



3. Entry of a preliminary injunction is appropriate here because: (a) Plaintiff is likely to succeed on the merits; (b) he is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of harm weighs in his favor; and (d) an injunction is in the public interest. Home Instead, Inc. v. Florance, 721 F.3d 494, 497 (8th Cir. 2013) (quoting Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981)).

4. Plaintiff is likely to succeed on the merits of his first two claims because: (a) Defendants enforce statutes requiring mandatory payment of dues to SBAND and have failed to implement any of the minimum safeguards needed to protect SBAND members' constitutional rights as required by Keller v. State Bar of California, 496 U.S. 1, 14 (1990), and Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 310 (1986); and (b) Defendants fail to provide SBAND members with the opportunity to affirmatively consent to funding non-germane expenditures. See Knox v. Service Employees Intern. Union, 132 S. Ct. 2277, 2290—93 (2012). Both failures violate Plaintiff's First and Fourteenth Amendment rights.

5. The ongoing deprivation of Plaintiff's constitutional rights constitutes irreparable harm. Lowry ex rel. Crow v. Watson Chapel Sch. Dist., 540 F.3d 752, 762 (8th Cir. 2008). Because Plaintiff has shown that he is likely to succeed on the merits, he has also established irreparable harm as a result of the deprivation of his constitutional rights. Phelps-Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by* Phelps-Roper v. City of Manchester, Mo., 697 F.3d 678 (8th Cir. 2012).

6. The balance of harm weighs heavily in Plaintiff's favor because Plaintiff's constitutional rights conflict with Defendants' non-constitutional interest. Absent judicial intervention, Plaintiff is deprived of his First and Fourteenth Amendment rights while

Defendants have no constitutional entitlement to members' mandatory dues. Knox, 132 S. Ct. at 2291.

7. The public interest "favors protecting core First Amendment freedoms," which is all that Plaintiff requests here. Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999).

8. The waiver of bond in this case is appropriate because there are important constitutional rights at stake and this motion for a preliminary injunction seeks only to compel Defendants to comply with the Constitution. Doe v. Pittsylvania County, Va., 842 F. Supp. 2d 927, 937 (W.D. Va. 2012); Baca v. Moreno Valley Unified Sch. Dist., 936 F. Supp. 719, 738 (C.D. Cal. 1996).

9. While preliminary relief is appropriately granted by this Court for Plaintiff's first and second claims to enjoin Defendants' collection of compelled dues until the requisite procedural safeguards are in place, Plaintiff acknowledges that binding precedent forecloses this Court from presently granting such relief for his third claim regarding compelled membership in SBAND. See Keller, 496 U.S. at 1; Lathrop v. Donohue, 367 U.S. 820 (1961). In order to preserve Plaintiff's third claim for interlocutory appellate review, Plaintiff also requests a preliminary injunction to enjoin Defendants' enforcement of statutes compelling membership in SBAND because mandated bar membership is not narrowly tailored to serve a compelling government interest. This request should be denied. See Agostini v. Felton, 521 U.S. 203, 237 (1997).

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WHEREFORE, Plaintiff respectfully asks this Court to immediately issue a preliminary injunction in the form of the attached proposed order.

Dated this 3<sup>rd</sup> day of February, 2015

Respectfully submitted,

/s/ Jared Blanchard

Jared Blanchard (031198)

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 3rd day of February, 2015, I filed the foregoing electronically through the CM/ECF system, and caused the foregoing to be served on the following non-CM/ECF Registered Participants in the manner indicated:

Via process server and Certified U.S. Mail, as follows:

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**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.

[illegible]

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF’S MOTION FOR  
PRELIMINARY INJUNCTION**

Case No. 1:15-cv-013

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## **I. SUMMARY OF ARGUMENT**

Under the laws of North Dakota, Plaintiff Arnold Fleck must join the State Bar Association of North Dakota (“SBAND”) and subsidize its speech in order to earn a living practicing law. Because this requirement necessarily impinges upon Plaintiff’s First Amendment rights, SBAND must provide Plaintiff with the minimum safeguards necessary to protect his rights as proscribed by the United States Supreme Court. See Keller v. State Bar of California, 496 U.S. 1, 14 (1990); Knox v. Service Employees Intern. Union, 132 S. Ct. 2277, 2290-93 (2012). Defendants have failed to implement the required safeguards, creating an ongoing violation of Plaintiff’s constitutional rights. Plaintiff can attest firsthand to the necessity of the required safeguards, as he was provided with no recourse to challenge what he reasonably believed to be a misuse of his dues, spent by SBAND in opposition to a ballot measure he supported.

For this reason, a preliminary injunction is necessary to abate Defendants’ ongoing violation of Plaintiff’s constitutional rights. “[W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). “While ‘no single factor is determinative,’ the probability of success factor is the most significant.” Home Instead, Inc. v. Florance, 721 F.3d 494, 497 (8th Cir. 2013) (quoting Dataphase).

