IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SCOTT LAUTENBAUGH, on behalf of himself and the class he seeks to represent, Plaintiff, v. NEBRASKA STATE BAR ASSOCIATION; WARREN R. WHITTED, JR., President, Nebraska State Bar Association, in his official capacity; MARSHA E. FANGMEYER, President-Elect, Nebraska State Bar Association, in her official capacity; G. MICHAEL FENNER, President-Elect Designate Nebraska State Bar Association, in his official capacity, Defendants.	No. 4:12-cv-03214-RGK-CRZ **PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff Scott Lautenbaugh, by and through his attorneys, on behalf of himself and the class he seeks to represent and pursuant to Fed. R. Civ. P. 65, respectfully moves the Court for entry of a Preliminary Injunction requiring Defendants Warren R. Whitted, Jr., Marsha E. Fangmeyer, G. Michael Fenner, and the Nebraska State Bar Association ("NSBA")[1] to immediately cease collection of Plaintiff Lautenbaugh's and other class members' member dues until further order of the Court. The grounds for this motion are as follows:

[1] The individual defendants are sued in their official capacity. Filing 1 at CM/ECF p. 1.

1. On October 10, 2012, Plaintiff Lautenbaugh filed this action, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of himself and others similarly situated, seeking declaratory and injunctive relief. Filing 1 at CM/ECF p. 1.

2. The NSBA has established, and continues to maintain, procedures for collecting mandatory member dues that are constitutionally inadequate under the First and Fourteenth Amendments to the United States Constitution. Failure to provide constitutionally adequate procedures deprives Plaintiff Lautenbaugh and other class members of their First Amendment rights against compelled speech and association, as well as their Fourteenth Amendment right to due process. *Chicago Teachers Union, Local No. 1 v. Hudson,* 485 U.S. 292, 306 (1986).

3. A plaintiff seeking a preliminary injunction must establish (a) that he is likely to succeed on the merits, (b) that he is likely to suffer irreparable harm in the absence of preliminary relief, (c) that the balance of equities tips in his favor, and (d) that an injunction is in the public interest. *Winter v. National Resources Defense Council,* 555 U.S. 7, 20 (2009).

4. Plaintiff Lautenbaugh and other class members, who are actual objectors or "potential objectors," *Hudson,* 475 U.S. at 306, are likely to succeed on the merits because the NSBA has failed to provide procedures that satisfy *any* of the *Hudson* requirements, and the NSBA has failed to provide procedures that allow NSBA members to opt in to paying for non-chargeable activities pursuant to *Knox v. Service Employees Intern. Union,* 132 S. Ct. 2277, 2295 (2012). Filing 1 at CM/ECF pp. 13–21. The procedures the NSBA does provide fall far short of what the Constitution requires. Filing 1 at CM/ECF pp. 10–12.

5. The ongoing deprivation of Plaintiff Lautenbaugh's and other class members' First Amendment rights against compelled speech and compelled association and Fourteenth

Amendment right to due process constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

6. The balance of equities tips in favor of Plaintiff Lautenbaugh and other class members because the injury to their First and Fourteenth Amendment rights far outweighs any injury to the NSBA that could occur as a result of granting a preliminary injunction. In fact, the NSBA has no right at all to collect mandatory member dues until it establishes procedures that meet the mandate of *Hudson. Reese v. City of Columbus,* 798 F. Supp. 463, 472 (S.D. Ohio 1992).

7. Issuance of a preliminary injunction is in the public interest because the public interest is served by judicial "insistence" on constitutionally adequate procedures for collection of mandatory member dues. *Weaver v. University of Cincinnati,* 970 F.2d 1523, 1534 (6th Cir. 1992).

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 the NSBA to comply with constitutional requirements. *Sak v. City of Aurelia, Iowa,* 832 F. Supp. 2d 1026, 1048 (N.D. Iowa 2011); *Swanson v. University of Hawaii Professional Assembly,* 269 F. Supp. 2d 1252, 1261 (D. Haw. 2003).

9. Because the prerequisites for granting a preliminary injunction have been met, Plaintiff Lautenbaugh and other class members are entitled to a preliminary injunction ordering the NSBA to: (1) cease collection of Plaintiff Lautenbaugh's and other class members' mandatory dues pending a final decision on the merits or until constitutionally adequate procedures are in place and operating; or, in the alternative, (2) cease use of such dues for non-chargeable activities, either by advance reduction of the disputed portions and/or by placing the

disputed portion of dues in interest-bearing escrow accounts. Of course, the burden rests on the NSBA to show which portion of Plaintiff Lautenbaugh's and other class members' mandatory member dues are used solely for chargeable activities, a burden that the NSBA has not met.

10. Filed concurrently herewith is a Brief in Support of Plaintiff's Motion For A Preliminary Injunction, which demonstrates in greater detail the grounds for issuance of a preliminary injunction.

WHEREFORE, Plaintiff Lautenbaugh respectfully requests that this Court issue a preliminary injunction restraining the NSBA from collecting Plaintiff Lautenbaugh's and other class members' mandatory member dues pending a final decision on the merits or until constitutionally adequate procedures are in place and operating. In the alternative, this Court should preliminary enjoin the NSBA from using any disputed portions of Plaintiff Lautenbaugh's and other class members' mandatory member dues for non-chargeable activities, either by ordering advance reduction of the disputed portions and/or by ordering the disputed portion to be placed in interest-bearing escrow accounts.

