No. 16-1564

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARNOLD FLECK,

Appellant,

v.

JOE WETCH, et al.,

Appellees,

BRIEF OF APPELLEES 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, IN THEIR OFFICIAL CAPACITIES

On appeal from the U.S. District Court for the District of North Dakota

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RESPONSE TO APPELLANT'S SUMMARY OF THE CASE

The District Court properly dismissed Appellants' claims based upon United States Supreme Court precedent directly on point. Appellant's arguments for overturning United States Supreme Court precedent must be denied by this Court.

Alternatively, should this Court consider Appellant's arguments for overturning established precedent, the District Court's decision should none-the-less be affirmed. Appellant's arguments are based upon a strained interpretation of *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012), a factually distinguishable case. Neither the United States Supreme Court, nor any other court for that matter, has determined mandatory membership in a bar association as a requirement for practicing law is unconstitutional. No court has determined the payment of compulsory dues to a bar association is unconstitutional, provided minimum procedural safeguards, such as the "opt-out" procedures established in *Chicago Teachers Union, Local No. 1, v. Hudson*, 475 U.S. 272 (1986) and implemented by SBAND, are in place. Further, no court has determined the "opt-in" procedures proffered by Appellant are required in relation to annual dues collected by either a bar association or public union. Finally, no bar association in the United States has implemented an opt-in procedure as proffered by Appellant.

SBAND Appellees request 20 minutes of oral argument time per side.

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STATEMENT OF ISSUES – APPOSITE CASES

1. Whether the First and Fourteenth Amendments require the State Bar Association of North Dakota to obtain member affirmative consent to utilize mandatory dues for non-germane expenditures.

- *Keller v. State Bar of California*, 496 U.S. 1 (1990)
- *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292 (1986)
- *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016)(per curiam)

2. Whether conditioning the practice of law upon membership in and funding of the State Bar Association of North Dakota violates the First and Fourteenth Amendments.

- *Keller v. State Bar of Cal*., 496 U.S. 1 (1990)
- *Lathrop v. Donohue*, 367 U.S. 820 (1961)

STATEMENT OF THE CASE

SBAND is a professional association of members of the legal profession licensed to practice law in the State of North Dakota and of attorneys who, by virtue of holding judicial or other office, are exempt from such licensing. N.D.C.C. § 27-12-02. The SBAND was created by statute, and is governed by a Board of Governors ("BOG") elected from its membership. The objectives of the 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. (JA.70 at Art. 2.) By statute, $75 of each annual license is paid to the 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, the 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. (JA.363 at ¶ 4.)

On February 3, 2015, Appellant 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, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990); (2) violation of the right to affirmatively consent to non-chargeable expenditures; and (3) the unconstitutionality of a mandatory bar association. (JA.1.) On February 3, 2015, Appellant filed a *Motion for Preliminary Injunction* with respect to his first and second claims for relief.

(Doc. 3.) On May 14, 2015, the District Court ordered the parties to conduct settlement discussions under the supervision of a Magistrate Judge. (Doc. 38.) On May 27, 2015, the parties conducted settlement discussions as ordered and agreed to negotiate a resolution of the case. (Doc. 39, JA.334.) All deadlines in the case were stayed. (Doc. 39, JA.342 at ¶ 4.)

Pursuant to *Joint Stipulation of Partial Case Resolution and Briefing Schedule Regarding Dispositive Motions* dated and filed November 20, 2015 (Doc. 42)("Joint Stipulation"), the parties agreed SBAND would adopt revised policies (JA.347 through JA.355), such adoption would fully and completely resolve Appellant's first claim for relief described above, Appellant would withdraw his *Motion for Preliminary Injunction*, and the parties settled all of Appellant's claims for recovery of past, present and future attorneys fees and costs in this case. A briefing schedule was also agreed upon in relation to the pending cross-motions for summary judgment as to Appellant's second and third claims. The Court adopted the Joint Stipulation and dismissed Appellant's first claim pursuant to *Order of Dismissal of Claim One; Order Finding as Moot Motion for Preliminary Injunction* filed November 24, 2015 (JA.361) and adopted a briefing schedule in relation to the pending cross-motions for summary judgment pursuant to *Order* filed November 23, 2015 (JA.360).

