, J., dissenting). In *Harris*, the Court specifically stated that its holding should not be assumed to "call into question our decision[] in *Keller*." 573 U.S. at 655. Thus, analysis of the potential relevance of the *Janus* and *Harris* decisions on remand requires careful attention to the specific claims asserted by Fleck in

this litigation. We must be mindful of the principle that, "if a precedent of this Court has direct application in a case [here, *Keller*], yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quotation omitted); *see Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 879 (8th Cir. 2012) (en banc).

B. Fleck asserted three separate First Amendment claims in his February 2015 Complaint: First, that SBAND's procedures for collecting and spending mandatory member dues fail to protect members' rights not to subsidize non-germane expenditures to which they objected. Second, that those procedures violate his right to "affirmatively consent" before subsidizing non-germane expenditures. Third, that mandatory membership in SBAND as a condition of practicing law violates his First Amendment right to freedom of association and to avoid subsidizing speech with which he disagrees. The first claim was resolved by a November 2015 settlement in which SBAND revised its license fee statement. *See Fleck*, 868 F.3d at 653. Fleck does not argue on remand that *Janus* permits him to revive a claim that he settled. Thus, we limit this opinion to whether *Janus* requires further consideration of our decision affirming the grant of summary judgment on his second and third claims.

II. The Mandatory Association Claim.

Fleck's brief on remand placed primary emphasis on his third claim – that mandatory state bar association membership violates the First Amendment by compelling him both to pay dues to SBAND and to associate with an organization that engages in political or ideological activities. He argues that *Janus* requires further consideration of this claim because *Keller* did not address what the Supreme Court described as "a much broader freedom of association claim than was at issue in *Lathrop*," 490 U.S. at 17,[2] and in *Janus* the Court "made clear that courts must apply 'exacting scrutiny' – or possibly even strict scrutiny – to the question of whether the state's decision to force an attorney to join the state bar association violates the First Amendment freedom of association."

Assuming without deciding that *Keller* "left the door open" to pursue this freedom of association claim in the district court and in this court, Fleck *explicitly* chose not to do so. In his motion for summary judgment to the district court, Fleck conceded that his "claim challenging the constitutionality of conditioning the practice of law upon SBAND membership . . . is presently foreclosed by *Keller*," and therefore the district

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[2] The Court in *Keller* applied its prior decision in *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961), where it held that the "compulsory payment of reasonable annual dues" to the integrated Wisconsin bar did not violate plaintiff's First Amendment "rights of association." The Court in *Lathrop* noted that it was presented "only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." *Id*. at 828.

court "must deny his motion for summary judgment as it relates [to] this claim." Defendants in responding to Fleck's motion and the district court's order granting defendants' cross-motion for summary judgment relied in part on this concession. Likewise, Fleck's brief on appeal to this court conceded that his "alternative claim challenging the constitutionality of mandatory bar association membership is foreclosed by *Keller* and *Lathrop*," and therefore "this Court must affirm the lower court's judgment on this claim." He explained that he was presenting the argument "to preserve it for the proper forum." Relying on this concession, we stated that "we need not further address this issue" and devoted our opinion to an analysis of Fleck's opt-out claim. *Fleck*, 868 F.3d at 653.

Fleck's petition to the Supreme Court for a writ of certiorari misrepresented his position before our court. The petition stated that he "acknowledged [to the district court] that his challenge to mandatory bar membership was foreclosed by binding precedent." But it then falsely asserted that our court "affirmed the dismissal of Fleck's challenge to mandatory bar membership on the basis of" *Keller* and *Lathrop* and asked the Supreme Court to "reverse the Eighth Circuit's decision and overrule *Keller* and *Lathrop*." Then on remand, he argued the constitutionality of mandatory bar association membership to this court *for the first time*, on a district court summary judgment record that did not address this issue, an issue a majority of the Court treated as highly fact-intensive in *Lathrop*. *See* 367 U.S. at 827-48 and 851-64 (Harlan, J., concurring).

As a general rule, we will not consider arguments raised for the first time on appeal "as a basis for reversal." *von Kerssenbrock-Praschma v. Saunders*, 121 F.3d 373, 375 (8th Cir. 1997) (citation omitted). In addition to the "inherent injustice in allowing an appellant to raise an issue for the first time on appeal," a primary reason for this rule is that "the record on appeal generally would not contain the findings necessary to an evaluation of the validity of an appellant's arguments." Id. at 376 (citation omitted). However, we may invoke our "discretion to consider an issue for the first time on appeal where the proper resolution [of that issue] is beyond any doubt . . . or when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case." *Weitz Co., LLC v. Lloyd's of London*, 574 F.3d 885, 891 (8th Cir. 2009) (citation omitted). This is not an appropriate case to invoke that exception.

Fleck conceded his associational claim was governed by binding precedent before the district court and on appeal. Fleck was represented by public interest lawyers who advised this court they were preserving the issue to argue to the Supreme Court that *Keller* and *Lathrop* should be overruled. Perhaps more importantly, this is not a "purely legal" issue. Based on Fleck's concession, defendants did not place in the summary judgment record the types of detailed information discussed by the Supreme Court in *Lathrop* concerning the legislative decision to adopt an integrated bar in North Dakota, the extent to which this method of licensing and regulating the profession

burdens associational rights of North Dakota lawyers, and whether, if exacting scrutiny is the governing standard, North Dakota can serve its "compelling state interests . . . through means [that are] significantly less restrictive of associational freedoms." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 680 (2000) (citation omitted).

It may well be, as Fleck now argues, that *Keller* and *Lathrop* did not consider, and therefore did not foreclose, his First Amendment associational claim. It may also be that *Janus* confirms that this issue would now be decided under a more rigorous exacting scrutiny standard than the Court may have applied in *Keller* and *Lathrop*. We decline to consider these issues because, whatever level of scrutiny is appropriate, the claim must still be decided on an evidentiary record. Based on prior Supreme Court precedent, we conclude the record is inadequate as the result of Fleck forfeiting the issue in the district court and on appeal. Accordingly, we decline to invoke our discretion to take up this claim for the first time on remand.

III. The Opt-Out Procedure Claim.

Once a year, SBAND mails a fee statement which attorney members fill out and return with their annual dues payment. SBAND fills in the top half of the statement including the member's annual license fee (for example, at the time in question, $380 for a lawyer with more than five years of practice.) As revised by the settlement that resolved Fleck's first claim in this

lawsuit, the bottom half of the statement includes a column in which the lawyer may elect to pay additional fees to enroll in one or more practice group sections, to donate to the North Dakota Bar Foundation or the Pro Bono Fund, and to take a "Keller deduction." SBAND agreed to add the Keller-deduction line in response to this lawsuit. Next to this line, the statement explains:

> OPTIONAL: Keller deduction relating to non-chargeable activities. Members wanting to take this deduction may deduct $10.07 if paying $380; $8.99 if paying $350; and $7.90 if paying $325. (See Insert.)