DATED this 12th day of October 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October 2012, I filed the foregoing document using the Court's CM/ECF system. I also served the foregoing document on all the parties by sending true and accurate copies via first class U.S. Mail, postage prepaid and addressed as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

SCOTT LAUTENBAUGH, on behalf of himself and the class he seeks to represent, Plaintiff, v. NEBRASKA STATE BAR ASSOCIATION; WARREN R. WHITTED, JR., President, Nebraska State Bar Association, in his official capacity; MARSHA E. FANGMEYER, President-Elect, Nebraska State Bar Association, in her official capacity; G. MICHAEL FENNER, President-Elect Designate, Nebraska State Bar Association, in his official capacity, Defendants.	Case No. 4:12-cv-03214-RGK-CRZ **BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiff Scott Lautenbaugh seeks preliminary injunctive relief to redress and prevent further deprivation of rights protected by the First and Fourteenth Amendments to the United States Constitution by actions of Defendants.[1] Specifically, Plaintiff Lautenbaugh seek to enjoin actions by the NSBA, under color of state law, that compel speech and compel association by Plaintiff Lautenbaugh and the other class members he seeks to represent. The NSBA's unlawful actions are the result of the NSBA's imposition of mandatory bar dues as a condition of membership to the NSBA, a portion of which are used to fund political, ideological, and other non-germane activities ("non-chargeable activities") which Plaintiff Lautenbaugh and other class members do not support. The NSBA fails to provide constitutionally required procedural protections to safeguard Plaintiff Lautenbaugh's and other class members' First and Fourteenth Amendment rights. Plaintiff Lautenbaugh therefore seeks injunctive relief to enjoin the NSBA's unconstitutional actions.

BACKGROUND

Plaintiff Lautenbaugh is a duly licensed attorney under the laws of Nebraska and, as required by Neb. Ct. R. § 3-803, is a member of the NSBA. As such, he is required to pay annual dues to the NSBA.[2] Filing 1-1 at CM/ECF p. 2. Plaintiff Lautenbaugh has been a State Senator since 2007, and has at various times during his tenure introduced or voted for bills which

[1] Defendants are the Nebraska State Bar Association ("NSBA"), Warren R. Whitted, Jr., President of the NSBA, Marsha E. Fangmeyer, President-Elect of the NSBA, and G. Michael Fenner, President-Elect Designate of the NSBA. The individual Defendants are sued in their official capacities. Filing 1 at CM/ECF pp. 4–5. Hereafter, Defendants will be referred to collectively as the "NSBA."

[2] In 2012, that amount was $345.00 per year. Filing 1-1 at CM/ECF p. 2.

the NSBA has formally opposed, supported, or taken no position on. Filing 1 at CM/ECF pp. 9–10.

Plaintiff Lautenbaugh seeks to represent a class of NSBA members who object to use of their mandatory member dues for political, ideological, and other non-germane activities.[3] Such members include those who have opted out of contributing to the lobbying activities of the NSBA on their annual member dues statements, approximately 1,100 of the NSBA's members; as well as those NSBA members who have filed a grievance pursuant to the NSBA's grievance procedure. Paul Hammel, *Mandatory Bar Membership for Lawyers Opposed,* OMAHA WORLD-HERALD (June 1, 2012). Such class members are, at a minimum, "potential objectors," as that term was used by the U.S. Supreme Court in *Chicago Teachers Union, Local No.* 1 *v. Hudson,* 485 U.S. 292, 306 (1986).

The NSBA is an association created by the Nebraska Supreme Court. *In re Integration of Nebraska State Bar Association,* 275 N.W. 265, 271–73 (Neb. 1937). The NSBA is a "mandatory" or "integrated" bar association as described in *Keller v. State Bar of California,* 496 U.S. 1, 5 (1990). That is, all attorneys must join the NSBA and pay mandatory bar dues as a condition of practicing law in the State of Nebraska. The NSBA thus acts under color of state law to collect mandatory dues from NSBA members. *Id.*; Filing 1-1 at CM/ECF p. 2.

In addition to regulating the legal profession and improving the quality of legal services, the NSBA conducts extensive lobbying activities, which are wholly or partially funded by mandatory member dues. Filing 1-2 at CM/ECF pp. 2–3. In fact, the NSBA has "a comprehensive and in-depth procedure for drafting, evaluating, and modifying proposed legislation at both [state and local] levels." *Memorandum to Executive Council: Rationale for*

[3] Filed contemporaneously herewith is Plaintiff Lautenbaugh's Motion for Certification of Class and supporting Brief.

the Unified Bar in Nebraska, Nebraska State Bar Association 4 (Mar. 2012) (hereinafter "*Memorandum to Executive Council")* (*available online at* http://nebar.com/associations/8143/files/WhyIntegratedBar_2012.pdf) (last accessed Oct. 9, 2012). For example, over the past two years, the NSBA has expended mandatory bar dues on tracking almost 300 bills and taking positions on more than 100. Many of the bills on which the NSBA took positions had nothing to do with the regulation and/or improvement of the legal profession. Instead, many of the bills dealt with a wide range of unrelated issues, including concealed handguns, government contracts, divorce, grandparent visitation, child support, truancy, and criminal sentences. Filing 1 at CM/ECF p. 9*; NSBA Legislative Summary,* Nebraska State Bar Association (2012) (*available online at* http://nebar.com/associations/8143/files/NSBA_FinalLegSummary_4-23-12_Subject.pdf) (last accessed Oct. 9, 2012).