SBAND's new procedures[1] 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. Appellant concedes SBAND's newly adopted procedures are in compliance with the minimum required safeguards established under *Keller* and *Hudson*, and that such new procedures resolve Appellant's first claim for relief in this case. However, Appellant asserts such precedence 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*. Specifically, Appellant asserts the opt-out procedure is not adequate to protect his First Amendment rights, and instead, members must be allowed to opt-in in order to fund non-chargeable expenditures. SBAND Defendants deny Appellant's claims.

RESPONSE TO APPELLANT'S STATEMENT OF THE CASE

At numerous locations throughout Appellant's Brief, including in his Statement of the Case, Appellant misstates the applicable standard established under *Keller v. State Bar of California*, 496 U.S. 1 (1990). In *Keller*, the United States Supreme Court determined expenditures of an integrated bar are chargeable if they are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal services available to the

[1] SBAND Board of Governors adopted the revised policies on September 18, 2015. (JA.363.)

people of the State.'" *Id.* at p. 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843, 81 S.Ct. 1826, 1838, 6 L.Ed.2d 1191 (1961)(plurality opinion))(underlining added). Appellant attempts to narrow the permissible purposes for which mandatory dues may be expended by twisting this language by asserting "SBAND's chargeable expenditures are limited to those germane to a mandatory bar's purpose of improving the quality of legal services through the regulation of attorneys." (*Generally* Appellant's Brief.) As stated in *Keller*, regulation of the legal profession is only one of two separate permissible purposes. The improvement of the quality of legal services available to the people of the State is another permissible purpose for which mandatory dues may be expended without member consent.

SUMMARY OF THE ARGUMENT

Appellant concedes his claim challenging the constitutionality of conditioning the practice of law upon SBAND membership and payment of SBAND dues is presently foreclosed by *Keller* and *Lathrop*, and concedes the Court must therefore affirm the District Court's dismissal of this claim.

Appellant's claim challenging the constitutionality of SBAND's opt-out procedures pertaining to the use of mandatory bar dues for non-germane expenditures is similarly foreclosed by *Keller*, *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and *Friedrichs v. California Teachers*

Association, 136 S.Ct. 1083 (2016)(per curiam). In *Keller*, the Supreme Court determined the payment of compulsory dues to an integrated bar is constitutional provided minimum procedural safeguards, such as the "opt-out" procedures established in *Chicago Teachers Union, Local No. 1, v. Hudson*, 475 U.S. 272 (1986), are in place. Appellant concedes SBAND's current "opt-out" procedures comply with the requirements discussed in *Keller* and *Hudson*.

Appellant next argues the Supreme Court's decision in *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012) evidences the Supreme Court's willingness to overturn *Keller* and *Hudson*. Such an argument is foreclosed, however, by the very recent Supreme Court decision in *Friedrichs*. In *Friedrichs*, the Supreme Court rejected the argument that an "opt-in" (i.e. affirmative consent) versus an "opt-out" procedure was constitutionally required even in the context of the utilization of compelled dues by an agency shop public union for non-germane expenditures.

The District Court's dismissal of Appellant's claims should be affirmed.

ARGUMENT

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

A. Appellant Concedes This Claim Must Be Denied By This Court

Appellant concedes his claim challenging the constitutionality of conditioning the practice of law upon SBAND membership and payment of

SBAND dues is presently foreclosed by *Keller* and *Lathrop*, and concedes the Court must therefore affirm the District Court's dismissal of this claim. (Appellant's Brief at fn. 1, pp. 6, 8, 15, 20.)

Although Appellant concedes this claim is foreclosed by precedent, Appellant asserts such precedent should be overturned by the United States Supreme Court on a future appeal from this Court's decision on the alleged basis *Keller* and *Lathrop* are irreconcilable with basic First Amendment principles and subsequent decisions, and in particular, the United States Supreme Court decision in *Knox*. Specifically, Appellant argues there is no state interest sufficiently compelling to overcome the alleged impingement upon Appellant's First Amendment right to freedom of association and speech. As stated above, as Appellant's arguments are contrary to United States Supreme Court precedent directly on point, this Court should refrain from addressing the merits of Appellant's arguments and affirm the grant of summary judgment in favor of Defendants, consistent with precedent. In the alternative, should this Court decide to consider Appellant's arguments, as discussed below, summary judgment in favor of Defendants was still appropriate as Appellant's arguments are without merit.

