

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

SCOTT LAUTENBAUGH, on behalf of)
himself and the class he seeks to)
represent,)

No. _____

Plaintiffs,)

v.)

**CLASS ACTION COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

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.)
_____)

Plaintiff, Scott Lautenbaugh, by and through his undersigned attorneys, hereby files this Complaint against the Nebraska State Bar Association, Warren R. Whitted, Jr., President of the Nebraska State Bar Association; Marsha E. Fangmeyer, President-Elect of the Nebraska State Bar Association; and G. Michael Fenner, President-Elect Designate of the Nebraska State Bar Association; in their official capacities (“Defendants”), on behalf of himself and the class he seeks to represent and alleges as follows:

NATURE OF THE CLAIMS

1. This civil rights class action seeks immediate injunctive and declaratory relief to redress and prevent the deprivation of Plaintiff Lautenbaugh's rights, and the rights of the class members he seeks to represent, against compelled speech and compelled association protected by the First and Fourteenth Amendments to the United States Constitution by practices and policies of Defendants acting under color of state law.

2. Specifically, those rights have been violated by Defendants' imposition of mandatory dues as a condition of membership to the Nebraska State Bar Association ("NSBA"), which is a prerequisite to the ability to practice law in the State of Nebraska. A portion of these mandatory dues, however, are used to fund political, ideological, and other non-germane activities ("non-chargeable activities") which Plaintiff Lautenbaugh and other class members do not support. Defendants fail to provide constitutionally required procedural protections to safeguard Plaintiff's and other class members' constitutional rights. Plaintiff therefore seeks declaratory and injunctive relief to abate and correct Defendants' unconstitutional actions.

JURISDICTION AND VENUE

3. Plaintiff Lautenbaugh and other class members bring this civil rights lawsuit pursuant to the First and Fourteenth Amendments to the United States Constitution. Because this action arises under the Constitution and laws of the United States, this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

4. This is also an action under the Civil Rights Act of 1871, specifically 42 U.S.C. § 1983, to redress the deprivation, under color of state law, of rights, privileges, and immunities secured to Plaintiff Lautenbaugh and other class members by the Constitution of the United States, particularly the First and Fourteenth Amendments thereto. The jurisdiction of this Court, therefore, is also invoked under 28 U.S.C. § 1343(a)(3), (4).

5. This is also a case of actual controversy because Plaintiff Lautenbaugh and other class members are seeking a declaration of their rights under the Constitution of the United States. Under 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights of Plaintiff Lautenbaugh and other class members and grant further necessary and proper relief, including preliminary and permanent injunctive relief, pursuant to Fed. R. Civ. P. 65.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because it is the judicial district where Defendants reside, and “in which a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. §§ 1391(b), 124(d)(1).

PARTIES

7. Plaintiff Lautenbaugh, is a citizen of the United States and a resident of Nebraska. Plaintiff Lautenbaugh is also a duly licensed attorney under the laws of Nebraska and, as required by Neb. Ct. R. § 3-803(A), is a member of the Nebraska State Bar Association (“NSBA”), which is a mandatory prerequisite to the ability to practice law in the State of Nebraska.

8. As an active member of the state bar, Plaintiff Lautenbaugh has paid mandatory dues to the NSBA since he was admitted to practice law in 1991.

9. Plaintiff Lautenbaugh is also a member of the Nebraska State Legislature, where he has served since 2007. At various times during his tenure as a state Senator, Plaintiff Lautenbaugh has introduced bills, some of which the NSBA has formally opposed, some of which the NSBA has formally supported, and on some of which the NSBA has taken no position.

10. Defendant 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). Defendant NSBA is headquartered in Lincoln, Nebraska, and conducts its business and operations throughout the State of Nebraska. Defendant 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. Defendant NSBA is currently enforcing the unconstitutional practices and policies complained of in this action.

11. Defendant, Warren R. Whitted, Jr., is a resident of Omaha, Nebraska and is President of the NSBA. In that capacity, Defendant Whitted conducts business on behalf of the NSBA throughout the State of Nebraska. For example, Defendant Whitted has testified at legislative hearings; voted to take positions on legislation as a member of the NSBA Legislation Committee and Executive Committee, and defended the use of member dues to support the NSBA lobbying program. *See Warren R. Whitted Jr., Making Sure Our Voice Is Heard, THE NEBRASKA LAWYER* (Mar./Apr. 2011); *see also, e.g., Act Relating to Schools and to Change Provisions Relating to Compulsory Attendance, Hearing on LB933 Before the Neb. Leg. Comm. on the Judiciary*, 102nd Leg., 2nd Sess. (Feb. 13, 2012). Defendant Whitted is currently implementing and enforcing the unconstitutional practices and policies complained of in this action. Defendant Whitted is sued in his official capacity.