In addition to hiring outside lobbyists, the NSBA also uses mandatory member dues to fund other non-chargeable activities, such as: (a) sending NSBA staff members to legislative hearings and legislative committee meetings; (b) holding receptions for Nebraska state legislators; (c) drafting proposed legislation (*Memorandum to Executive Council* at 4); and (d) paying the administrative and overhead costs of legislation-related activities. Filing 1-3 at CM/ECF p. 6.

The NSBA has adopted two procedures in a failed attempt to protect the First and Fourteenth Amendment rights of NSBA members. *Id* at 3–5. The first procedure is a one-sentence "check-off" ("Lobbying Check-Off") that is an option on annual dues notices. It provides, "I do not want any portion of my dues used for lobbying purposes" next to a box, which members may check. Filing 1-2 at CM/ECF p. 2; Neb. Ct. R. § 3-803(D)(2)(b). Nowhere

in its member dues notices or other publications to NSBA bar members does the NSBA provide examples or a coherent definition of the activities to which "lobbying purposes" applies.

To make matters worse, the NSBA's policy is to simply reallocate check-off dues for other uses, that is, check-off dues "shall be budgeted by the Executive Council" for other activities. Neb. Ct. R. § 3-803(D)(2)(b). According to a memorandum to the Executive Council, the NSBA "segregates and then deducts from legislative counsel's contract, the amount that is determined by the number of NSBA members that 'check off.'" *Memorandum to Executive Council* at 4. Thus, although the amount of money paid to outside lobbyists is reduced, Plaintiff Lautenbaugh and other class members are given no assurances that, even if they check the Lobbying Check-Off box, their dues will not be "budgeted by the Executive Council", Neb. Ct. R. § 3-803(D)(2)(b), for other non-chargeable activities that the NSBA does not categorize as "lobbying purposes" or to legislative activities that are not conducted by the NSBA's outside lobbyists, such as those conducted by NSBA staff members. In short, utilizing the Lobbying Check-Off procedure only exempts member dues from being used to pay the NSBA's outside lobbyists. Filing 1-3 at CM/ECF pp. 2–6; *Memorandum to Executive Council* at 4.

The second procedure established by the NSBA is a "Member Dues Grievance Procedure" ("Grievance Procedure").[4] The Grievance Procedure seeks to provide NSBA members with a means to "challenge[] a particular expenditure." Filing 1-4 at CM/ECF p. 2. Under this procedure, a Member Dues Grievance Committee made up of non-NSBA employed attorneys reviews a grievance and makes a recommendation to the NSBA's Executive Council. *Id*. However, the NSBA's own Executive Council makes the "final determination regarding the grievance." *Id*.

[4] Oddly, NSBA members who have utilized the Lobbying Check-Off procedure may not utilize the Grievance Procedures. Filing 1-4 at CM/ECF p. 2.

SUMMARY OF ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2009).

Plaintiff Lautenbaugh and other class members are likely to succeed on the merits because the NSBA has failed to provide procedures that satisfy any of the *Hudson* requirements, the NSBA has failed to provide procedures that allow NSBA members to opt-in to paying for non-chargeable activities pursuant to *Knox v. Service Employees Intern. Union,* 132 S. Ct. 2277, 2295 (2012), and the NSBA has failed to provide procedures that protect Plaintiff Lautenbaugh's and other class members' right to procedural due process. Filing 1 at CM/ECF pp. 13–21. The ongoing deprivation of Plaintiff's and other class members' First Amendment rights against compelled speech and compelled association and Fourteenth Amendment right to due process, constitutes irreparable injury. *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"). The balance of equities tips in favor of Plaintiff Lautenbaugh and other class members because the NSBA has no right at all to collect mandatory member dues until it establishes constitutionally adequate procedures. *Reese v. City of Columbus,* 798 F. Supp. 463, 472 (S.D. Ohio 1992) (in the absence of *Hudson* procedures, an association has "no right to collect fees"). Finally, an injunction is in the public interest because that interest is served by protecting First Amendment rights to freedom of expression and freedom of speech. *Swanson v. University of Hawaii Professional Assembly,* 269 F. Supp. 2d 1252, 1260–61 (D. Haw. 2003).

Additionally, the waiver of a bond is appropriate in this case because there are important constitutional rights at stake and the preliminary injunction seeks only to compel the NSBA to comply with constitutional requirements. *Id.* at 1261; *Sak v. City of Aurelia, Iowa,* 832 F. Supp. 2d 1026, 1048 (N.D. Iowa 2011).