B. North Dakota's Mandatory Membership In, And Funding Of, SBAND, Is Not Significantly Broader Than Necessary To Serve The Compelling Interests Of Regulating The Legal Profession And Improving The Quality Of Legal Services Available To Its

Citizens

Appellant challenges the constitutionality of mandatory membership in SBAND[2] and funding of SBAND as a condition to the practice of law in North Dakota under the First Amendment's guarantees of freedom of association and speech. As stated by the Court in *Knox*, "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." *Knox* at 2291.

The United States Supreme Court has previously decided this very issue. In *Lathrop*, the United States Supreme Court upheld Wisconsin's integrated 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." *Lathorp* at 827-28. In *Lathrop*, the United States Supreme Court, in a plurality opinion, established a state may constitutionally require a lawyer to be a member of a mandatory or unified bar to which compulsory dues are paid. *Lathrop v. Donohue*, 367 U.S. at 842-43. The United States Supreme Court reaffirmed this point in *Keller*. *See*

[2] N.D.C.C. § 27-12-02 provides, in relevant part: "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. . . . ."

Keller v. State Bar of Cal., 496 U.S. at 4 ("We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, ..."). "[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13.

The important interests of the State of North Dakota served by SBAND were discussed by the North Dakota Supreme Court in *Menz v. Coyle*, 117 N.W.2d 290 (N.D. 1962), in part, as follows:

> The law creating the North Dakota Bar Association had for its purpose the regulation of the practice of the law in this State, in order to protect the public by eliminating from the practice those persons who are unfit to assume this privilege and those persons lacking proper training and qualifications necessary to perform the services of an attorney in the best interests of the public. In other words, the purpose of the Legislature in creating the State Bar Association was to protect the public interests. The Act creating the State Bar Association is based on the premise that the practice of law is a matter of vital interest to the general public, and that lawyers are engaged in the preservation and the protection of the fundamental liberties and rights of the people and in the administration of justice. Thus attorneys are constantly engaged in carrying out fundamental aims and purposes of any good government, and are a necessary aid to any good government in protecting the rights of its citizens.

Id. at pp. 296-97 (citation omitted). As noted by the North Dakota Supreme Court, the public's interest in maintaining an active bar association is without question. The State of North Dakota has a compelling interest in requiring membership in, and funding of, SBAND.

Appellant's reference to the fact the State of New York does not require

membership in its bar association as an example of how an integrated bar is not necessary for achieving the compelling interests of regulating the legal profession and improving the quality of legal services available to citizens, has no application to SBAND. As stressed by Appellant, New York has one of the largest economies in the world. It also has a vastly greater number of licensed attorneys than does North Dakota. The issue of funding for the services provided by a bar association is obviously dependent upon the number of attorneys financially contributing. North Dakota has a relatively small pool of attorneys from which funding for regulatory, educational, and public protection services may be obtained. Regardless of the economy of a given state, or the number of licensed attorneys therein, there is a certain minimal infrastructure which is required to provide these services. Due to issues of scale, North Dakota requires funding from all of its licensed attorneys in order to perform its role in attorney disciplinary matters, providing legal education and public protection services.

In addition, North Dakota is not required to implement the "least restrictive means" of achieving its compelling interests in regulating the legal profession and improving the quality of legal services available to its citizens, as alluded to by Appellant. Instead, the means utilized "must not be significantly broader than necessary to serve that interest." *Knox* at 2291. As discussed above, considering the economies of scale applicable to North Dakota, the requirement that all

attorneys be members of SBAND, and contribute financially thereto, cannot be said to be "significantly broader than necessary" to achieve those compelling interests.

In relation to Appellant's challenge to the dues paid to SBAND, it should be noted that not all money paid to SBAND by members through annual dues are properly categorized as compelled speech. Annual dues are utilized by SBAND for many purposes, most of which have nothing to do with speech. For example, 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, and monitors and keeps members of the bar updated on the status of various legislative measures. These activities are content neutral and do not espouse positions on political or ideological matters. The portion of member annual dues expended for these purposes should not be subjected to First Amendment scrutiny. Instead, dues utilized for these purposes are more appropriately characterized as payments for services rendered by SBAND.