12. Defendant, Marsha E. Fangmeyer, is a resident of Kearney, Nebraska, and is the President-Elect of the NSBA. In that capacity, Defendant Fangmeyer has voted to take positions on legislation as a member of the NSBA Legislation Committee and Executive Committee. Defendant Fangmeyer is currently implementing and enforcing the unconstitutional practices and policies complained of in this action. Defendant Fangmeyer is sued in her official capacity.

13. Defendant, G. Michael Fenner, is a resident of Omaha, Nebraska, and is the President-Elect Designate of the NSBA. In that capacity, Mr. Fenner has voted to take positions on legislation as a member of the NSBA Legislation Committee and Executive Committee.

Defendant Fenner is currently implementing and enforcing the unconstitutional practices and policies complained of in this action. Defendant Fenner is sued in his official capacity.

CONSTITUTIONAL STANDARDS

14. Under 42 U.S.C. § 1983, every person who, under color of state law, subjects any citizen of the United States to the deprivation of “rights, privileges, or immunities secured by the Constitution and laws,” shall be liable to the injured party.

15. 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 v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2288–89 (2012); *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, 712–13 (7th Cir. 2010).

16. 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 13–14; *Kingstad*, 622 F.3d at 712–13; *see also Knox*, 132 S. Ct. at 2295–96; *Aboud 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. *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1192–93 (7th Cir. 1984) *aff’d sub nom. Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986).

17. Any activities that are not “germane” to the bar association’s dual purposes of regulating the legal profession and improving the quality of legal services, including political and ideological activities, are “non-chargeable activities.” *Keller*, 496 U.S. at 14; *see also Kingstad*, 622 F.3d at 718–19; *Romero v. Colegio de Abogados de Puerto Rico*, 204 F.3d 291, 302–03 (1st

Cir. 2000).

18. When mandatory member dues are used for non-chargeable activities, the bar association is required to establish procedures that satisfy three requirements: (a) proper notice to members, including an adequate explanation of the calculations of all non-chargeable activities; (b) a reasonably prompt decision by an impartial decision maker once a member makes an objection to the manner in which his or her mandatory member dues are being spent; and (c) an escrow for the amounts reasonably in dispute while such challenges are pending.

Keller, 496 U.S. at 14; *Hudson*, 475 U.S. at 306–08.

19. Defendants bear the burden of proving that expenditures are germane and chargeable. *Hudson*, 475 U.S. at 306; *see also Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 524 (1991) (emphasizing that, “as always, the union bears the burden of proving the proportion of chargeable expenses to total expenses”).

CLASS ACTION ALLEGATIONS

20. This is a class action brought by Plaintiff Lautenbaugh on his own behalf and on behalf of others similarly situated, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class that Plaintiff Lautenbaugh seeks to represent consists of all current NSBA members who paid annual dues in 2012 and selected the “check-off” option on their annual dues notices, or will select the “check-off” option on their 2013 dues notices, thus attempting to exempt their dues from use for non-chargeable activities conducted by the NSBA. It also includes any NSBA members who have filed or will file a grievance pursuant to the NSBA’s defective grievance procedure, as described below.

21. The number of persons in this class is approximately 1,100. Paul Hammel, *Mandatory Bar Membership For Lawyers Opposed*, OMAHA WORLD-HERALD (June 1, 2012).

The class is therefore so numerous that joinder of all members of the class is clearly impracticable. *See* Fed. R. Civ. P. 23(a)(1).

22. There are questions of law and fact common to all members of the class; to wit, whether Defendants may constitutionally and lawfully collect mandatory bar dues without providing the procedural safeguards required by the First and Fourteenth Amendments to the United States Constitution. *See* Fed. R. Civ. P. 23(a)(2).

23. Plaintiff Lautenbaugh's claims are typical of other members of the class, who have been subject to the same deprivations of their First and Fourteenth Amendment rights by the NSBA's collection and spending of their dues, without providing the necessary constitutional safeguards, as hereinafter alleged. *See* Fed. R. Civ. P. 23(a)(3).

24. Plaintiff Lautenbaugh can adequately represent the interests of other members of the class. *See* Fed. R. Civ. P. 23(a)(4). Plaintiff Lautenbaugh has no interests antagonistic to other members of the class related to the subject matter of this lawsuit, since all members of the class are "potential objectors," *Hudson*, 475 U.S. at 306, and are entitled to notice and the procedures and safeguards required by the Constitution.