ARGUMENT

I. PLAINTIFF LAUTENBAUGH AND OTHER CLASS MEMBERS ARE LIKELY TO SUCCEED ON THE MERITS.

The First Amendment protects not only the freedom to associate, but the freedom not to associate; and it protects not only the freedom of speech, but the freedom to avoid subsidizing group speech with which an individual disagrees. *Knox,* 132 S. Ct. at 2288–89; *Kingstad v. State Bar of Wisconsin,* 622 F.3d 708, 712–13 (7th Cir. 2010). Unless specific procedural protections are in place, an individual's rights against compelled speech and compelled association are violated when a mandatory bar uses mandatory member dues for purposes not germane to regulating the legal profession or improving the quality of legal services. *Keller,* 496 U.S. at 17; *Kingstad,* 622 F.3d 708, 712–13; *see also Knox,* 132 S. Ct. at 2295–96; *Abood v. Detroit Board of Education,* 431 U.S. 209, 235 (1977). The failure to provide such procedural protections in the first instance violates bar members' Fourteenth Amendment right to procedural due process. *Wessel v. City of Albuquerque,* 299 F. 3d 1186, 1193 (10th Cir. 2002).

A. The NSBA Has Violated Plaintiff Lautenbaugh's And Other Class Members' First And Fourteenth Amendment Rights Against Compelled Speech And Compelled Association Because The NSBA Has Failed To Comply With Constitutional Requirements Set Forth In *Hudson*.

Compelled association in a mandatory bar association has been held to be justified by the State's interest in regulating the legal profession and improving the quality of legal services. *Keller,* 496 U.S. at 13. A mandatory bar association may thus use mandatory member dues to

fund only activities germane to the dual goals of regulating the legal profession and improving the quality of legal services. *Id.* at 14. Any activities that are not related to the bar association's dual goals of regulation and improvement of the legal profession, including political, ideological, and other non-germane activities, are "non-chargeable activities," meaning members may not be compelled to pay for these activities. *Id.; see also Kingstad,* 622 F.3d at 718–19; *Romero v. Colegio de Abogados de Puerto Rico,* 204 F.3d 291, 302 (1st Cir. 2000).

When a mandatory bar association expands its activities beyond those germane to a bar association's constitutional purposes and spends member dues for non-chargeable activities, the Supreme Court has held that procedural protections must be instituted to safeguard bar members' First and Fourteenth Amendment rights against compelled speech and compelled association.[5] *Keller,* 496 U.S. at 15–17; *see also Hudson,* 475 U.S. at 310; *Knox*, 132 S. Ct. at 2291. As demonstrated below, the NSBA has spent member dues for non-chargeable activities, while failing to provide the requisite procedural protections, and has thereby violated Plaintiff Lautenbaugh's and other class members' First and Fourteenth Amendment rights. Ralph A. 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, 69 (2000) (concluding that the NSBA's Lobbying Check-Off and Grievance Procedures fail to comply with *Keller* and *Hudson*).

The two limited procedures provided by the NSBA fail to satisfy the minimum procedures required by the First and Fourteenth Amendments as explained in *Hudson*. 475 U.S. at 306–08, 310. The *Hudson* requirements include: (1) financial disclosure of chargeable and non-chargeable activities adequate to allow dues-payers to gauge the propriety of the fee and to

[5] Two purposes are served by procedural safeguards. First, they ensure that the dues paid include only objecting members' *pro rata* share of constitutionally chargeable costs. *Hudson,* 475 U.S. at 310. Second, procedural safeguards facilitate a bar member's ability to protect his constitutional rights. *Id.* at 303, 307 n.20.

make an intelligent decision regarding whether to challenge the fee; (2) an opportunity to challenge the fee calculation before an impartial decision-maker; and (3) an escrow of the amounts reasonably in dispute pending such challenges. *Id*.

The NSBA is in violation of the first *Hudson* requirement because it fails to make adequate financial disclosures of chargeable and non-chargeable activities prior to collecting mandatory member dues. Plaintiff Lautenbaugh and other class members have a First Amendment right to procedures that would give them adequate notice and explanation of non-chargeable activities, including, at a minimum, "the major categories of expenses, as well as verification by an independent auditor." *Hudson,* 475 U.S. at 307 n.18. Such notice would allow them to make informed decisions regarding whether their member dues are (or will be) used for non-chargeable activities that conflict with their own personal preferences so that they may timely object. *Id.* at 306. Neither the Lobbying Check-Off nor the Grievance Procedure provides Plaintiff Lautenbaugh and other class members with this information. Rather, if Plaintiff Lautenbaugh and other class members seek to exempt their dues from being used for non-chargeable activities, their only option is to select the Lobbying Check-Off and blindly trust the NSBA not to spend a portion of their mandatory member dues on non-chargeable activities.