The allocation of the costs described above to members of the legal profession has long been deemed justifiable and appropriate. *See Lathrop* at 842-42 (plurality opinion) ("We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional

services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity."). The nature of these SBAND expenditures are distinguishable from expenditures of nonmember funds by public unions for collective bargaining purposes, as were at issue in *Knox*. As noted by the *Knox* Court, "[b]ecause a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences, the compulsory fee constitutes a form of compelled speech and association that imposes a significant impingement on First Amendment rights."[3] *Knox* at 2289 (citation and quotation omitted). By comparison, the activities of SBAND discussed above do not have powerful political or civic consequences, and instead are more akin to regulatory activities and the provision of educational and public protection services – all of which is content neutral. As a result, Appellant's claims of violation of his First Amendment rights should be denied to the extent such claims are based upon Appellant's payment of annual dues to SBAND expended for the content neutral purposes described above.

Even as to SBAND's activities involving speech, such may be funded with compulsory dues obtained from members irrespective of whether members are

[3] The Court in *Knox* noted it had tolerated such impingement on First Amendment rights in prior cases, and was not revisiting the issue in *Knox*. *Knox* at 2289.

provided a means to opt-in or opt-out provided such expenditures are germane to the compelling interests of regulating attorneys or improving the quality of legal services available to the citizens of North Dakota (i.e. chargeable expenditures). In other words, Appellant's challenge to SBAND's procedural protections (opt-in versus opt-out) only implicates SBAND activities involving compelled speech which is not germane to the regulation of attorneys or the improvement of the quality of legal services available to the citizens of North Dakota (i.e. non-chargeable expenditures).

II. SBAND'S OPT-OUT PROCEDURE IS CONSTITUTIONAL

A. Appellant concedes SBAND's procedures comply with *Keller* and *Hudson*

For the same reason Appellant's challenge to the constitutionality of SBAND's integrated bar is foreclosed by United States Supreme Court precedent, Appellant's challenge to SBAND's opt-out procedure is also foreclosed by Supreme Court precedent. Specifically, the Supreme Court 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 satisfied constitutional requirements. *See Keller*, 496 U.S. at 16 ("We believe an integrated bar could certainly meets its *Abood* obligation[4] by adopting the sort of procedures described

[4] In *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) the United States Supreme Court concluded although the Constitution

in *Hudson*." (footnote added)). Appellant concedes SBAND's new procedure complies with the minimum requirements of *Hudson/Keller* safeguards[5]. (Doc. 43 at p. 10 ("Although Defendants have revised SBAND's procedures to meet the minimum requirements of the *Hudson/Keller* safeguards . . . ."); Add.5 ("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.") As a result, Appellant's challenge to SBAND's opt-out procedure is also foreclosed and must be denied. *See 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).

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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.

[5] The *Hudson/Keller* safeguards integrated 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.

B. The Supreme Court in *Friedrichs* recently rejected a similar opt-in argument

In addition, the United States Supreme Court very recently rejected the argument an "opt-in" versus an "opt-out" procedure was constitutionally required in the context of an agency shop public union in *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016)(per curiam). In *Friedrichs*, plaintiff school teachers who resigned their union membership challenged the constitutionality of a California law which allows a union to become the exclusive bargaining representative for public school employees in a bargaining unit such as a public school district, and to establish an "agency shop" whereby all employees in the district are required, as a condition of continued employment, to either join the union and pay union dues, or to pay a fair share service fee to the union which is usually in the same amount as the union dues. The California law limits the use of agency fees to activities germane to collective bargaining. Each year, the union sends out a notice listing the amount of the agency fee which is chargeable and non-chargeable, and gives non-members of the union the ability to opt out of paying the non-chargeable portion. The plaintiffs objected to paying the non-chargeable portion of their agency fee each year, and alleged such requirement, as well as the opt-out procedure, violated their rights to free speech and association under the First and Fourteenth Amendment to the United States Constitution. *See*

Friedrichs v. California Teachers Association, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013)(granting union judgment on the pleadings, finding claims to be foreclosed by *Abood* and *Mitchell*). The Ninth Circuit Court of Appeals upheld the district court's dismissal of the claims on the basis they are foreclosed by *Abood* and *Mitchell*. *Friedrichs v. California Teachers Ass'n*, 2014 WL 10076847 (9th Cir. Nov. 18, 2014)(upholding dismissal of claims as foreclosed under *Abood* and *Mitchell*), *affirmed by Friedrichs v. California Teachers Ass'n*, 136 S.Ct. 1083 (2016)(per curiam)).