25. Plaintiff Lautenbaugh's attorneys are experienced in representing litigants in federal court. These attorneys are provided *pro bono* by a national charitable legal foundation and are experienced in representing parties in constitutional rights litigation. Plaintiff Lautenbaugh's attorneys are therefore well qualified to serve as class counsel.

26. Defendants have acted or refused to act on grounds generally applicable to the class. *See* Fed. R. Civ. P. 23(b)(2). Specifically, Defendants have failed to comply with the constitutional requirements for collecting mandatory member dues from Plaintiff Lautenbaugh and other class members. The declaratory and injunctive relief requested herein is therefore

appropriate with respect to the class as a whole. *See id.*

FACTUAL ALLEGATIONS

27. The NSBA is a mandatory bar. *In re Integration of Nebraska State Bar Association*, 275 N.W. at 269. As such, it is unlawful for a person to practice law in the State of Nebraska unless such person is a member of the NSBA. Neb. Ct. R. § 3-803(A). The NSBA thus acts under color of state law to collect mandatory dues from NSBA members. *Id.*; *Membership Dues Statement*, Nebraska State Bar Association (Nov. 15, 2011) (attached hereto as Exhibit 1).

28. In addition to chargeable activities, which include providing continuing education for practicing lawyers and regulating the practice of law, the NSBA conducts extensive lobbying activities, which are wholly or partially funded by mandatory member dues. *Legislative Program & Policy Statement*, Nebraska State Bar Association (adopted Oct. 23, 2008) (attached hereto as Exhibit 2).

29. 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 the Unified Bar in Nebraska*, Nebraska State Bar Association 4 (Mar. 2012) (available online at http://nebar.com/associations/8143/files/WhyIntegratedBar_2012.pdf) (last accessed Oct. 9, 2012).

30. 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 regulating the legal profession or improving the quality of legal services. 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. *See NSBA Legislative Summary*, Nebraska State Bar

Association (Apr. 2012) (*available online at*

http://nebar.com/associations/8143/files/NSBA_FinalLegSummary_4-23-12_Subject.pdf) (last

accessed Oct. 9, 2012). These bills included:

- a. LB 12: Eliminate “without parole” relating to life imprisonment (NSBA opposed);
- b. LB 129: Eliminate the statute of limitations for certain felonies (NSBA opposed);
- c. LB 408: Change provisions relating to divorce (*i.e.*, require marriage counseling, six month waiting period, etc.) (NSBA opposed);
- d. LB 433: Provide requirements for contracts for child welfare services between private agencies and the state (NSBA supported);
- e. LB 516: Authorize carrying of concealed handguns in educational institutions by certain personnel (NSBA opposed);
- f. LB 612: Increase the statute of limitations for plaintiffs suffering injury from sexual assault as a child (NSBA opposed);
- g. LB 647: Prohibit use of certain foreign laws in Nebraska courts (NSBA opposed);
- h. LB 844: Change child support and parenting time provisions (NSBA opposed);
- i. LB 933: Change provisions relating to truancy (NSBA supported);
- j. LB 1086: Provide additional grounds for grandparent visitation (NSBA opposed);
- k. LB 1134: Change agency procedures for eminent domain, making it more difficult for agencies to condemn private property (NSBA opposed); and
- l. LB 1171: Adopt the Nebraska Balance of Powers Act and create the Committee on Nullification of Federal Laws (NSBA opposed).

31. 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. Letter from G. Michael Fenner, Professor of Law, Creighton University, to Jane Schoenike, Executive Director, NSBA 3 (Feb. 15, 2012) (attached hereto as Exhibit 3).

32. Plaintiff Lautenbaugh supports some of the propositions the NSBA opposes, opposes some of the propositions the NSBA supports, and does not believe that his mandatory dues should be used for legislative lobbying or other non-chargeable activities, including those that conflict with his personal beliefs.

33. Defendants have adopted two procedures in an attempt to protect the First and Fourteenth Amendment rights of NSBA members. *Memorandum to Executive Council* at 4–5.

34. The first of these procedures is a one-sentence “check-off” procedure (“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. Exhibit 1; Neb. Ct. R. § 3-803(D)(2)(b).

35. Defendants do not explain in the dues notice what portion of the NSBA’s budget is used for “lobbying purposes.” The dues notice does provide a “tax notice” that states “[t]he nondeductible portion of your 2012 dues—the portion which is allocable to lobbying—is 5%.” Exhibit 1. However, the NSBA does not provide a basis upon which this percentage was purportedly calculated, nor does it provide a percentage of member dues that are allocated to non-chargeable activities besides “lobbying purposes.”