The NSBA also fails to comply with the second *Hudson* requirement because, even if Plaintiff Lautenbaugh and other class members were provided with information on which they could base an objection, the NSBA has no grievance procedure that would provide a reasonably prompt decision by an impartial decision-maker. *Id.* at 308. First, since Plaintiff Lautenbaugh and other class members selected the Lobbying Check-Off option on their 2012 dues notices and/or will select the Lobbying Check-Off on their 2013 notices, they are barred from availing themselves of the Grievance Procedure. Filing 1-4 at CM/ECF p. 2. Second, the Grievance

Procedure itself is constitutionally flawed because it allows the NSBA's own Executive Council to make the final determination regarding grievances. *Id; Hudson,* 475 U.S. at 308 (holding that a grievance procedure controlled by an "interested party"—the association that stands to benefit from receipt of member dues—does not satisfy the Constitution). In short, Plaintiff Lautenbaugh and other class members have no ability to file a grievance and prevent their member dues from being spent in violation of their First and Fourteenth Amendment rights in direct violation of the second Hudson requirement.[6]

Finally, the NSBA is in violation of the third *Hudson* requirement because the NSBA's policy of reallocating member dues, rather than holding any disputed amount of member dues in an escrow account and reimbursing a dissenting bar member in the event of a successful challenge, similarly violates Plaintiff Lautenbaugh's and other class members' First and Fourteenth Amendment rights. *Id*. at 310. Reallocation improperly deprives Plaintiff Lautenbaugh and other class members of their right to reimbursement. *Id.*; *Ellis v. Railway Clerks,* 466 U.S. 435, 444 (1984) (constitutionally permissible options include advance reduction of dues and/or interest-bearing escrow accounts). Additionally, as discussed below, selection of the Lobbying Check-Off does not operate to exempt member dues from all non-chargeable activities of the NSBA, but rather only a portion of the non-chargeable activities related to lobbying. *See Tierney v. City of Toledo,* 824 F.2d 1497, 1506 (6th Cir. 1987) (rejecting the union's practice of refunding only that portion of union dues expended for "*ideological* purposes" because, under *Hudson,* the union is required to refund that portion of union dues used

[6] To make matters worse, although Defendants' Grievance Procedure claims to provide members with a means to file a claim, the procedure completely fails to provide the information on which such a claim might be based in the first place, because the NSBA makes no adequate financial disclosures of chargeable and non-chargeable activities. *Hudson*, 475 U.S. at 306–308; Filing 1-4 at CM/ECF p. 2. This may explain why only one grievance has ever been filed. *Memorandum to Executive Council* at 5.

for *all* non-chargeable activities) (emphasis in original). Even if the dues of those who select the Lobbying Check-Off option are completely redirected to chargeable activities, the NSBA has no right to retain and reallocate funds that were slated for non-chargeable activities. The proper remedy is advance reduction or reimbursement of that portion of member dues. *Id.* at 1505 (emphasizing that "the union may not claim a right to receive from the [plaintiff] full union dues . . . [i]nstead, it may collect *only for those expenses affirmatively related to the bargaining agreement* [germane to the union's purposes]") (emphasis in original).

As the foregoing demonstrates, the NSBA has utterly failed to satisfy any of the *Hudson* requirements. Importantly, it is axiomatic that when a plaintiff shows that the *Hudson* requirements have not been met, there is a likelihood that the plaintiff will succeed on the merits. *Swanson,* 269 F. Supp. 2d. at 1259. For example, in a case similar to this one, the Sixth Circuit found that plaintiffs had established a substantial likelihood of success on the merits where they had shown the defendant union failed to disclose the amounts allocated to chargeable and non-chargeable activities and failed to provide an impartial grievance procedure because the procedure included officers employed by the union. *Weaver v. University of Cincinnati,* 942 F.2d 1039, 1046–47 (6th Cir. 1991). Similarly, the Ninth Circuit has found a *Hudson* claim meritorious where a union had made financial disclosures to dues-payers and assured them the financial disclosures had been audited, but failed to provide verification by an independent auditor. *Cummings v. Connell,* 316 F.3d 886, 890–91 (9th Cir. 2003).

Plaintiff Lautenbaugh in this case has shown far more egregious constitutional violations, including: (1) the NSBA's failure to make *any* disclosures regarding amounts slated for "lobbying purposes" or even a coherent definition of "lobbying purposes," much less verification by an independent auditor; (2) the partiality of the NSBA grievance procedure, which involves a

final determination by the NSBA's own Executive Council; and (3) the NSBA's failure not only to place disputed amounts in an escrow account, but to provide any rebate or reimbursement at all. Based on these ongoing failures to meet the *Hudson* requirements, Plaintiff Lautenbaugh and other class members have shown a strong likelihood of success on the merits.

B. The NSBA Has Failed To Comply With The Constitutional Requirements Of *Knox*.

The NSBA's procedures also fail to meet the constitutional requirements of *Knox,* which requires the NSBA to give Plaintiff Lautenbaugh and other class members the opportunity to affirmatively consent to the use of their dues for non-chargeable activities. *Knox,* 132 S. Ct. at 2295 (holding that, "by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of [dues-payers]"). Although the Supreme Court in *Knox* dealt only with an opt-out procedure in the context of special assessments, *Knox* merely reaffirms past decisions placing the burden of protecting dues-payers' constitutional rights on "the side whose constitutional rights are not at stake." *Id*. Requiring objecting dues-payers to opt out of paying the non-chargeable portion of dues provides a "remarkable boon" to the association collecting dues, and dues-payers' "acquiescence in the loss of fundamental rights" should not be presumed. *Id.* at 2290.