Plaintiff is likely to succeed on the merits because Defendants enforce mandatory membership in and payment of dues to SBAND and have failed to implement any of the

minimum safeguards needed to protect SBAND members' constitutional rights. Keller, 496 U.S. at 14; Chicago Teachers Union, Local No. 1 v. Hudson, 485 U.S. 292, 310 (1986); Knox, 132 S. Ct. at 2290–93. These failures violate Plaintiff's First and Fourteenth Amendment rights.

"When a plaintiff has shown a likely violation of his or her First Amendment rights, the other requirements for obtaining a preliminary injunction are generally deemed to have been satisfied." Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 870 (8th Cir. 2012).

The ongoing deprivation of Plaintiffs' constitutional rights constitutes irreparable harm. The balance of equities tips in favor of Plaintiff because Plaintiff's constitutional rights trump Defendants' non-constitutional interests. See Knox, 132 S. Ct. at 2295; see also Reese v. City of Columbus, 798 F. Supp. 463, 472 (S.D. Ohio 1992) (in the absence of Hudson safeguards, an association is not permitted to collect fees). Finally, an injunction is in the public interest because that interest favors protecting First Amendment freedoms. Emineth v. Jaeger, 901 F. Supp. 2d 1138, 1142 (D.N.D. 2012); see also Swanson v. University of Hawaii Professional Assembly, 269 F. Supp. 2d 1252, 1260–61 (D. Haw. 2003).

## II. FACTUAL BACKGROUND

SBAND is a mandatory bar association. N.D.C.C. §§ 27-11-22, 27-12-02. That means North Dakota compels attorneys to become members and pay association dues as a condition of practicing law in that jurisdiction. See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska, 286 Neb. 1018, 1022 (2013). SBAND "was created by an Act of the Legislative Assembly. It was the first integrated Bar in the entire United States." Menz v. Coyle, 117 N.W.2d 290, 296 (N.D. 1962). It is unlawful for a person to practice law in the State

of North Dakota without being a member of SBAND and subsidizing its speech. N.D.C.C. §§ 27-11-01, 27-11-22, 27-12-02.

SBAND acts under color of law. See Menz, 117 N.W.2d at 296 (rejecting argument that Bar Association is a private group and recognizing that “[t]he Bar Association was created and now exists under and by virtue of the laws of this State”). Mandatory dues are collected by the State Board of Law Examiners and disbursed to SBAND as proscribed by statute. N.D.C.C §§ 27-11-24, 27-12-04. Pursuant to N.D.C.C. § 27-12-04, SBAND must receive \$75 out of each member’s mandatory dues for the operation of the lawyer discipline system and receive 80 percent of the remaining amount of the mandatory dues paid by SBAND members for the purpose of administering and operating the association. Defendants, as SBAND officers, enforce laws requiring membership in and funding of SBAND as a prerequisite to practicing law in the State of North Dakota. N.D.C.C. §§ 27-11-24, 27-12-02, 27-12-04; see also N.D. R. LWYR. DISC. Rule 2.4.

In part, compelled dues are expended on SBAND’s lobbying activities at the North Dakota Legislature. In acknowledgment of their obligation to provide minimum safeguards to SBAND’s membership, Defendants have instituted a Legislative Policy, most recently readopted on July 30, 2014. (Complaint Exhibit 3). The policy attempts to create parameters for SBAND’s legislative activities by placing legislation into three categories and defining what SBAND views as the appropriate level of activity for each category. Id. The policy also sets forth the procedure Defendant Weiler identified as SBAND’s “Keller refund notice” in correspondence with Plaintiff. (Complaint Exhibit 2). The procedure reads as follows:

Any member of the Association who dissents from a position on any legislative or ballot measure matter and records that opposition in writing to the Executive Director may receive a refund of that portion of his or her dues which would otherwise have been used in the Association legislative or ballot measure activity complained of.

(Complaint Exhibit 3).

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

Plaintiff strongly supported North Dakota Initiated Statutory Measure No. 6 (“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.” Official Ballot Language for Measures Appearing on the Election Ballot, North Dakota Secretary of State (available at [https://vip.sos.nd.gov/pdfs/measures%20Info/2014%20General/Official\\_Ballot\\_Language\\_2014\\_General.pdf](https://vip.sos.nd.gov/pdfs/measures%20Info/2014%20General/Official_Ballot_Language_2014_General.pdf)) (last accessed on Jan. 30, 2015). Plaintiff not only contributed \$1,000 to a ballot measure committee in support of Measure 6, he participated in the campaign—even appearing on television and radio to debate the merits of the measure. (Fleck Decl. ¶¶ 9-10 (Memo Exhibit 1)).

A few weeks before the election, Plaintiff discovered—through a third party—that SBAND staunchly opposed Measure 6 and threw its weight behind the opposition, expending member dues in the process. SBAND was the largest contributor to a committee that opposed Measure 6, “Keeping Kids First,” giving the committee \$50,000. (Memo Exhibit 2).<sup>1</sup> SBAND’s support did not end there. Defendant Weiler, the Executive Director of SBAND, served as a

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<sup>1</sup> A true and correct copy of Keeping Kid’s First’s Pre-General Report and two 48-hour reports received by the North Dakota Secretary of State is attached hereto as Memo Exhibit 2.

member of Keeping Kids First's committee. (Complaint ¶ 51). SBAND provided Keeping Kids First with logistical support, allowing its favored committee to utilize SBAND's email system and establish an email address with SBAND's domain name: keepingkidsfirst@sband.org. (Complaint ¶ 52).