As the plaintiffs in *Friedrichs* had requested the overruling of *Abood*, twenty-one past presidents of the District of Columbia Bar filed a brief in support of the union's position, noting the impact overruling *Abood* would potentially have upon integrated bars. Brief of 21 Past Presidents of the D.C. Bar as Amici Curiae Supporting Respondents, *Friedrichs v. California Teachers Ass'n*, 2015 WL 7252639 (U.S. Nov. 12, 2015). Specifically, they noted *Abood* is at the heart of a well-developed body of law which should not be overruled, that the closely related body of law under *Keller* supports the constitutionality of mandatory bar dues, and that the principles of stare decisis counsel against overruling *Abood*. The United States Supreme Court, in an equally divided decision, affirmed the decision rejecting the plaintiffs' arguments. *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016)(per curiam)

C. Appellant's reliance on *Knox* is misplaced

Further, Appellant's reliance upon the United States Supreme Court's decision in *Knox v. Service Employees International Union, Local 1000*, 132 S.Ct. 2277 (2012), for the proposition Supreme Court precedent established in the *Hudson* and *Keller* line of cases finding opt-out procedures constitutional should be overturned, is misplaced. First, as discussed, the United States Supreme Court, subsequent to the *Knox* decision, rejected the argument an "opt-in" procedure is constitutionally required in *Friedrichs*. Second, in *Knox*, the Court expressly distinguished the procedure accepted in *Hudson* from the procedure rejected in *Knox*. As noted by the Supreme Court in *Knox*:

> *Hudson* concerned a union's regular annual fees. The present case, by contrast, concerns the First Amendment requirements applicable to a special assessment or dues increase that is levied to meet expenses that were not disclosed when the amount of the regular assessment was set.

Knox at 2285.

> The procedure accepted in *Hudson* is designed for use when a union sends out its regular annual dues notices. The procedure is predicated on the assumption that a union's allocation of funds for chargeable and nonchargeable purposes is not likely to vary greatly from one year to the next. No such assumption is reasonable, however, when a union levies a special assessment or raises dues as a result of events that were not anticipated or disclosed at the time when a yearly *Hudson* notice was sent. Accordingly, use of figures based on an audit of the union's operations during the entire previous year makes no sense.

Id. at 2293 (footnote omitted).

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 materially different in its 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 public union should have sent out a fresh *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. The Supreme Court also determined in this context, the fresh *Hudson* notice to be provided to nonmembers of the public union should have provided for an opt-in, as opposed to an opt-out procedure, in relation to the special assessment. *Id.* at 2293. In coming to this conclusion, the Supreme Court asked the following rhetorical questions: "Shouldn't the default rule comport with the probable preferences of most nonmembers? And isn't it likely that most employees who choose not to join the union that represents their bargaining unit prefer not to pay the full amount of union dues?" *Knox* at 2290. These questions illustrate a factual distinction between integrated bars in which all attorneys must be a member, and public unions to which nonmembers are required

to contribute for collective bargaining purposes, such as were at issue in *Abood*, *Hudson*, and *Knox*.

D. Appellant is Requesting this Court to Overturn Significant Supreme Court Precedent Directly on Point

In addition, membership in unions is typically a matter of choice, further distinguishing *Abood*, *Hudson*, and *Knox* from the instant case. As all attorneys are required to be members of an integrated bar, no assumption as to their preferences can be made on such basis. Therefore, the logic of having the default favor against financial contribution has no application to the present case.

In addition, Appellant is essentially requesting long-standing precedent upholding the validity of opt-out procedures as established in *Hudson* (1986), and directly applied to integrated bars in *Keller* (1990), be overruled. The *Knox* Court did not determine the opt-out procedure to be unconstitutional in relation to annual dues assessments. Such a determination would have wide and far-reaching consequences beyond SBAND, and would be counter to the principles of stare decisis. As recently explained by the United States Supreme Court:

> Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is a foundation stone of the rule of law. Application of that doctrine, although not an inexorable command, is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

> Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (dissenting opinion). Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a special justification—over and above the belief that the precedent was wrongly decided.

Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015)(citations and quotations omitted).