Accompanying the fee statement is a two-page insert entitled Notice Concerning State Bar Dues Deduction and Mediation Process explaining how SBAND calculates non-chargeable activities and how members may object to these determinations. In addition, a new Keller Policy available on SBAND's member website provides an additional notice. *See Fleck*, 868 F.3d at 655.

In *Knox v. SEIU*, 567 U.S. 298, 322 (2012), the Supreme Court held that "when a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from nonmembers without their affirmative consent." In *Fleck*, we held that the revised SBAND procedures complied with the *annual* procedures established in *Hudson* and cross-referenced in *Keller* and that "the opt-out issue debated by the Court in *Knox* is simply not implicated by SBAND's revised license fee Statement":

> Before submitting an annual license fee payment, each member calculates the amount owing on the revised Statement. If he selects the Keller deduction, he writes a check for the lower amount that excludes a payment for SBAND's non-germane expenditures. If he does not choose the Keller deduction, he "opts in" to subsidizing non-germane expenses by the affirmative act of writing a check for the greater amount.

868 F.3d at 656-57.

On remand, Fleck argues that "SBAND's collection of money . . . for non-germane activities violates the First Amendment, just as the union fees in *Janus* did, because SBAND does not obtain attorneys' consent to pay in a manner that is (1) clear, (2) affirmative, and (3) prior to collecting of funds, as *Janus* requires." We disagree. *Janus* held that no fee or payment to the union "may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay. . . . before any money is taken." 138 S. Ct. at 2486. In this case, SBAND collects dues from members who are licensed attorneys. The audience is sophisticated and trained to understand and appreciate legal communications. Though membership is mandatory, it still involves a relatively comfortable relationship in which the member is encouraged to raise issues or seek information from his or her organization.

SBAND's revised fee statement and procedures clearly do not force members to pay non-chargeable dues over their objection. Attorneys are not paid public

sector wages, and SBAND does not automatically deduct annual dues from any source of member funds. It does not have an online system for collecting dues and fees and does not even accept credit card payments. Each member must determine how much he or she owes in annual dues and then write a check to SBAND to pay that amount. The member's right to pay or refuse to pay dues to subsidize non-chargeable expenses is clearly explained on the fee statement and accompanying instructions, *in advance of the member consenting to pay by delivering a check to SBAND*. Doing nothing may violate a member's obligations to pay dues, but it does not result in the member paying dues that he or she has not affirmatively consented to pay.

Nothing in the summary judgment record suggests that SBAND's revised fee statement is so confusing that it fails to give SBAND members adequate notice of their constitutional right to take the Keller deduction. Indeed, Fleck's stipulation that the revised fee procedures "resolve fully and completely" his first claim for relief is strong evidence to the contrary, as that claim included the allegation that SBAND was failing to provide "notice to members, including an adequate explanation of the basis for the dues and calculations of all non-chargeable activities." The best that can be said for Fleck's argument is that a busy or careless lawyer might fill out the fee statement and write a check to SBAND for the full annual dues without noticing the option to take the Keller deduction. The record contains no evidence this has ever happened or is

likely to happen. Fleck asserts a facial, not an as-applied attack on the revised fee statement.

In a "union shop," every employee must be a union member. The Supreme Court's public-sector union cases – *Abood*, *Knox*, *Harris*, and *Janus* – have involved "agency shop" relationships, authorized by state law and/or the collective bargaining agreement, in which employees may be nonmembers; the issue was the manner in which and extent to which nonmembers could be compelled to pay agency fees to subsidize the union's non-germane activities. The Supreme Court has never decided whether a public-sector union shop would violate employees' First Amendment associational rights. If the Court upheld a mandatory membership requirement, the dues subsidy issue would be analogous to the issue in this case under *Keller* and *Hudson*. We have little doubt the Court would impose a requirement that the union adopt procedures "carefully tailored to minimize the infringement" of a dissenting member's First Amendment rights. *Hudson*, 475 U.S. at 303. But because of the practical differences when an organization deals with members and nonmembers, we do not assume that the "*Hudson* notice" requirements would be the same in every detail. Therefore, as *Janus* did not overrule *Keller* and did not question use of the *Hudson* procedures *when it is appropriate to do so*, we conclude after further consideration that *Janus* does not alter our prior decision explaining why the district court did not err in granting summary judgment dismissing Fleck's second claim.

For the foregoing reasons, the judgment of the district court is affirmed.

United States Court of Appeals
For the Eighth Circuit

No. 16-1564

Arnold Fleck

Plaintiff-Appellant

v.

Joe Wetch, President of the State Bar Association of North Dakota, et al.

Defendants-Appellees

Appeal from United States District Court
for the District of North Dakota-Bismarck

Submitted: April 4, 2017
Filed: August 17, 2017

Before LOKEN, COLLOTON, and KELLY, Circuit Judges.

LOKEN, Circuit Judge.

In 2014, North Dakota attorney Arnold Fleck volunteered time and money to support Measure 6, a state ballot measure to establish a presumption that each parent is entitled to equal parental rights. North Dakota has an integrated bar, meaning that Fleck and

other licensed attorneys must maintain membership in and pay annual dues to the State Bar Association of North Dakota ("SBAND") as a condition of practicing law.[1] When Fleck learned that SBAND was using his compulsory fees to oppose Measure 6, he filed a lawsuit seeking declaratory and injunctive relief, asserting three First Amendment claims. First, he alleged that SBAND's procedures for allowing members to object to non-germane expenditures failed to comply with the minimum safeguards required by *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). This claim was resolved by a November 2015 settlement in which SBAND revised its license fees statement. Second, Fleck alleged that an integrated bar violates his freedoms not to associate and to avoid subsidizing speech with which he disagrees. The district court dismissed this claim as barred by *Keller*. Fleck concedes we are bound by *Keller*, so we need not further address this issue. Third, he alleged that SBAND's "opt-out" procedure violates his right to affirmatively consent before subsidizing non-germane expenditures. The district court[2] granted summary judgment dismissing this claim, the subject of Fleck's appeal. Reviewing this ruling *de novo*, we affirm.

1. The First Amendment Landscape. In *International Association of Machinists v. Street*, 367 U.S.

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[1] North Dakota's integrated bar is codified in N.D.C.C. §§ 27-11-22, 27-12-02.

[2] The Honorable Daniel L. Hovland, Chief Judge of the United States District Court for the District of North Dakota.

740, 774 (1961), a divided Supreme Court upheld the validity of a Railway Labor Act provision authorizing "union shop" collective bargaining agreements that require railroad employees to pay union dues, fees, and assessments as a condition of continued employment. Four Justices upheld the statute by construing it as "denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes," *id.* at 768 (opinion of Brennan, J., for the Court); a fifth Justice agreed to this remedy "dubitante," *id.* at 779 (Douglas, J., concurring). That same day, a divided Court held that a State may constitutionally condition practicing law on membership in an integrated bar association. There was no majority opinion, and Justice Brennan's four-Justice plurality did not address whether an integrated bar association may use a member's compulsory fees to support political activities that he or she opposes. *See Lathrop v. Donohue*, 367 U.S. 820, 843-844 (1961).