To place the burden of protecting dues-payers' constitutional rights on the appropriate party, the Supreme Court specified that "careful application of First Amendment principles" favors an opt-in scheme, rather than an opt-out one. *Id.* The Court in *Knox* shed light on language in *Hudson* that any procedure for exacting fees from unwilling contributors must be "carefully tailored to minimize the infringement" of free speech rights. *Id.* at 2291 (quoting *Hudson,* 475 U.S. at 303). The Court went on to point out, "to underscore the meaning of this careful tailoring, we followed that statement with a citation to cases holding that measures

burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id.*

Assuming the NSBA has a compelling interest in regulating the legal profession and improving the quality of legal services, *see Keller,* 496 U.S. at 13–14, a mandatory bar association "may not . . . in such manner fund activities of an ideological nature which fall outside these areas of activity." *Id.* at 14. Therefore, the burden on NSBA members must be no broader than necessary to serve the NSBA's purported compelling interest, and must simultaneously protect NSBA members' First and Fourteenth Amendment rights. *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)).

According to *Knox,* the most narrowly tailored means of collecting mandatory member dues for chargeable activities is to provide NSBA members with the opportunity to opt in to the use of their dues for non-chargeable activities. 132 S. Ct. at 2293 ("[t]o respect the limits of the First Amendment, the union should have sent out a new notice allowing nonmembers to opt in to the special fee rather than requiring them to opt out."); *see also Hudson,* 475 U.S. at 303 n.12 ("[p]rocedural safeguards often have a special bite in the First Amendment context") (internal quotations omitted); *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) (infringements on freedom of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means

significantly less restrictive of associational freedoms"); *Elrod,* 427 U.S. at 363 (government means must be "least restrictive of freedom of belief and association").

The NSBA's opt-out procedure is not the least restrictive means of collecting mandatory member dues. It fails to carefully protect the First Amendment rights at stake and "creates a risk" that dues paid by bar members "will be used to further political and ideological activities" with which those bar members do not agree. *Knox,* 132 S. Ct. at 2290. Nor would the use of an opt-in procedure for non-chargeable activities interfere with any compelling interests the NSBA may have, since the opt-in provision would not apply to that portion of member dues slated for chargeable activities. Because the NSBA's Lobbying Check-Off option requires bar members to affirmatively *dissent* from use of their membership dues for "lobbying purposes," and thus falls short of the narrow tailoring necessary to prevent infringement of the free speech rights of Plaintiff Lautenbaugh and other class members, Plaintiff Lautenbaugh and other class members are likely to succeed on the merits. *Knox*, 132 S.Ct. at 2290–91.

C. The NSBA Has Failed To Protect Plaintiff Lautenbaugh's And Other Class Members' Fourteenth Amendment Right To Due Process.

The NSBA's failure to comply with the *Hudson* requirements violates the Fourteenth Amendment right to due process of Plaintiff Lautenbaugh and other class members. "Even in the absence of First Amendment interests, minimum procedural safeguards under the due process clause include timely and adequate notice detailing the reasons for a proposed deprivation of property." *Lowary v. Lexington Local Board of Education*, 903 F.2d 422, 429 (6th Cir. 1990); *see also Hudson v. Chicago Teachers Union Teachers Local No. 1,* 743 F.2d 1187, 1192–93 (7th Cir. 1984) (holding that an employee compelled to support a union has a Fourteenth Amendment due process right to fair procedure—including adequate notice, disclosures, and an impartial review process—"quite apart from any procedural safeguards required by the First Amendment

directly."). As demonstrated above, the NSBA's procedures fail to satisfy any of the *Hudson* or *Knox* requirements. Therefore, Plaintiff Lautenbaugh and other class members are likely to succeed on the merits of their claim that the NSBA has violated their procedural due process rights.

II. PLAINTIFF LAUTENBAUGH AND OTHER CLASS MEMBERS ARE SUFFERING IRREPABLE HARM.

A. The NSBA's Violation of Plaintiff Lautenbaugh's And Other Class Members' First And Fourteenth Amendment Rights Against Compelled Speech And Compelled Association Constitute Irreparable Harm.

No matter how small a portion of Plaintiff Lautenbaugh's and other class members' dues are being used to fund the non-chargeable activities of the NSBA, Plaintiff Lautenbaugh and other class members still suffer irreparable harm in the absence of a preliminary injunction because their First and Fourteenth Amendment rights against compelled speech and compelled association are being violated by the use of *any* portion of their dues for non-chargeable activities. *Hudson,* 475 U.S. at 305 (discussing the risk that dissenters' funds may be used, even temporarily, for an improper purpose and emphasizing that "[t]he amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of [dissenters'] interest in not being compelled to subsidize the propagation of political or ideological views they oppose is clear"); *see also Weaver,* 942 F.2d at 1045 ("the dollar amount in issue is irrelevant").