Plaintiff reasonably believed that this was a misuse of his mandatory dues. Had proper safeguards been in place, he would have objected to his dues' use in furthering Keeping Kids First's activities.

Plaintiff filed the instant action seeking declaratory and injunctive relief to remedy Defendants' ongoing violation of his First and Fourteenth Amendment rights.

### III. **ARGUMENT**

#### A. **PLAINTIFF IS LIKELY TO PREVAIL ON THE MERITS**<sup>2</sup>

##### 1. **SBAND Violates Plaintiff's First and Fourteenth Amendment Rights by Receiving and Expending Mandatory Member Dues Without Providing Members with the Minimum Safeguards Set Forth in Keller and Hudson.**

There is great tension between mandatory associations like an integrated bar association and the First Amendment because compelled membership and dues are "a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'" Knox, 132 S. Ct. at 2289 (quoting Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees, 466 U.S. 435, 455 (1984)). Because of this inherent tension, the Supreme Court allows mandatory associations to collect and spend dues only for "chargeable

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<sup>2</sup> Plaintiff acknowledges that his third claim challenging the constitutionality of preconditioning the practice of law upon SBAND membership and payment of SBAND dues is presently foreclosed by Keller v. State Bar of California, 496 U.S. 1 (1990) and Lathrop v. Donohue, 367 U.S. 820, 843 (1961). Plaintiff reserves that issue to present in the proper forum.

expenditures”—meaning expenditures related to the narrow purpose found to justify abridging members’ First Amendment rights. Knox, 132 S. Ct. at 2289; United States v. United Foods, Inc., 533 U.S. 405 (2001); Ellis, 466 U.S. 435, 447 (1984); Abood v. Detroit Board of Education, 431 U.S. 209, 235–36 (1977). To ensure members are compelled to foot the bill only for this narrow subset of expenditures, mandatory associations must institute safeguards “carefully tailored to minimize the infringement” of members’ First Amendment rights. Hudson, 475 U.S. at 303. These safeguards are meant to both ensure that members’ mandatory dues are used only for chargeable expenditures and help provide a member recourse to protect her constitutional rights. Id., 475 U.S. at 302, 307 n.20.

While Defendants have accepted the privilege of receiving and spending mandatory bar dues, they have neglected their corresponding responsibility to implement the necessary minimum safeguards to protect the constitutional rights of SBAND members. SBAND’s minimum safeguards must provide: (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, 485 U.S. at 310. 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. Keller, 496 U.S. at 14; Lathrop v. Donohue, 367 U.S. 820, 843 (1961).

These three minimum safeguards work together to limit violations of members’ First Amendment rights by giving them information, recourse, and remedy. Collecting mandatory dues while failing to implement just one of the Keller/Hudson safeguards would be a violation of



Plaintiff's First and Fourteenth Amendment rights, see Cummings v. Connell, 316 F.3d 886, 890-91 (9th Cir. 2003) (public union's failure to provide verification by an independent auditor of its financial disclosures was a Hudson violation), but Defendants have failed to properly implement any of them. See Ralph H. Brock, "An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with Hudson and Keller, 1 Tex. Tech J. Tex. Admin. L. 23, 73 (2000) ("The North Dakota procedure is deficient in almost every respect.").<sup>3</sup>

**i. SBAND has failed to provide notice to members.**

To start, SBAND's procedures fail to provide notice to members that includes any explanation of the basis for the dues, with no calculations of non-chargeable activities. (See Complaint Exhibit 3; Fleck Decl. ¶¶ 16-18). At a minimum, SBAND is required to provide a notice with an explanation of non-chargeable activities that includes "the major categories of expenses, as well as verification by an independent auditor." Hudson, 475 U.S. at 307 n.18. Such notice is a crucial safeguard to the First Amendment rights of members because SBAND alone possesses all pertinent information regarding its expenditures. Id. at 306. SBAND thus bears the burden of proof that it is expending mandatory dues only on germane items. Id. Without notice, members are left in the dark and robbed of their ability to safeguard their constitutional rights. Because SBAND provides no notice of expenses and no calculations of its non-chargeable activities—let alone notice verified by an independent auditor—Defendants have

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<sup>3</sup> The failure to provide the required safeguards in the first instance is also a violation of Plaintiff's Fourteenth Amendment right to procedural due process. Wessel v. City of Albuquerque, 299 F.3d 1186, 1193 (10th Cir. 2002); see also Lowary v. Lexington Local Bd. of Educ., 903 F.2d 422, 429 (6th Cir. 1990) (internal quotations omitted) ("minimum procedural safeguards under the due process clause include timely and adequate notice detailing the reasons for a proposed deprivation of property").

unconstitutionally shifted the burden to Plaintiff, who has no sufficient means to determine if his dues are being spent in violation of his First Amendment rights. SBAND's notice failure violates Plaintiff's First and Fourteenth Amendment rights.