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), applying *Street* and First Amendment principles, the Court held that public sector unions may collect compulsory "agency fees" from non-members within the bargaining unit to fund activities germane to collective bargaining, but may not use those fees to fund non-germane political or ideological activities that a non-member employee opposes. In *Hudson*, the Court held that the procedure a union adopts to implement this distinction must "be carefully tailored to minimize the infringement" of a non-member's First Amendment rights. 475 U.S. at 303. The procedure at

issue in *Hudson* did not meet this standard "because it failed to minimize the risk that non-union employees' contributions might be used for impermissible purposes . . . failed to provide adequate justification for the advance reduction of dues, and . . . failed to offer a reasonably prompt decision by an impartial decisionmaker." *Id.* at 309. Constitutional requirements include, the Court declared, "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310.

The Supreme Court returned to the issue of integrated bar compulsory fees in *Keller*, concluding that an integrated bar can, consistent with the First Amendment, use a member's compulsory fees to fund activities germane to "regulating the legal profession and improving the quality of legal services," but not to fund non-germane activities the member opposes. 496 U.S. at 13-14. Lacking an adequate record to address procedural alternatives in detail, the Court stated that "an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson*." *Id.* at 17.

2. SBAND's Post-Settlement Procedures. SBAND concedes that its expenditures in support of Measure 6 were "non-germane" under *Keller*, so the issue in this case is whether SBAND has implemented constitutionally adequate procedures to protect the First Amendment rights of North Dakota attorneys

who oppose a non-germane expenditure. When Fleck filed this action, SBAND's Legislative Policy provided that a member who dissented from a position on any legislative or ballot measure matter could receive a refund of that portion of his or her dues which would otherwise have been used in that activity. The Policy did not advise if members could opt out of paying for non-germane expenses in advance, inform members of the breakdown between germane and non-germane expenses, or allow members to challenge SBAND's calculation of germane expenses before an impartial decisionmaker. In response to this lawsuit, SBAND adopted revised policies that Fleck agreed comply with the minimum safeguards required by *Keller* and *Hudson*, and the district court dismissed Fleck's first claim without prejudice. Accordingly, it is the revised policies that are relevant to Fleck's appeal of the "opt-out" issue.

Each year, SBAND sends a Statement of License Fees Due. Unless exempt, a member must pay annual dues of either $380, $350, or $325, depending on years of practice. The Statement lists this figure as the "annual license fee." The member certifies that he or she has complied with rules governing trust accounts and malpractice insurance, and checks boxes to enroll in specialized SBAND sections for additional fees, contribute to the bar foundation, and donate to a pro bono fund. The following new section appears near the end of the revised Statement:

> OPTIONAL: Keller deduction relating to nonchargeable activities. Members wanting to

> take this deduction may deduct $10.07 if paying $380; $8.99 if paying $350; and $7.90 if paying $325. (See Insert.)

SBAND computes this deduction as a percentage of annual license fees based on the percentage of the prior year's fees that SBAND spent on non-germane activities. Next to this explanation is a blank allowing the member to write in an amount to be deducted from the license fees due. At the end of the Statement, the member adds optional fees selected to the annual license fee and subtracts the "Keller deduction" if chosen. The resulting figure is the amount due. Members return the completed Statement with a check payable to the State Board of Bar Examiners ("Board"), which collects license fees and issues annual licenses. *See* N.D.C.C. § 27-11-22.[3]

An Insert with the new Statement is a Notice Concerning State Bar Dues Deduction and Mediation Process. This two-page document describes the holding in *Keller*, explains how SBAND calculates nonchargeable activities each year, and informs members how to object to SBAND determinations. In addition, a new Keller Policy available on SBAND's member website provides an additional notice:

> SBAND shall provide periodic notice to its membership of any expenditures that deviate from its pre-collection notice. SBAND shall

[3] SBAND receives $75 of each annual license fee for operation of the lawyer discipline system and 80% of the remaining fee totals "for the purpose of administering and operating the association." § 27-12-04.

> also provide notice of any position it adopts regarding legislative proposals and initiated and referred measures within two weeks of SBAND's vote to adopt such positions. After being emailed to members of SBAND, such notices will be readily accessible at www.sband.org.

3. The Opt-Out Issue. Relying on the Supreme Court's recent decision in *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298 (2012), Fleck argues that the revised license fees Statement violates the First Amendment because it requires him to opt out of subsidizing non-germane expenses, and SBAND may only finance non-germane activities with compulsory fees paid by affirmatively consenting members. The district court concluded that *Knox* did not overrule prior cases holding that the First Amendment does not require an opt-in procedure.

Railway Labor Act agency shop collective bargaining agreements at issue in *Street* and in *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), provided a "checkoff" procedure whereby the railroad employer sent union members' mandatory dues directly to the union and deducted the dues from the employees' paychecks. If members successfully objected to paying dues for union expenditures for political causes, the union would place them on "agency fee payer status." *See generally Conrad v. Int'l Ass'n of Machinists*, 338 F.3d 908, 910-11 (8th Cir. 2003). Likewise, in *Hudson*, the Chicago School Board agreed to deduct "proportionate share payments" from the paychecks of

non-member teachers and send them directly to the Teachers Union; after the deduction, if the Union sustained a non-member's objection, future deductions of all non-members were reduced and the objector received a rebate. 475 U.S. at 295.

In *Knox*, a public-sector union provided an annual *Hudson* notice calculating germane expenses and permitting non-members to opt out of non-germane expenses by objecting within thirty days. 567 U.S. at 303. Thirty days later, the union imposed a one-time dues increase to fund its political opposition to controversial ballot measures and to re-electing the incumbent governor. *Id.* at 304-05. The union sent no new *Hudson* notice, applied a portion of the dues increase to non-members who already had opted out, and did not allow non-members who did not initially opt out to opt out of paying the special assessment. *Id.* at 305-06. The Court struck down this procedure, concluding that, "[t]o respect the limits of the First Amendment, the union should have sent out a new notice allowing non-members to opt in to the special fee rather than requiring them to opt out." *Id.* at 317.

In the majority opinion, five Justices more broadly criticized the opt-out procedure approved in its prior decisions:

> Once it is recognized, as our cases have, that a nonmember cannot be forced to fund a union's political or ideological activities, what is the justification for putting the burden on the nonmember to opt out of making such a payment? Shouldn't the default rule comport

> with the probable preferences of most nonmembers? . . . An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree.

Id. at 312. The Court explained that its tolerance of annual opt-out procedures came about "more as a historical accident than through the careful application of First Amendment principles." *Id.* The majority stated that these "prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." *Id.* at 314. It invalidated the special assessment at issue because, even if the opt-out burden "can be justified during the collection of regular dues on an annual basis, there is no way to justify the additional burden of imposing yet another opt-out requirement to collect special fees whenever the union desires." *Id.* at 317. Two Justices agreed that the special assessment in *Knox* failed to follow procedures mandated by *Hudson* but disagreed with the majority's broad condemnation of opt-out procedures upheld in *Hudson* and *Abood*. *Id.* at 323 (Sotomayor, J., concurring in the judgment).