The deprivation of First Amendment rights in itself is sufficient to show irreparable harm. *Elrod,* 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Child Evangelism Fellowship of Minnesota v. Minneapolis Special School Dist. No. 1,* 690 F.3d 996, 1000 (8th Cir. 2012) (holding that "a high likelihood of success on the merits of [a] First Amendment claim [] is likely enough,

standing alone, to establish irreparable harm"); *Phelps-Roper v. Nixon,* 545 F.3d 685 (8th Cir. 2008) (holding that, if a plaintiff "can establish a sufficient likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of the deprivation"). Once any portion of Plaintiff Lautenbaugh's and other class members' dues are spent on non-chargeable activities, without the procedural safeguards mandated by *Hudson* and *Knox*, their First Amendment rights are irretrievably lost; NSBA's lobbying and other non-chargeable activities cannot be undone. *Knox,* 132 S. Ct. at 2293 (recognizing that a full refund of associational dues used for political purposes after the association's political objectives had been achieved would be "cold comfort" to dues-payers).

As demonstrated above, the NSBA's procedures fail to comply with the straightforward procedural protections mandated by *Hudson* and *Knox*; thus, Defendants are depriving Plaintiff Lautenbaugh and other class members of their First and Fourteenth Amendment rights. As a result, Plaintiff Lautenbaugh and other class members are suffering irreparable harm justifying a preliminary injunction. *Weaver v. University of Cincinnati,* 970 F.2d 1523, 1534 (6th Cir. 1992) (where even *chargeable* fees have been collected under a plan that does not comport with constitutional requirements, "the proper remedy is an injunction").

B. The NSBA's Violation of Plaintiff Lautenbaugh's And Other Class Members' Fourteenth Amendment Due Process Rights Constitutes Irreparable Harm.

The irreparable injury to Plaintiff Lautenbaugh's and other class members' constitutional rights consists not only of deprivation of their First Amendment rights against compelled speech and compelled association that result from use of their dues for non-chargeable activities, *see Kingstad,* 622 F.3d at 712–13, but also the deprivation of their Fourteenth Amendment procedural due process rights. Dues-payers have a:

> [F]ederal right to challenge a procedure that may not have resulted in any improper expenditures . . . in other words, even if the union has not used any of the money it has collected from objecting employees to promote political activities unrelated to its role in collective bargaining, the plaintiffs can still complain that they have been deprived of the liberty secured to them by the Constitution . . . [the association is required] to give [plaintiffs] due process of law in the sense of fair procedure, quite apart from any procedural safeguards required by the First Amendment directly.

Hudson, 743 F.2d at 1192–93; *see also Lowary,* 903 F.2d at 429 (holding that, "[e]ven in the absence of First Amendment interests, minimum procedural safeguards under the due process clause include timely and adequate notice detailing the reasons for a proposed deprivation of property") (internal citations omitted); *Tierney,* 824 F.2d at 1504 (holding that injunctive relief is appropriate "until a constitutionally adequate plan consistent with the holdings in *Abood, Hudson,* and this opinion is functioning.").

As demonstrated above, the NSBA's procedures are constitutionally inadequate under the mandates of *Hudson* and *Knox.* Therefore, Plaintiff Lautenbaugh and other class members are being deprived of their right to procedural due process under the Fourteenth Amendment. This constitutes an ongoing irreparable harm that justifies issuance of a preliminary injunction.

III. THE BALANCE OF EQUITIES TIPS IN PLAINTIFF LAUTENBAUGH'S AND CLASS MEMBERS' FAVOR BECAUSE THE NSBA WILL SUFFER NO INJURY.

The injury to Plaintiff Lautenbaugh's and other class members' First and Fourteenth Amendment rights in the absence of a preliminary injunction far outweighs any injury to the NSBA that could result from improvidently granting such relief. As the Supreme Court recently emphasized, "[f]ar from calling for a balancing of rights or interests, *Hudson* made it clear that any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights." *Knox,* 132 S. Ct. at 2291. As demonstrated above, in the absence of such carefully tailored procedures, "[d]efendants have no right to collect

fees." *Reese,* 798 F. Supp. at 472. Accordingly, an injunction prohibiting the NSBA from collecting Plaintiff Lautenbaugh's and other class members' mandatory member dues until constitutionally adequate procedures are in place will inflict no injury on the NSBA.

Plaintiff Lautenbaugh and other class members do not seek to limit the NSBA's ability to collect mandatory member dues from non-objecting members. And the NSBA need only institute the minimal requirements mandated by *Hudson* and *Knox* in order to constitutionally collect mandatory member dues from Plaintiff Lautenbaugh and other objecting class members. This is a small price to pay for ensuring that the NSBA does not continue to irreparably harm the First and Fourteenth Amendment rights of Plaintiff Lautenbaugh and other class members. *See Lowary v. Lexington Board of Education,* 854 F.2d 131, 134–135 (6th Cir. 1988) (once a dues-payer has objected to payment of mandatory dues on the basis that those procedures do not satisfy the constitutional requirements set forth in *Hudson*, and once the district court has found it likely that the procedures violate *Hudson;* it constitutes abuse of discretion for the court to allow such dues to be collected, even if the collected dues are placed into an escrow account); *Tierney,* 824 F.2d at 1504 (holding that "no union or employer may take any action [to collect compulsory dues] . . . until a plan with procedures meeting the commands of *Abood* and *Hudson* is established and operating").[7]