The shortcomings of SBAND's notice failure are laid bare by Plaintiff's recent experience during the run-up to the North Dakota election held on November 4, 2014. Because SBAND provides no notice nor endeavors to categorize items as chargeable and non-chargeable, Plaintiff was left in the dark as to its political activities and only became aware of SBAND's opposition to Measure 6 through a third party mere weeks before the election. (Fleck Decl. ¶ 11). This was long after SBAND had expended mandatory dues on an initial \$30,000 contribution and Keeping Kids First had already begun its opposition campaign. At that point, any effort Plaintiff made to protect his constitutional rights would have been too little, too late to prevent irreparable injury. See Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). By the time Plaintiff confirmed the extent of SBAND's involvement, it had donated another \$20,000 of member dues to Keeping Kids First. (Memo Exhibit 2).

**ii. SBAND has failed to provide members with an opportunity to challenge the use of compelled dues before an independent decision maker.**

Since SBAND provides no explanation of its dues nor endeavors to categorize items as chargeable and non-chargeable, it is impossible for SBAND's procedures to provide an adequate opportunity for members to challenge its chargeability determinations. Should a member attempt to mount an objection despite this, SBAND fails to provide a reasonably prompt decision by an impartial decision maker. Hudson, 475 U.S. at 308. SBAND's procedure is flawed because its own Executive Director sits as the decision maker when a member makes an

objection. (Complaint Exhibit 3). A procedure controlled by an “interested party” falls short of the minimum safeguards required, Hudson, 475 U.S. at 308, and provides Plaintiff with no adequate means of having an objection heard.<sup>4</sup> The lack of adequate procedures is a second and independent violation of Plaintiff’s First and Fourteenth Amendment rights.

Again, Plaintiff’s Measure 6 experience is illustrative. Plaintiff reasonably believed SBAND’s activities in opposition to Measure 6 were non-chargeable but he was not able to challenge the misuse of his dues before an impartial decision maker. If he had followed the Legislative Policy, Plaintiff’s objection would have been heard by the Executive Director of SBAND, Defendant Weiler. (Complaint Exhibit 3). Defendant Weiler not only has an interest in SBAND, but he was also a committeeperson for the Ballot Measure Committee that Plaintiff opposed funding; Defendant Weiler was clearly not an impartial decision maker.

As evidence of his partiality, in a phone conversation with Plaintiff, Defendant Weiler told Plaintiff that he could possibly receive a refund of “around \$6 and some change” if Plaintiff objected to the \$50,000 gift to Defendant Weiler’s Keeping Kids First committee. (Fleck Decl. ¶ 16). Plaintiff could not determine if a refund of “around \$6” accurately reflected the portion of his mandatory dues used to further SBAND’s Measure 6 opposition because of SBAND’s failure to provide notice. (Id. ¶ 18). Simple division tells us that, given an SBAND membership of

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<sup>4</sup> The Legislative Policy’s focus on “Association legislative or ballot measure activity” makes it clear that expenditures beyond those related to SBAND’s legislative endeavors are not subject to any objection procedure at all. Hudson/Keller safeguards are necessary not only to protect members’ constitutional rights from non-germane political expenditures but all expenditures unrelated to a mandatory bar’s purpose of improving the quality of legal services through the regulation of attorneys. Romero v. Colegio de Abogados de Puerto Rico, 204 F.3d 291, 302 (1st Cir. 2000); Kingstad v. State Bar of Wisconsin, 622 F.3d 708, 718–19 (7th Cir. 2010). This failure to even consider apolitical non-germane spending constitutes a further violation of Plaintiff’s First and Fourteenth Amendment rights.

approximately 2,700, \$6 seems at least three times too low. Whatever the actual amount of SBAND's total non-chargeable spending, Defendant Weiler acting alone does not constitute the requisite impartial decision-making process.

**iii. SBAND has failed to provide an escrow for the amounts reasonably in dispute.**

SBAND also fails to provide an escrow for the amounts reasonably in dispute while objections are pending. (Complaint Exhibit 3). SBAND's Legislative Procedure only provides objecting members with a refund. *Id.* "A remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose." *Hudson*, 475 U.S. at 305. Providing only a refund, SBAND obtains an involuntary loan from the very member who objects to funding SBAND's activities. *Ellis*, 466 U.S. at 444; *see also Romero v. Colegio De Abogados De Puerto Rico*, 204 F.3d 291, 304 (1st Cir. 2000) ("[T]he Supreme Court held in *Hudson* that unions must place into escrow amounts reasonably in dispute while such challenges are pending. We see no reason why an integrated bar association should be held to a lesser standard.") (citation and quotation marks omitted)). By failing to provide an escrow, SBAND's procedures leave Plaintiff unprotected from his dues being used for non-germane purposes he finds objectionable, creating another violation of Plaintiff's First and Fourteenth Amendment rights.

Plaintiff's Measure 6 experience illustrates the flaws of a refund system. Defendant Weiler told Plaintiff he could expect a \$6 refund if he objected to SBAND's Measure 6 activities. (Fleck Decl. ¶ 16). If a refund was indeed warranted, it means Plaintiff's First Amendment rights were violated because his mandatory dues had already been used for an improper purpose. *Hudson*, 475 U.S. at 305; *see also Elrod*, 427 U.S. at 373.