We agree with the district court that the decision in *Knox* left in place annual procedures established in *Hudson*, and cross-referenced in *Keller*, which included an opt-out feature. But this does not wholly answer the issue on this appeal, because *Hudson* requires procedures "carefully tailored to minimize the infringement" of a non-member's First Amendment rights, 475 U.S. at 303, which is a fact-intensive standard, as the Court

acknowledged in *Keller*, 496 U.S. at 17. In our view, focusing on the revised SBAND procedures, there is an obvious answer to Fleck's challenge, namely, that the opt-out issue debated by the Court in *Knox* is simply not implicated by SBAND's revised license fee Statement.

In a Railway Labor Act or public sector union case involving a collectively bargained dues checkoff procedure, the employer transfers money the employee has earned directly to the union, unless the protesting employee affirmatively "opts out." The union then gets to use this compulsory payment on non-germane expenditures the employee opposes, at least until the employee successfully objects and obtains a rebate. Here, on the other hand, North Dakota attorneys pay the annual license fee themselves. Fleck admits the revised license fee Statement adequately discloses a member's option not to fund non-germane expenditures, the issue resolved by the settlement and dismissal of his first claim. Before submitting an annual license fee payment, each member calculates the amount owing on the revised Statement. If he selects the Keller deduction, he writes a check for the lower amount that excludes a payment for SBAND's non-germane expenditures. If he does not choose the Keller deduction, he "opts in" to subsidizing non-germane expenses by the affirmative act of writing a check for the greater amount. Thus, the opt-out issue debated but not decided in *Knox* is irrelevant to whether SBAND's

revised license fee procedures comply with the mandates of *Keller* and *Hudson*.

The judgment of the district court is affirmed.

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

Arnold Fleck, Plaintiff, Jack McDonald, 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.	**ORDER OF DISMISSAL OF CLAIM ONE; ORDER FINDING AS MOOT MOTION FOR PRELIMINARY INJUNCTION** (Filed Nov. 24, 2015) Case No: 1:15-cv-136

Before the Court is a "Joint Stipulation of Partial Case Resolution," filed on November 20, 2015. *See* Docket No. 42. The Court **ADOPTS** the stipulation, as it relates to the Plaintiff's substantive claims, in its entirety (Docket No. 42) and **ORDERS** that the Plaintiff's first claim regarding a lack of minimum safeguards required under *Keller v. State Bar of California,* 496 U.S. 1 (1990), be dismissed pursuant to Rule 41(a)(1)(a)(ii) of the Federal Rules of Civil Procedure, without prejudice and without costs or disbursements

to either party. Accordingly, the Plaintiff's "Motion for Preliminary Injunction" (Docket No. 3) is **DENIED** as **MOOT**.

IT IS SO ORDERED.

Dated this 24th day of November, 2015.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

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

Arnold Fleck, Plaintiff, vs. 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.	Case No. 1:15-CV-13 **ORDER GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT; ORDER DENYING PLAINTIFFS MOTION FOR SUMMARY JUDGMENT** (Filed Jan. 28, 2016)

The Plaintiff, Arnold Fleck, is an attorney and member of the integrated State Bar Association of North Dakota ("SBAND"). The Defendants are 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; and Tony Weiler, Executive Director of the State Bar Association of North Dakota ("SBAND Defendants"). All parties agree there are no genuine issues of material fact in dispute. The parties request the Court, through

their pending cross-motions for summary judgment, rule upon the following issues as a matter of law:

(1) Whether the Plaintiff may constitutionally be required to be a member of, and pay dues to, SBAND in order to practice law in North Dakota; and

(2) Whether SBAND's procedures, which permit the Plaintiff to "opt-out" of funding activities which are not germane to the compelling interests of regulating attorneys and improving the quality of legal services available to the citizens of North Dakota, provide the Plaintiff with minimum constitutionally required safeguards.

I. BACKGROUND

SBAND is a professional association of members of the legal profession licensed to practice law in the State of North Dakota and attorneys who, by virtue of holding judicial or other office, are exempt from such licensing. N.D.C.C. § 27-12-02. SBAND was created by statute, and is governed by a Board of Governors elected from its membership. SBAND is an integrated bar association meaning membership and payment of dues are mandatory in order to practice law in the State of North Dakota. The objectives of SBAND are to improve professional competence, promote the administration of justice, uphold the honor of the profession of law, and encourage cordial relations among members of the State Bar. *See* Docket No. 26-1.

SBAND sets annual bar dues for its members. By statute, $75 of each annual license is paid to SBAND to fund the lawyer discipline system, with 80% of the remainder of each annual license being paid to SBAND "for the purpose of administering and operating the association." N.D.C.C. § 27-12-04. In part, SBAND investigates complaints against attorneys and facilitates attorney discipline, promotes law-related education and ethics, facilitates and administers a volunteer lawyers program and lawyer assistance program, administers a client protection fund, provides advisory services to government officials on various legal subjects, monitors and keeps members of the bar updated on the status of various legislative measures, and provides information to the legislature on matters affecting regulation of the legal profession and matters affecting the quality of legal services available to the people of the State of North Dakota. *See* Docket No. 50, p. 2.

SBAND also engages in certain "non-chargeable" activities, 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 v. State Bar of California*, 496 U.S. 1, 14 (1990); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986); *See* Docket No. 42-2. Some portion of the dues are spent on political or ideological activities, and SBAND is constitutionally compelled to reimburse that spending to bar members who so request. SBAND conducts a variety of activities that include

lobbying on bills pending before the Legislative Assembly of North Dakota. *See* Docket No. 25, pp. 3-4.

In this case, SBAND expended member dues on certain challenged "non-chargeable" activities, namely opposing North Dakota Initiated Statutory Measure No. 6 ("Measure 6"). *See* Docket No. 42-2, p. 3. Fleck strongly supported Measure 6, which appeared on the North Dakota ballot on November 4, 2014. 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." Fleck contributed $1,000 to a committee in support of Measure 6, and he also he [sic] participated in the campaign – appearing on television and radio to debate the merits of the measure. *See* Docket No. 4-1, p. 2.

The record reveals that a few weeks before the election Fleck discovered – through a third party – that SBAND staunchly opposed Measure 6 and threw its weight behind the opposition, expending member dues in the process. *See* Docket No. 4-1, p. 3. SBAND contributed $50,000 in compelled member dues to "Keeping Kids First," a committee that opposed Measure 6. *See* Docket Nos. 4-2 and 42-2. Ultimately, the "Keeping Kids First" committee returned some of these funds, and SBAND's final contribution totaled $46,525.85. *See* Docket No. 20, p. 8. 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. *See* Docket No. 1, p. 9; Docket No. 20, p. 9.