Bars across the country have modified their procedures during the two and one-half decades since *Keller* was decided to come into compliance with the *Hudson/Keller* requirements, including the opt-out procedure at issue. 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, 235-36, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)(upholding the constitutional validity of compelling employees to support collective bargaining representative and rejecting notion the only funds from nonunion members that a union constitutionally could use for political or ideological causes were those funds that the nonunion member affirmatively consented to pay); *Mitchell v. Los Angeles Unified School District*,

963 F.2d 258, 260-63 (9th Cir. 1992)(discussing long line of United States Supreme Court cases supporting utilization of "opt-out" procedures, citing *Abood* in rejecting claim an "opt-in" procedure is constitutionally required, and holding "opt out" procedures followed by union to give dissenting nonunion members opportunity to object to full agency fee assured protection of non-members First Amendment Rights.) The United States Supreme Court has also very recently rejected the assertion an "opt-in" procedure is constitutionally required in the context of an agency shop public union in *Friedrichs*. Appellant seeks to turn this long-standing body of law on its head.

It should be noted that since *Knox* was decided in 2012, no court has interpreted *Knox* as finding the opt-out procedures established in *Hudson* to be unconstitutional, nor has any court determined opt-in procedures are constitutionally required. In addition, no integrated bar association has adopted an opt-in procedure as advocated by Appellant.

Although subsequent to the *Knox* decision, the Supreme Court of Nebraska modified its court rules[6] to limit the use of mandatory dues or assessments for the

[6] The Nebraska State Bar Association was created, and is governed, by rules established by the Supreme Court of Nebraska. *In re Petition for a Rule Change to Create a Voluntary Bar Association*, 841 N.W.2d 167, 178-79 (Neb. 2013)(noting Nebraska State Bar Association was created by court rules, and administratively modifying court rules governing the association). By comparison, SBAND was legislatively established by statute, and is governed by policies established by SBAND.

regulation of the legal profession only, it did so voluntarily and not as a result of any finding such change in procedure was mandated by *Knox* or other United States Supreme Court precedent. *In re Petition for a Rule Change to Create a Voluntary Bar Association*, 841 N.W.2d at 178-79. Instead, the Supreme Court of Nebraska noted that making such a modification "avoid[ed] embroiling the court and the legal profession in unending quarrels and litigation over the germaneness of an activity in whole or in part, the constitutional adequacy of a particular opt-in or opt-out system, or the appropriateness of a given grievance procedure." *Id*. In other words, the Supreme Court of Nebraska chose to simply avoid future conflict on these issues by severely restricting the use of mandatory dues or assessments.

More recently, and three years subsequent to the *Knox* decision, the United States District Court for the Western District of Washington rejected a plaintiff attorney's challenge to mandatory membership in the Washington State Bar Association (WSBA), and challenge to the *Hudson* opt-out procedures utilized by the WSBA. *See* Order Granting In Part and Denying in part Defendants' Motions to Dismiss and Striking Plaintiff's Surreply, *Eugster v. Washington State Bar Ass'n*, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015)(granting WSBA's motion for judgment on the pleadings in relation to challenge to mandatory bar membership and challenge to *Hudson* procedures utilized by WSBA). The procedures utilized by the WSBA, described in detail in the *Eugster* decision, are

essentially identical to those now utilized by SBAND and challenged by Appellant. The plaintiff attorney in *Eugster* has appealed the decision to the Ninth Circuit Court of Appeals where it is currently pending.

The Supreme Court has also more recently commented upon and specifically indicated mandatory bars are constitutional in *Harris v. Quinn*, 134 S.Ct. 2618 (2014). The Supreme Court explained its reasoning in *Keller* was still sound and viable when it analyzed a similar opt in request in *Harris* in the context of non-union home-care personal assistants who provided in-home care to disabled individuals through Medicaid-waiver programs run by the Illinois Department of Human Services who brought an action against the Governor in his official capacity and three unions, challenging mandatory fair share fees paid to the union. In analyzing the issue before the Court, the Supreme Court explained that *Keller* specifically indicates mandatory bars are constitutional and allowed.

As discussed above, challenges to the constitutionality of mandatory financial contributions to both integrated bars and agency shop public unions, as well as opt-out procedures for non-chargeable expenditures, have long been upheld by the courts of the United States, including the United States Supreme Court. Appellant's claims are therefore foreclosed and were properly dismissed.

CONCLUSION

For the foregoing reasons, SBAND Defendants request the District Court's

grant of summary judgment in favor of Defendants, and dismissing Appellant's claims, be in all things affirmed.

Dated this 27th day of May, 2016.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 5,615 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: May 27, 2016

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

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