As shown above, Defendants have failed in their obligation to provide minimum Hudson/Keller safeguards to SBAND members. While the Measure 6 debacle is merely illustrative, it reveals the chasm between SBAND's deficient procedures and the minimum Hudson/Keller safeguards. The protections to Plaintiff's First Amendment rights that the Hudson/Keller safeguards afford are a floor, not a ceiling, and SBAND's procedures are in the basement. In short, SBAND fails to (1) provide members with any notice, let alone one verified by an independent auditor; (2) provide members with 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 (3) provide members with an escrow for the amounts reasonably in dispute while such objections are pending. Because each failure is a violation of Plaintiff's First and Fourteenth Amendment rights, Plaintiff is likely to succeed on the merits of his first claim. Accordingly, Defendants should be enjoined from collecting and expending dues until such time as the Hudson/Keller safeguards are in place.

**2. SBAND Violates Plaintiff's First and Fourteenth Amendment Rights by Failing to Provide Members with the Opportunity to Affirmatively Consent to Funding Non-Chargeable Activities.**

Currently, Plaintiff can only hope to receive a constitutionally-deficient refund on the backend for certain non-chargeable expenditures. (Complaint Exhibit 3). However, even if Defendants bring SBAND's policies and practices out of the unconstitutional basement and up to the Hudson/Keller safeguards, Plaintiff would still have to opt out of all non-chargeable expenditures. Because "acquiescence in the loss of fundamental rights" should not be presumed, College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) (internal quotation marks and citation omitted), the Hudson/Keller safeguards must be

coupled with procedures that allow members to affirmatively consent to non-chargeable expenditures. Without the addition of affirmative consent, SBAND's safeguards will be below the baseline necessary to permit the Association to enjoy the "remarkable boon" of receiving compelled dues. Knox, 132 S. Ct. at 2290-93. SBAND's failure to allow members to affirmatively consent to non-chargeable expenditures is an ongoing violation of Plaintiff's First and Fourteenth Amendment rights.

While the Supreme Court has only addressed the necessity of affirmative consent for non-chargeable expenditures in the context of union special assessments, in doing so, the Court reaffirmed that "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." Knox, 132 S. Ct. at 2291. Just as an opt-out system for special assessments failed that standard in Knox, it would fail that standard here because there is no state interest—let alone a compelling one—in "shift[ing] the advantage of . . . inertia," South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966), away from members who wish to exercise their First Amendment rights and onto SBAND, which has "no constitutional entitlement to the fees" it compels from members. Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 185 (2007); see also Lincoln Fed. Labor Union No. 19129, A.F. of L. v. Nw. Iron & Metal Co., 335 U.S. 525, 529–31 (1949). Put another way, there is no compelling government interest that can justify the inherent First Amendment burden of collecting compelled dues for non-germane expenditures; only funds given voluntarily are constitutionally permitted to fund such expenditures. Therefore, only affirmative consent creates a sufficient barrier between compelled dues and voluntary funds.

As such, an opt-out system for non-chargeable activities is necessarily broader than can be justified by any interests served by SBAND. Only through allowing Plaintiff and all SBAND

members to affirmatively consent to funding non-chargeable activities will members' First and Fourteenth Amendment rights be adequately walled off from impingements purportedly justified by SBAND's regulation of attorneys. See Hudson, 475 U.S. at 303 (the collection of mandatory dues burdens rights to freedom of speech and association, and "the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement."); Seidemann v. Bowen, 499 F.3d 119, 124 (2d Cir. 2007) (holding that a union's burden includes adopting procedures "that least interfere with an objecting employee's exercise of his First Amendment rights") (quoting Shea v. Int'l Ass'n of Machinists & Aerospace Workers, 154 F.3d 508, 515–17 (5th Cir. 1998)).

Because SBAND's procedures do not provide Plaintiff with the opportunity to affirmatively consent to funding non-germane expenditures in violation of his First and Fourteenth Amendment rights, Plaintiff is likely to succeed on the merits of his second claim. Accordingly, Defendants should be enjoined from collecting and expending dues until such time an opt-in for non-chargeable spending is in place.

## **B. PLAINTIFF IS SUFFERING IRREPARABLE HARM**

The ongoing deprivation of Plaintiff's constitutional rights constitutes irreparable harm. Lowry ex rel. Crow v. Watson Chapel Sch. Dist., 540 F.3d 752, 762 (8th Cir. 2008). Because Plaintiff has shown that he is likely to succeed on the merits, he has also established irreparable harm as the result of the deprivation of his constitutional rights. Phelps–Roper v. Nixon, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by* Phelps–Roper v. City of Manchester, Mo., 697 F.3d 678 (8th Cir. 2012) ("If [Plaintiff] can establish a sufficient likelihood of success on the merits of [his] First Amendment claim, [he] will also have

established irreparable harm...”); accord Emineth, 901 F. Supp. 2d at 1142; see also McGlumphy v. Fraternal Order of Police, 633 F. Supp. 1074, 1079 (N.D. Ohio 1986) (finding that rebate procedure instituted by police union violated the First Amendment rights of nonunion members forced to contribute fair share dues because “[i]mplicit in the substantive protections engendered by the first amendment is the requirement that adequate procedures and safeguards exist to prevent substantive violations.”).