On February 3, 2015, Arnold Fleck filed a complaint in federal court for declaratory and injunctive relief, alleging three claims for relief against the Defendants: (1) lack of minimum safeguards required under *Keller v. State Bar of California*, 496 U.S. 1 (1990); (2) violation of the right to affirmatively consent to "non-chargeable" expenditures; and (3) the unconstitutionality of a mandatory bar association. *See* Docket No. 1. On February 3, 2015, Fleck filed a "Motion for Preliminary Injunction" with respect to his first and second claims for relief. *See* Docket No. 3. On May 14, 2015, the Court ordered the parties into an early settlement conference under the supervision of Magistrate Judge Charles Miller. On May 27, 2015, the parties became involved in settlement discussions as ordered and agreed to negotiate a resolution of the case. All deadlines in the case were then stayed.

Pursuant to a "Joint Stipulation of Partial Case Resolution and Briefing Schedule Regarding Dispositive Motions," dated and filed November 20, 2015 (Docket No. 42), the parties agreed SBAND would adopt revised policies (Docket Nos. 42-1 through 42-3); that such adoption would fully and completely resolve the Plaintiff's first claim for relief described above; that the Plaintiff would withdraw his "Motion for Preliminary Injunction," and the parties agreed to settle all of the Plaintiff's claims for the recovery of past, present, and future attorney fees and costs in this case. A briefing schedule was agreed upon relative to the

pending cross-motions for summary judgment as to the Plaintiff's second and third claims. Thereafter, this Court adopted the Joint Stipulation and dismissed the Plaintiff's first claim for relief pursuant to the "Order of Dismissal of Claim One; Order Finding as Moot Motion for Preliminary Injunction" filed on November 24, 2015, (Docket No. 46).

SBAND's new procedures[1] now provide members with the ability to "opt-out" of payment of their pro-rata share of "non-chargeable" expenditures estimated for the upcoming fiscal year, and based on the prior years audited financial statements. Fleck concedes SBAND's newly adopted procedures are in compliance with the minimum safeguards established under *Keller* and *Hudson*, and that such new procedures resolve the first claim for relief in this case. With respect to the remaining two counts, Fleck asserts Supreme Court precedent is no longer viable and should be overturned as such precedence is allegedly irreconcilable with the United States Supreme Court's subsequent decision in *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012). Specifically, Fleck asserts the "opt-out" procedure is not adequate to protect his First Amendment rights, and instead asserts that bar members must be allowed to "opt-in" in order to fund "non-chargeable" expenditures.

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[1] SBAND Board of Governors adopted the revised policies on September 18, 2015. (Second Weiler Aff. At ¶ 5 and Exhibit Y.) The new "Keller Policy" is posted on the SBAND website.

II. STANDARD OF REVIEW

It is well-established in the Eighth Circuit that summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates no genuine issues of material fact exist and, therefore, the moving party is entitled to judgment as a matter of law. *Davison v. City of Minneapolis, Minn.*, 490 F.3d 648, 654 (8th Cir. 2007); *See* Fed. R. Civ. P. 56(c). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. *Id.*

The Court must inquire whether the evidence presents sufficient disagreement to require the submission of the case to a jury or if it is so one-sided that one party must prevail as a matter of law. *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 832 (8th Cir. 2005). The moving party first has the burden of demonstrating an absence of genuine issues of material fact. *Simpson v. Des Moines Water Works*, 425 F.3d 538, 541 (8th Cir. 2005). The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In the present case, the record reveals that all parties agree there are no genuine issues of material fact

in dispute, and the remaining legal claims are issues for this Court to resolve.

III. LEGAL DISCUSSION

A. CONSTITUTIONALITY OF NORTH DAKOTA'S INTEGRATED BAR AND COMPULSORY DUES

The Plaintiff, Arnold Fleck, concedes his "claim challenging the constitutionality of conditioning the practice of law upon SBAND membership and payment of SBAND dues is presently foreclosed by" the United States Supreme Court decisions in *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990) and *Lathrop v. Donohue*, 367 U.S. 820 (1961). The Supreme Court in *Lathrop* upheld Wisconsin's integrated state bar on the basis that (1) the only "compelled association" was the payment of dues, which was insufficient on its own to comprise a constitutional violation, and (2) the purpose of integrating the bar was to "promote high standards of practice and the economical and speedy enforcement of legal rights." 367 U.S. at 827-28. The Supreme Court in *Keller* reaffirmed this point decades later. *Keller* clearly clarified that "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." 496 U.S. at 4. There is no question under *Keller* and *Lathrop* that integrated bar associations are justified by a state's interest "in regulating the legal profession and improving the quality of legal services." 496 U.S. at 13. Thus, the State of North Dakota may constitutionally condition the right

of its attorneys to practice law upon the payment of membership dues to an integrated bar.

Although Fleck has conceded his third claim for relief is foreclosed by Supreme Court precedent, he asserts this long-standing precedent should be overturned by the Supreme Court on a future appeal on the basis that *Keller* and *Lathrop* are irreconcilable with basic First Amendment principles and subsequent decisions and, in particular, the United States Supreme Court decision in *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012). As Fleck has conceded his legal arguments are contrary to United States Supreme Court precedent directly on point, the Court will grant summary judgment in favor of the Defendants on the third claim for relief.

B. SBAND'S OPT-OUT PROCEDURE IS CONSTITUTIONAL

For the same reason Fleck's challenge to the constitutionality of SBAND's integrated bar is foreclosed by United States Supreme Court precedent, the challenge to SBAND's "opt-out" procedure is also foreclosed by similar precedent. The United States Supreme Court specifically stated in the context of an integrated bar in *Keller* that the "opt-out" procedures established under *Chicago Teachers Union, Local No. 1, v. Hudson*, 475 U.S. 272 (1986) satisfied constitutional requirements. *See Keller*, 496 U.S. at 16 ("We believe an integrated

bar could certainly meet its *Abood* obligation[2] by adopting the sort of procedures described in *Hudson*." (Footnote added)).

As a result of this lawsuit, SBAND has now established a new procedure called the "Keller Policy" by which members choose whether to allow their bar dues to be used for "non-chargeable" activities, i.e., political or ideological activities. *See* Docket No. 42-3. The new procedures employed by SBAND are based on the policies and procedures for labor unions that the Supreme Court approved in *Hudson.* In *Hudson*, the Supreme Court required a labor union's agency fees to include "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending. *Id.* at 310.

SBAND provides its members with annual notice of the fee, a description of how it is calculated, and the ability to receive a deduction for the portion of the dues

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[2] In *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) the United States Supreme Court concluded although the Constitution of the United States of America did not prohibit a union from spending funds for the expression of political views, or toward the advancement of other ideological causes not germane to its duties as collective bargaining representatives, the Constitution did require that such expenditures be financed from charges, dues, or assessments paid by employees who did not object to advancing those ideas and who were not coerced into doing so against their will by the threat of loss of governmental employment. *Id.* at 234-36.

used for "non-chargeable" purposes. A neutral mediator (Karen Klein or her designee) hears timely challenges to that amount. The new procedures are as follows:

SBAND KELLER POLICY

1. The State Bar Association of North Dakota ("SBAND") may engage in and fund any activity that is reasonably intended for the purposes of the association which are set forth in Article 2 of the Constitution of SBAND, permitted by the by-laws of SBAND, or as otherwise statutorily authorized. SBAND may not use the compulsory dues of any member who objects pursuant to paragraph 3 of this policy for activities that are not germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990).