[7] At the very least, this Court must prevent disputed portions of dues from being used for non-chargeable activities, either by ordering advance reduction of the disputed portions and/or by ordering the disputed portion to be placed in interest-bearing escrow accounts. *Ellis*, 466 U.S. at 444; *Romero,* 204 F.3d at 302. The burden rests on the NSBA to show which portion of Plaintiff Lautenbaugh's and other class members' dues are used for chargeable activities and may thus be lawfully collected. *Harrington v. City of Albuquerque,* 329 F. Supp. 2d 1237, 1243 (D.N.M. 2004) (where defendant-union "failed to even address what proportion of the fees collected actually went to chargeable activities", the union failed to satisfy its burden of proof with regard to any dues collected from plaintiffs and the dues should be refunded "in their entirety"); *see also Hudson,* 475 U.S. at 310 (holding that, in the context of union nonmembers requesting

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

"Judicial insistence" on constitutionally adequate procedures for the collection of mandatory member dues serves the public interest. *Weaver,* 942 F.2d at 1047. It is obvious that the public interest is served by requiring a mandatory bar to protect the First and Fourteenth Amendment rights of its members prior to collecting mandatory member dues. *Swanson,* 269 F. Supp. 2d at 1260–61 (recognizing that "the public's interest in upholding [F]irst [A]mendment freedoms of political expression favors the granting of a preliminary injunction"); *Reese,* 798 F. Supp. at 472 (holding that, "[s]ince the granting of a preliminary injunction is necessary to prevent further infringement of the plaintiffs' core First Amendment rights, the granting of such an injunction would be in the public interest"). Furthermore, a preliminary injunction would serve the public interest in avoiding the distortion of the political process that occurs when compulsory funds are exacted from dues-payers who do not agree with the political viewpoints they are compelled to support. *See Knox,* 132 S. Ct. at 2289.

V. THE WAIVER OF A BOND IS APPROPRIATE.

Ordinarily, the entry of preliminary relief requires the posting of security. Fed. R. Civ. P. 65(c). A court, however, has discretion to waive this requirement or require only a nominal bond. *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 collecting cases); *see also Stockslager v. Carroll Elec. Cooperative Corp.,* 528 F.2d 949, 951 (8th Cir. 1976) (amount of bond required

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compensatory damages, a union may retain portions of collected dues that were not subject to dispute and that "no dissenter could reasonably challenge").

upon the issuance of a preliminary injunction is within the sound discretion of the district court). In setting bond amounts, courts generally take special precautions to ensure that plaintiffs bringing suit under 42 U.S.C. § 1983 are not thereby effectively denied access to judicial review. *Baca v. Moreno,* 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).

Specifically, where a preliminary injunction would merely require a defendant to comply with the Constitution, no bond is required. *See Swanson,* 269 F. Supp. 2d at 1261 (waiving the bond requirement where union failed to comply with *Hudson*); *Doe v. Pittsylvania County, Va.,* 842 F. Supp. 2d 927, 937 (W.D. Va. 2012) (fixing the bond at zero dollars where there could be no damages to the defendant other than complying with the Constitution). Where the amount of potential damages is limited, a nominal bond of $1 is appropriate. *Sak,* 832 F. Supp. 2d at 1048. Here, Plaintiff Lautenbaugh is seeking to vindicate his constitutional rights and those of the class he seeks to represent, rather than to recover damages; and attorneys provided by a non-profit legal foundation represent him *pro bono*. This case involves a relatively small amount of money taken from Plaintiff Lautenbaugh and other class members in alleged violation of important constitutional rights, and seeks to enjoin further collection of their member dues until constitutionally adequate *Hudson* and *Knox* procedures are in place.

Additionally, 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 discussed above, Plaintiff Lautenbaugh and other class members have demonstrated a high likelihood of success on the merits based on the Supreme Court's clear precedent regarding constitutionally adequate procedures and the NSBA's ongoing failure to provide such procedures. Accordingly, it would be appropriate to waive the bond requirement in this case or to set bond at a nominal amount.

CONCLUSION

Because the NSBA has failed to comply with the constitutional requirements for the collection of mandatory member dues, this Court should immediately issue a preliminary injunction restraining the NSBA from collecting Plaintiff Lautenbaugh's and other class members' mandatory member dues pending a final decision on the merits or until constitutionally adequate procedures are in place and operating. In the alternative, this Court should preliminary enjoin the NSBA from using any disputed portions of Plaintiff Lautenbaugh's and other class members' mandatory member dues for non-chargeable activities, either by ordering advance reduction of the disputed portions and/or by ordering the disputed portion to be placed in interest-bearing escrow accounts. Of course, the burden rests on the NSBA to show which portion of Plaintiff Lautenbaugh's and other class members' mandatory member dues are used solely for chargeable activities, a burden that the NSBA has not met.

DATED this 12th day of October 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October 2012, I filed the foregoing document using the Court's CM/ECF system. I also served the foregoing document on all the parties by sending true and accurate copies via first class U.S. Mail, postage prepaid, and addressed as follows:

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