### C. **THE BALANCE OF HARM TIPS IN PLAINTIFF’S FAVOR**

The balance of equities weighs heavily in Plaintiff’s favor. When considering injunctions, the Eighth Circuit has noted that “[t]he balance of equities . . . favors the constitutionally-protected freedom of expression.” Phelps–Roper v. Nixon, 545 F.3d at 690. Absent judicial intervention, Plaintiff is deprived of his First and Fourteenth Amendment rights. Meanwhile, SBAND has no constitutional entitlement to members’ mandatory dues. Knox, 132 S. Ct. at 2291 (quoting Davenport, 551 U.S. at 185). When the choice is between First Amendment rights and compelled subsidization, the choice must always be resolved against “the side whose constitutional rights are not at stake.” Knox, 132 S. Ct. at 2295. Indeed, “no party has an interest in the enforcement of an unconstitutional law.” Emineth, 901 F. Supp. 2d at 1142. Because Plaintiff’s constitutional rights conflict with Defendants’ non-constitutional interest, the equities favor Plaintiff.

### D. **GRANTING AN INJUNCTION IS IN THE PUBLIC INTEREST, GIVEN THE IMPORTANT CONSTITUTIONAL RIGHTS AT STAKE**

“It is undisputed that the ‘public interest favors protecting core First Amendment freedoms.’” Emineth, 901 F. Supp. 2d at 1143 (quoting Iowa Right to Life Comm., Inc. v.



Williams, 187 F.3d 963, 970 (8th Cir. 1999)). Here, Defendants violate the First and Fourteenth Amendments by wrongfully compelling SBAND membership and dues from Plaintiff and failing to provide the minimum required safeguards. The public interest thus plainly favors injunctive relief. See Phelps–Roper, 545 F.3d at 690 (“the determination of where the public interest lies also is dependent on the determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to protect constitutional rights.”); see also Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1, 690 F.3d 996, 1004 (8th Cir. 2012) (noting that a likely First Amendment violation favors the issuance of an injunction).

#### **E. THE WAIVER OF A BOND IS APPROPRIATE**

This Court has discretion to waive the security requirements of Fed. R. Civ. P. 65(c), or require only a nominal bond. Stockslager v. Carroll Elec. Cooperative Corp., 528 F.2d 949, 951 (8th Cir. 1976) (amount of bond required upon the issuance of a preliminary injunction is within the sound discretion of the district court); see also Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999) (recognizing that “[o]ur sister circuits have construed Fed. R. Civ. P. 65(c) as investing the district court with discretion as to the amount of security required, if any,” and listing cases). When a preliminary injunction would merely require compliance with the Constitution, no bond is required. See Doe v. Pittsylvania County, Va., 842 F. Supp. 2d 927, 937 (W.D. Va. 2012) (fixing the bond at zero dollars where injunction merely required compliance with the Constitution); Baca v. Moreno Valley Unified School Dist., 936 F. Supp. 719, 738 (C.D. Cal. 1996) (waiving bond because “to require a bond would have a negative impact on plaintiff’s constitutional rights, as well as the constitutional rights of other members of the public affected

by the policy”); Smith v. Board of Election Com’rs for City of Chicago, 591 F. Supp. 70, 72 (N.D. Ill. 1984) (recognizing that, in cases involving constitutional rights, requiring plaintiffs to post bond would condition the exercise of those rights on plaintiffs’ financial status). Further, where the amount of potential damages is limited, a nominal bond of \$1 is appropriate. Sak v. City of Aurelia, Iowa, 832 F. Supp. 2d 1026, 1048 (N.D. Iowa 2011). Here, Plaintiff is seeking only to vindicate his constitutional rights and, to this end, he is represented pro bono.

Further, courts have found that a high likelihood of success on the merits supports waiver of the bond requirement. People of State of Cal ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1326 (9th Cir. 1985), *amended on other grounds*, 775 F.2d 998 (9th Cir. 1985). As demonstrated above, Plaintiff has shown a high likelihood of success on the merits based on SBAND’s ongoing failure to provide the minimum safeguards required by clear Supreme Court precedent. As such, it would be appropriate to waive the bond requirement or set bond at a nominal amount.

#### IV. CONCLUSION

Because SBAND has failed to provide the minimum safeguards necessary to allow for the collection of mandatory dues, Plaintiff respectfully asks this Court to immediately issue a preliminary injunction: (1) restraining Defendant Miller from collecting mandatory SBAND dues; (2) restraining Defendant Miller from disbursing to SBAND mandatory SBAND dues collected and currently under her control; and (3) restraining Defendants McDonald, Fiebelkorn-Zuger, and Weiler from receiving and expending mandatory SBAND dues pending a final decision on the merits or further order of this Court confirming that the minimum safeguards required by Hudson, Keller, and Knox are in place and operating.