   Expenditures that are not germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990) may be funded only with user fees or other sources of revenue, or those portions of member compulsory dues for which no objection has been made pursuant to paragraph 3 unless any such objection has been determined against the objecting member by a neutral mediator.

2. Prior to the beginning of each fiscal year, SBAND shall publish written notice of the activities that can be supported by compulsory dues ("Chargeable") and the activities that cannot be supported by compulsory dues ("nonchargeable"). The notice shall estimate

the cost of each activity, including all appropriate indirect expense, and the amount of dues to be devoted to each activity. The notice shall set forth each member's pro rata portion, according to class of membership, of the dues to be devoted to activities that cannot be supported by compulsory dues without such member's consent. The notice shall be sent to every member of SBAND together with the annual dues statement. A member of SBAND may deduct the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues without such member's consent.

3. SBAND shall provide periodic notice to its membership of any expenditures that deviate from tis [sic] pre-collection notice. SBAND shall also provide notice of any position it adopts regarding legislative proposals and initiated and referred measures within two weeks of SBAND's vote to adopt such positions. After being emailed to members of SBAND, such notices will be readily accessible at www.sband.org.

4. A member of SBAND who contends SBAND incorrectly set the amount of dues which can be withheld must deliver to SBAND a written objection. Any such demand shall be delivered to the Executive Director of SBAND within 30 days of receipt of the member's dues statement or any additional notice, and if not so submitted any such claim shall be considered time barred. SBAND's Board of Governors will address each objection, and if the member is not satisfied with the Board's decision, the

member may demand binding dispute resolution which shall be conducted by Mediator Karen Klein, or someone she so designates. The objecting SBAND member may object to mediator Klein or her designee in which case the parties shall mutually agree upon a mediator.

5. If one or more timely demands for binding dispute resolution are delivered, the stat [sic] bar shall promptly submit the matter to binding dispute resolution before Mediator Karen Klein or someone she so designates. The objecting SBAND member may object to mediator Klein or her designee in which case the parties shall mutually agree upon a mediator. All such demands for binding dispute resolution shall be consolidated for binding dispute resolution. No later than 7 calendar days before binding dispute resolution, any member, having given written objection pursuant to paragraph 4 and requesting binding dispute resolution, may file with the mediator a statement specifying with reasonable particularity each activity he or she believes should not be supported by compulsory dues under this paragraph and the reasons for the objection. SBAND will have the burden to show that the disputed activities are germane under *Keller v. State Bar of California*, 496 U.S. 1 (1990). The costs of the binding dispute resolution shall be paid by SBAND.

6. In the event the decision of the mediator results in an increased pro rata deduction of dues for members who have delivered timely

> demands for binding mediation for a fiscal year, the state bar shall provide such increased pro rata deduction to all members who did not consent to funding nonchargeable activities, as well as members first admitted to the state bar during that fiscal year and after the date of the mediator's decision.

See Docket No. 42-3

The United States Supreme Court has validated this prior-year calculation process in the union dues context. *See Hudson*, 475 U.S. at 307, n. 18. The Court concludes that the new "Keller Policy" provides procedural safeguards which comport with long-established precedent. Further, the Supreme Court specifically stated in the context of an integrated bar in *Keller* that the "opt-out" procedures established under *Hudson* satisfied constitutional requirements. *See Keller*, 496 U.S. at 16.

The Plaintiff's reliance on *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277 (2012) for the proposition that the "opt-out" procedures are unconstitutional, and that *Keller* and *Hudson* should be overturned, is misplaced. The Supreme Court in *Knox* was careful to distinguish the "opt-out" procedures accepted in *Hudson*, in the context of annual dues assessments, from procedures which are required in the context of mid-year special assessments and dues increases. The special assessment at issue in *Knox* was significantly different in nature from typical union annual dues assessments. Specifically, the temporary mid-year special assessment in *Knox* was to be utilized 100% to fund a "Political

Fight-Back Fund," to achieve the union's political objectives in upcoming elections. In this context, the Supreme Court determined the union should have sent out a new *Hudson* notice regarding the special assessment (in addition to the annual dues *Hudson* notice), noting it made no sense to apply the same chargeable versus non-chargeable expense allocations utilized for the annual dues assessment to the special assessment.

In essence, Fleck is requesting that long-standing precedent upholding the validity of "opt-out" procedures as established by the Supreme Court in *Hudson* (1986), and directly applied to integrated bars in *Keller* (1990), be overruled. This Court is unwilling to do that.

In *Knox*, the Supreme Court did not determine the "opt-out" procedure to be unconstitutional in relation to annual dues assessments. State bar associations across the country have modified their licensing procedures since *Keller* was decided in 1990, to come into compliance with the *Hudson/Keller* requirements, including the "opt-out" procedure at issue in this lawsuit. Similarly, public unions across the nation have modified their procedures related to compulsory dues to come into compliance with the "opt-out" procedures of *Hudson*. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977) (upholding the constitutional validity of compelling employees to support collective bargaining representative and rejecting the notion the only funds from non-union members that a union constitutionally could use for political or ideological causes were those funds that the non-union member affirmatively consented to pay.); *Mitchell v. Los Angeles*

Unified School District, 963 F.2d 258, 260-63 (9th Cir. 1992) (discussing a long line of Supreme Court cases supporting the utilization of "opt-out" procedures, citing *Abood* in rejecting a claim that an "opt-in" procedure is constitutionally required, and holding that "opt-out" procedures followed by the union to give dissenting non-union members an opportunity to object to full agency fee assured protection of non-members' First Amendment rights). This Court is unaware of any federal or state court which has interpreted *Knox* to hold that the "opt-out" procedures established in *Hudson* are unconstitutional, or that the "opt-in" procedures advocated by the Plaintiff are constitutionally required. Further, neither party has cited any case that has reached such a holding to date.

In summary, the Court has not been presented with any facts or case law which supports an inference that SBAND's new procedural safeguards infringe on the Plaintiff's constitutional rights to free association and speech. The Court holds, as a matter law, that SBAND's "opt-out" procedure is reasonable and constitutionally permissible under current United States Supreme Court precedent. The Court grants summary judgment in favor of the Defendants on the second claim for relief.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' briefs, and relevant case law. For the reasons set forth above, the Plaintiff's motion for

summary judgment (Docket No. 43) is **DENIED** and the Defendant's cross-motion for summary judgment (Docket No. 48) is **GRANTED**. Accordingly, all of the Plaintiff's remaining claims are dismissed with prejudice and judgment is entered in favor of the Defendants.

IT IS SO ORDERED

Dated this 28th day of January, 2016.

/s/ Daniel L. Hovland
Daniel L. Hovland,
District Judge
United States District Court

United States District Court
District of North Dakota

Arnold Fleck,

Plaintiff,

vs.

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.

JUDGMENT IN A CIVIL CASE

(Filed Jan. 28, 2016)

Case No. 1:15-cv-13

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☑ **Decision on Motion.** This action came before the Court on motion. The issues have been considered and a decision rendered.

☐ **Stipulation.** This action came before the court on motion of the parties. The issues have been resolved.

☐ **Dismissal.** This action was voluntarily dismissed by Plaintiff pursuant to Fed. R. Civ. P. 41(a)(1)(ii).

IT IS ORDERED AND ADJUDGED:

The Plaintiff's motion for summary judgment (Docket No. 43) is DENIED and the Defendant's cross-motion for summary judgment (Docket No. 48) is GRANTED. Accordingly, all of the Plaintiff's remaining claims are dismissed with prejudice and judgment is entered in favor of the Defendants.

Date: January 28, 2016

ROBERT J. ANSLEY, CLERK OF COURT

by: */s/ Jeanene Thompson, Deputy Clerk*

RELEVANT NORTH DAKOTA STATUTES

N.D. Cent. Code § 27-11-01

Practicing law and serving on courts of record without certificate of admission and without payment of annual license fee prohibited – Penalty. Except as otherwise provided by state law or supreme court rule, a person may not practice law, act as an attorney or counselor at law in this state, or commence, conduct, or defend in any court of record of this state, any action or proceeding in which the person is not a party concerned, nor may a person be qualified to serve on a court of record unless that person has: 1. Secured from the supreme court a certificate of admission to the bar of this state; and 2. Secured an annual license therefor from the state board of law examiners. Any person who violates this section is guilty of a class A misdemeanor.

N.D. Cent. Code § 27-11-22

Annual licenses to practice law and to serve on certain courts – Requirement – Issuance – Fees. A person who has an unrevoked certificate of admission to the bar of this state and who desires to engage in the practice of law, or who is to serve as a judge of a court of record, must secure an annual license from the state board of law examiners on or before January first of each year. The secretary-treasurer of the board shall issue the license upon compliance with the rules adopted or approved by the supreme court to assure

the professional competence of attorneys, and upon payment of a fee established by the state bar association at its annual meeting, by a majority vote of its members in attendance at the meeting, not to exceed four hundred dollars. The license is valid for the calendar year for which it is issued. Issuance of an annual license to practice law may not be conditioned upon payment of any surcharge, assessment, or fee in excess of the maximum fee established by this section. This section does not prohibit imposition of a reasonable fee for filing and processing reports of compliance with continuing education requirements.

N.D. Cent. Code § 27-11-23

Fees from annual licenses to be deposited in state bar fund. The secretary-treasurer of the state board of law examiners shall deposit and disburse all fees and moneys collected by the board in accordance with section 54-44-12.

N.D. Cent. Code § 27-11-24

Expenditure of state bar fund. Moneys in the state bar fund must be used to pay:

1. The bar association of the state of North Dakota the sum required to be paid under section 27-12-04;

2. The compensation and expenses allowed by law to each member and to the secretary-treasurer of the state board of law examiners;

3. The expenses incurred by the state board of law examiners in conducting examinations of applicants for admission to the bar of this state and expenses of the board or a grievance committee of the supreme court in investigating charges warranting the suspension or disbarment of members of the bar, or in prosecutions brought and conducted before the supreme court for the discipline of such members;

4. The expenses incurred by the bar association of the state of North Dakota in conducting investigations and prosecutions of proceedings instituted for the purpose of protecting the public and the bar of North Dakota against unauthorized practice by corporations, limited liability companies, or persons not licensed to practice law; and

5. The necessary expenses of conducting and supplying the offices of the state board of law examiners.

N.D. Cent. Code § 27-12-02

Membership of state bar association. The membership of the state bar association of North Dakota consists of every person:

1. Who has secured an annual license to practice law in this state from the state board of law examiners in accordance with section 27-11-22; or

2. Who has an unrevoked certificate of admission to the bar of this state and who has paid an annual membership fee to the state bar association. The annual fee must be established by the state bar association at its annual meeting, by a majority vote of its members in attendance at the meeting, not to exceed eighty percent of the maximum fee for an annual license to practice law in this state as prescribed in section 27-11-22.

N.D. Cent. Code § 27-12-04

Moneys payable from state bar fund to state bar association. The state bar association of North Dakota, out of the state bar fund, must receive for operation of the lawyer discipline system seventy-five dollars of each license fee beginning January 1, 1999. Eighty percent of the remaining amount of the annual license fees paid by licensed members must be paid to the state bar association for the purpose of administering and operating the association. These sums must be paid quarterly to the association by the state board of law examiners upon vouchers drawn in accordance with section 54-44-12.

U.S. CONST., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST., amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

Arnold Fleck Plaintiff, v. Jack McDonald, 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.	Civil No. 1:15-CV-00013 **JOINT STIPULATION OF PARTIAL CASE RESOLUTION AND BRIEFING SCHEDULE REGARDING DISPOSITIVE MOTIONS** (Filed Nov. 20, 2015)

*** *** ***

COMES NOW Plaintiff, Arnold Fleck, and Defendants Jack McDonald, Aubrey Fiebelkorn-Zuger, Tony Weiler (collectively "SBAND Defendants"), and Penny Miller, who stipulate as follows:

1. 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 v. State Bar of California, 496 U.S. 1 (1990); (2) violation of the

right to affirmatively consent to non-chargeable expenditures; and (3) the unconstitutionality of a mandatory bar association. Doc. 1.

2. On February 3, 2015, Plaintiff filed a Motion for Preliminary Injunction with respect to his first and second claims for relief.

3. On May 14, 2015, this Court ordered the parties to conduct settlement discussions under the supervision of a Magistrate Judge.

4. On May 27, 2015, the parties conducted settlement discussions as ordered and agreed to negotiate a resolution of the case. All deadlines in the case were stayed.

5. Between August 7 and September 18, 2015, the parties exchanged documents in an attempt to resolve the dispute.

6. On September 24, 2015, SBAND Defendants submitted final drafts of the revised policies of the State Bar Association of North Dakota to Plaintiff. A copy of the revised policies is incorporated herein as Exhibits 1-3.

7. SBAND Defendants agree to adopt the revised policies reflected in Exhibits 1-3 and to adhere to them until such time as the policies may hereinafter be revised further by the SBAND, consistent with applicable law.

8. Accordingly, Plaintiff and SBAND Defendants agree that adoption of and adherence to the revised

policies reflected in this stipulation will resolve fully and completely the first claim for relief requested in Plaintiff's Complaint, see Doc. 1 ¶¶ 71-76.

9. In light of SBAND Defendants' agreement in ¶ 7, above, Plaintiff hereby withdraws his Motion for Preliminary Injunction.