Dated this 3<sup>rd</sup> day of February, 2015

Respectfully submitted,

/s/ Jared Blanchard

Jared Blanchard (031198)

James Manley (031820)

**Scharf-Norton Center for Constitutional  
Litigation at the  
GOLDWATER INSTITUTE**

500 E. Coronado Road

Phoenix, AZ 85004

Ph: 602-462-5000

Fax: 602-256-7045

[litigation@goldwaterinstitute.org](mailto:litigation@goldwaterinstitute.org)

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 3rd day of February, 2015, I filed the foregoing electronically through the CM/ECF system, and caused the foregoing to be served on the following non-CM/ECF Registered Participants in the manner indicated:

Via process server and Certified U.S. Mail, as follows:

Jack McDonald  
220 N. 4th St.  
P.O. Box 1776  
Bismarck, ND 58502-1776

Aubrey Fiebelkorn-Zuger  
51 Broadway, Suite 400  
Fargo, ND 58102-4991

Tony Weiler  
1661 Capitol Way, Ste 104LL  
P.O. Box 2136  
Bismarck, ND 58502-2136

Penny Miller  
Supreme Court  
Judicial Wing, 1st Floor  
600 E. Boulevard Ave.  
Bismarck, ND 58505-0530

/s/ Jared Blanchard  
Jared Blanchard (031198)  
**Scharf-Norton Center for Constitutional  
Litigation at the  
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[litigation@goldwaterinstitute.org](mailto:litigation@goldwaterinstitute.org)  
*Attorneys for Plaintiff*

## **EXHIBIT 1 TO PI MEMO**

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

ARNOLD FLECK,	)	
	)	
Plaintiff,	)	
	)	<b>DECLARATION OF</b>
v.	)	<b>ARNOLD FLECK</b>
	)	
JACK MCDONALD, President of the State	)	
Bar Association of North Dakota;	)	
AUBREY FIEBELKORN-ZUGER, Secretary	)	
and Treasurer of the State Bar Association of	)	Case No. 1:15-cv-013
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.	)	

---

I, Arnold Fleck, declare as follows:

1. I am over 18 years of age and I am competent to testify from my first-hand knowledge as to matters set forth in this Declaration.

2. I am a citizen of the United States and reside in Bismarck, North Dakota.

3. I have been a member of the State Bar of Association of North Dakota (“SBAND”) since I was admitted to practice law in North Dakota in 1983.

4. I have paid mandatory dues to SBAND on an annual basis since 1983.

5. I received the 2015 Statement of License Fees Due on November 7, 2014.

(Complaint Exhibit 1.)

6. No other documents were enclosed with the Statement of License Fees Due.

7. I remitted my mandatory dues on December 26, 2014.

8. I strongly supported North Dakota Initiated Statutory Measure No. 6 ("Measure 6"), which appeared on the North Dakota ballot on November 4, 2014.

9. To support Measure 6, I contributed \$1,000.00 to "ND Shared Parenting Initiative," a Ballot Measure Committee which supported Measure 6.

10. In October 2014, I expressed my support of Measure 6 in interviews with television and newspaper reporters and I participated in both television and radio debates in which I argued in favor of the Measure.

11. On September 22, 2014, I first became aware through a third party that SBAND was possibly funding "Keeping Kids First," a Ballot Measure Committee which opposed Measure 6.

12. On October 15, 2014, I found a campaign disclosure report on the North Dakota Secretary of State's campaign finance website that confirmed SBAND had contributed \$40,000.00 to Keeping Kids First.

13. Shortly thereafter, I became aware that SBAND contributed an additional \$10,000.00 to Keeping Kids First.

14. I received no notice from SBAND regarding its opposition to Measure 6 and its contributions to Keeping Kids First, until October 15, 2014, when I initiated a telephone conversation with Defendant Weiler and he admitted to me that SBAND had contributed a total of \$50,000.00 to Keeping Kids First.

15. I contacted Defendant Weiler on October 15, 2014, to determine whether what I had been told and read about SBAND's support of Keeping Kids First was true, as I reasonably believed SBAND's support was a misuse of my mandatory dues.

16. During our phone conversation on October 15, 2014, Defendant Weiler informed me that my only remedy was to request SBAND refund me a portion of my dues. He indicated that, though he had not done the calculation recently, the last time he had done the calculation the amount of the refund came to \$6 and some change.

17. Defendant Weiler provided me with no explanation as to how he came to his calculation of approximately \$6, other than stating it was consistent with SBAND's legislative refund policy.

18. I was unable to determine if the \$6 refund accurately reflected the amount of my mandatory dues used for SBAND's Measure 6 opposition.

19. On October 15, 2014, I followed up my phone conversation with Defendant Weiler with an email requesting more information. (Complaint Exhibit 2.)

20. One of my requests to Defendant Weiler was for "[a] current copy of SBAND's procedures relating to its collection and refunding/rebating of mandatory member dues, including but not limited to any provisions that allow members to opt-out of paying for non-regulatory activities and/or that set out the procedure that a member must follow to file a grievance against the Association when the Association spends mandatory member dues on non-regulatory activities and/or seek the refund/rebate to which you stated members are entitled to when the Association spends mandatory member dues on non-regulatory activities." *Id.*

21. In response to this request, Mr. Weiler provided me with SBAND's Legislative Policy via email on October 16, 2014. (Complaint Exhibit 3.)