10. Although Plaintiff agrees that the policies embodied in Exhibits 1-3 resolve his first claim, Plaintiff asserts that he lacks sufficient knowledge to endorse or dispute the accounting set forth in Exhibit 2 (Notice Concerning State Bar Dues Reduction and Mediation Process) or to state that it accurately reflects all non-chargeable expenditures made by SBAND. Plaintiff however agrees he does not intend to challenge and/or dispute the accounting set forth in Exhibit 2.

11. Plaintiff and SBAND have resolved plaintiffs claim for attorneys' fees and costs in this case and agree that plaintiff's request for attorneys' fees and costs has been fully and finally resolved, including any future attorneys' fees and costs to be incurred by the plaintiff.

12. Plaintiff and SBAND Defendants have conferred and agreed on a proposed schedule for dispositive motions in this case with respect to the two claims which Plaintiff asserts remain outstanding: (1) violation of the alleged right to affirmatively consent to non-chargeable expenditures; and (2) the alleged unconstitutionality of a mandatory bar association.

13. SBAND Defendants assert there are no outstanding issues remaining, as the above issues asserted by Plaintiff are already disposed of in Defendants' favor based on existing law.

14. SBAND Defendants also claim Plaintiff has asserted constitutionality of North Dakota law claims against the wrong party or parties.

15. Defendant Miller asserts that she is not the proper party to address the issues identified in paragraph 12 or to defend the constitutionality of North Dakota law.

16. Plaintiff's motion for summary judgment shall be due on or before **November 20, 2015**.

17. Defendants' cross-motion for summary judgment and opposition to Plaintiff's motion for summary judgment (including any opposition under Federal Rule of Civil Procedure 56(d)) shall be due on or before **December 23, 2015**.

18. Plaintiff's reply in support of their motion for summary judgment and opposition to SBAND Defendants' cross-motion for summary judgment (including any opposition under Federal Rule of Civil Procedure 56(d)) shall be due 45 days after the filing of Defendants' cross-motion for summary judgment.

19. Defendants' reply in support of their cross-motion for summary judgment shall be due 30 days after the filing of Plaintiff's reply in support of his motion for summary judgment and opposition to Defendants' cross-motion for summary judgment.

20. The parties respectfully request that the Court adopt this stipulation and proposed schedule.

Dated this 20th day of November, 2015.

SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE

By: */s/ Jared Blanchard*
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Dated this 20th day of November, 2015.

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Dated this 20th day of November, 2015.

STATE OF NORTH DAKOTA WAYNE
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ATTORNEY GENERAL

By: */s/ Douglas A. Bahr*
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[Certificate of Service Omitted]

PLEASE SEE INSTRUCTIONS ON REVERSE SIDE

PLEASE RETAIN A COPY FOR YOUR RECORDS

04102

NORTH DAKOTA STATE BOARD OF LAW EXAMINERS
JUDICIAL WING 1ST FL
600 E. BOULEVARD AVE
BISMARCK, ND 58505-0530 • 701-328-4201

STATEMENT OF LICENSE FEES DUE

(Return complete statement with check. No credit cards accepted.)

Section 27-11-22, NDCC, provides every person engaged in the practice of law or who serves as a judge of a court of record shall secure an annual license **ON OR BEFORE JANUARY 1 OF EACH CALENDAR YEAR.**

ANNUAL LICENSE FEE FOR 2018 $380.00 – five or more years from the date of admission.

PLEASE NOTIFY THIS OFFICE OF ANY CHANGES IN THE ABOVE INFORMATION

REQUIRED ANNUAL CERTIFICATE OF COMPLIANCE TO CLERK OF THE SUPREME COURT

I certify that I have read rule 1.15, N.D. Rules of Professional Conduct and that:

A. TRUST ACCOUNT

_____I am in compliance with Rule 1.15. My trust account is:
Account Number _____
Financial Institution _____

OR

_____I am exempt from Rule 1.15 because:
_____I do not actively practice law.
_____I am admitted in, or associated with a law firm located in another jurisdiction where a trust account is maintained.
_____I do not hold client funds because:
_____I am a full-time judge, corporate counsel, or government attorney.
_____I **never** hold property of clients or third persons.
_____Other: Please explain

B. MALPRACTICE INSURANCE

_____I represent private clients
_____I am currently covered by professional liability insurance and intend to maintain such insurance during the next 12 months.
_____I am **NOT** covered by professional liability insurance.
_____Other: Please explain
_____I do not represent private clients.

SIGNATURE: _____
LAW FIRM: _____

STATE BAR ASSOCIATION OF NORTH DAKOTA ANNUAL SBAND SECTION ENROLLMENT FORM

- ☐ Administrative & Government Lawyers – $10
- ☐ Business & Corporations – $10
- ☐ Criminal Defense – $10
- ☐ Family Law – $25
- ☐ Legal Economics – $10
- ☐ Real Property, Probate & Trust Law – $25
- ☐ Taxation – $10
- ☐ Women Lawyers – $10
- ☐ Elder Law – $10
- ☐ Indian Law – $10

Subtotal $ _____

ND BAR FOUNDATION

- ☐ Sustaining Member (Annual) $ 25.00
- ☐ Donor ($500 total or $50 Annual) $ 50.00
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- ☐ Silver Patron ($2,500 total or $250 Annual) $ 250.00
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☐ _____ Hours ($85/hour) $ _____

Subtotal $ _____

OPTIONAL: Keller deduction relating to nonchargeable activities. Members wanting to take this deduction may deduct $1.45 if paying $380; $1.33 if paying $350; and $1.22 if paying $325. (See Insert.) ($ _____)

TOTAL SECTION AND FOUNDATION FEES REMITTED **TOTAL** $ _____

MAKE ALL CHECKS PAYABLE TO: STATE BOARD OF LAW EXAMINERS

600 E. BOULEVARD AVE, BISMARCK, ND 58505-0530

INSTRUCTIONS FOR COMPLETING LICENSE RENEWAL FORM

The following information ***MUST BE COMPLETED*** on the Statement of License Fees/Certificate of Compliance.

1. **Verify your address, phone, fax, and e-mail information is correct.** Changes can be handwritten directly on the statement.

2. **Lower left portion of the statement – *Mandatory*:**

   ☐ Answer section A regarding Trust Account Information

   ☐ Answer section B regarding Malpractice Insurance

   ☐ Sign the certificate and identify your law firm name, if applicable.

3. **Lower right portion of the statement – *Optional*:**

   ☐ If you choose to enroll in any section of the State Bar Association, please send one check or money order which includes your license fee and the additional section fees.

   ☐ If you choose the optional Keller deduction, please deduct that amount from the total section and foundation fees to be remitted. See enclosed insert explaining Keller deduction policy.

4. Return the ***complete*** Statement (not just the top half) with your check or money order. The statement must accompany your check.

No credit card payments are accepted.

Please note: Licenses expire on December 31. You will not be licensed for the following calendar year without the completed license statement and fees on file in the Board office on December 31.

Failure to properly complete and return the license statement and provide the appropriate fees will result in a delay of your licensure.

Thank you.