22. In his email response that accompanied the Policy, Defendant Weiler wrote, "In the last paragraph [of the Legislative Policy], you will notice language that we consider our "Keller" refund notice." (Complaint Exhibit 2.)



23. I believe Measure 6 was not germane to SBAND's purpose of improving the quality of legal services through the regulation of attorneys.

24. I believe SBAND's activities in opposition to Measure 6 were non-chargeable.

25. I did not want SBAND to use my mandatory dues to oppose Measure 6.

26. Had I been provided with constitutionally adequate procedures to dispute SBAND's activities as non-chargeable and prevent my dues money from being expended, I would have done so.

27. If I could practice law in North Dakota without being a member of SBAND and paying SBAND's mandatory dues, I would do so.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30<sup>th</sup> day of January 2015.

  
\_\_\_\_\_  
Arnold Fleck

## **EXHIBIT 2 TO PI MEMO**

ALVIN A. JAEGER  
SECRETARY OF STATE  
STATE OF NORTH DAKOTA  
600 E BOULEVARD AVENUE DEPT 108  
BISMARCK ND 58505-0500



EMAIL [sos@nd.gov](mailto:sos@nd.gov)  
WEBSITE [www.nd.gov/sos](http://www.nd.gov/sos)

GENERAL INFORMATION (701) 328-2900  
TOLL FREE 1-800-352-0867

SECRETARY OF STATE

January 28, 2015

This letter is to acknowledge your request, received by phone on January 28, 2015, for a copy of what the measures committee called, Keeping Kids First, has filed with our office regarding their campaign finance activity in our state.

At this point they have filed a Pre-General on October 9, 2014 and two 48-hour reports on October 15<sup>th</sup> and November 3<sup>rd</sup> 2014.

If you have any questions, please contact myself, Lee Ann Oliver, Elections Specialist, via e-mail message at [loliver@nd.gov](mailto:loliver@nd.gov) or by telephone at (701) 328-4146 or at (800) 352-0867, ext. 8-4146.

Sincerely,

A handwritten signature in cursive script that reads "Lee Ann Oliver".

Lee Ann Oliver  
Elections Specialist

**Keeping Kids First**  
**Ballot Measure Committee**  
**Registration Date: 9/5/2014**

Committee Type **Ballot Measure Committee**  
 The committee **Opposes**  
 Ballot Measure/Petition **Parental Rights and Responsibilities - Statutory**

**Committee Information**

Committee Name **Keeping Kids First**  
 Committee Acronym  
 Committee Telephone **(701) 426-1875**  
 Committee Email **info@keepingkidsfirst2014.org**  
 Committee Address **P. O. Box 2253  
 Bismarck, ND 58502-2253**

**Agent Information**

Agent Name **Paul Schauer**  
 Agent Title/Position **Chair**  
 Agent Telephone **(701) 426-1875**  
 Agent Email **info@keepingkidsfirst2014.org**  
 Agent Address **P.O. Box 2253  
 Bismarck, ND 58502-2253**

	Date Filed	Starting Balance	Ending Balance	Total of all contributions received of \$100 or less	Total of all expenditures made of \$100 or less	Total of all contributions received greater than \$100	Total of all expenditures made greater than \$100
Pre-General	10/9/2014	\$0.00	\$7,000.00	\$0.00	\$50.00	\$60,000.00	\$53,000.00

**Contributions**

\* Indicates an amended transaction. Click to view the original transaction.

Name	Address	Date	Amount	In-Kind	Amended Date
<a href="#">State Bar Association of North Dakota</a>	504 N Washington St Bismarck, ND 58501	09/25/14	\$40,000.00		
<a href="#">State Bar Association of North Dakota Family Law Section</a>	504 N Washington St Bismarck, ND 58501	09/25/14	\$20,000.00		

**Expenditures**

\* Indicates an amended transaction. Click to view the original transaction.

Name	Address	Date	Amount	Amended Date
<a href="#">Prairie Airways</a>	1321 3rd St. North Fargo, ND 58102	09/25/14	\$53,000.00	

	Date Filed	Total of all contributions received greater than \$500
48-hour	10/15/2014	\$10,000.00

**Contributions**

\* Indicates an amended transaction. Click to view the original transaction.

Name	Address	Date	Amount	In-Kind	Amended Date
<a href="#">State Bar Association of North Dakota</a>	1661 Capitol Way, LL104 Bismarck, ND 58501	10/14/14	\$10,000.00		

	Date Filed	Total of all contributions received greater than \$500
48-hour	11/3/2014	\$5,747.00

**Contributions**

\* Indicates an amended transaction. Click to view the original transaction.

Name	Address	Date	Amount	In-Kind	Amended Date
<a href="#">Tim Brookings</a>	847 47th Ave. W West Fargo, ND 58078	10/31/14	\$5,747.00		