36. Nowhere in the member dues notice or other publications issued by the NSBA does the NSBA provide examples or a coherent definition of “lobbying purposes.”

37. For those members who utilize the Lobbying Check-Off procedure, the NSBA's purported policy is to "reallocate" the relevant percentage of those members' dues for other activities. That is, these monies will be "budgeted by the Executive Council" for other activities, which may or may not be non-chargeable activities. *See* Neb. Ct. R. § 3-803(D)(2)(b).

38. Specifically, although Neb. Ct. R. § 3-803(D)(2)(b) directs that the lobbying fund shall be reduced in proportion to a dissenter's contribution, materials released by the NSBA in an attempt to defend its practices and policies allow only that, if an NSBA member utilizes the Lobbying Check-Off procedure, "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; Neb. Ct. R. § 3-803(D)(2)(b). In other words, utilization of the Lobbying Check-Off procedure only exempts member dues from being used to pay the NSBA's outside lobbyists. Exhibit 3; *Memorandum to Executive Council* at 4.

39. As a result, Plaintiff Lautenbaugh and other class members are given no assurances that, even if they check the Lobbying Check-Off box, their mandatory member dues will not go to other non-chargeable activities that the NSBA does not categorize as "lobbying purposes" conducted by its outside lobbyists, such as legislative or lobbying activities conducted by NSBA staff members.

40. Plaintiff Lautenbaugh and approximately 1,100 proposed class members, utilize the Lobbying Check-Off procedure each year (out of the approximately 9,300 attorneys practicing in Nebraska). Paul Hammel, *Mandatory Bar Membership for Lawyers Opposed*, OMAHA WORLD-HERALD (June 1, 2012).

41. NSBA members not utilizing the Lobbying Check-Off procedure have access to a "Member Dues Grievance Procedure" ("Grievance Procedure"). *Member Dues Grievance*

Procedure, Nebraska State Bar Association (attached hereto as Exhibit 4). The Grievance Procedure seeks to provide NSBA members with a means to “challenge[] a particular expenditure.” *Memorandum to Executive Council* at 5. Yet, the NSBA’s own Executive Committee makes the “final determination regarding the grievance.” Exhibit 4. This may explain why only one grievance has ever been filed. *Memorandum to Executive Council* at 5.

42. NSBA members who have utilized the Lobbying Check-Off procedure may not file a grievance. Exhibit 4.

43. Except Nebraska, every state with a mandatory bar association that engages in non-chargeable activities provides for reimbursement or an advance reduction of the portion of member dues used for non-chargeable activities (most with interest).

44. The annual dues notice sent out by the NSBA does not seek the affirmative consent of bar members to use compulsory dues for political, ideological, and other non-chargeable activities. *See* Exhibit 1.

45. On February 29, 2012, Plaintiff Lautenbaugh filed a petition with the Nebraska Supreme Court captioned *Petition for a Rule Change to Create a Voluntary State Bar in Nebraska: to Abolish Neb. Ct. R.. Chapter 3, Article 8, and to Make Whatever Other Rule Changes are Necessary to Transition from a Mandatory to a Voluntary State Bar Association*.

46. On March 21, 2012, the Nebraska Supreme Court ordered publication of a petition for public comment by interested parties. *See Comment Sought on S-36-120001 “Petition for a Rule Change to Create a Voluntary State Bar of Nebraska”*, Nebraska Supreme Court (April 2012) (*available online at* <http://www.supremecourt.ne.gov/community/adminmemos/2012/12-4.shtml>) (last accessed Sept. 27, 2012).

47. On September 21, 2012, the Nebraska Supreme Court ordered the NSBA to file a report providing “a detailed inventory of *all* programs, services, and activities of the NSBA and an accounting of funds” and addressing “certain questions of law arising out of this petition,” including questions regarding whether the NSBA’s procedures are constitutional. Order at 3, *In Re Petition for Rule Change to Create Voluntary State Bar of Nebraska, etc.*, No. S-36-120001 (Neb., Sep. 21, 2012) (emphasis in original).

48. Because the Nebraska Supreme Court is still gathering information about Defendants’ practices and policies, it has not taken final action on Plaintiff Lautenbaugh’s petition.

FIRST CLAIM FOR RELIEF
(Compelled Speech and Association)
(First and Fourteenth Amendments)

49. Plaintiff Lautenbaugh and class members reallege and incorporate by reference each and every allegation set forth above.

50. Under color of state law, Defendants have collected and continue to collect mandatory member dues from Plaintiff Lautenbaugh and other class members, which are used in part for political, ideological, and other non-chargeable activities contrary to their views.

51. Without being provided with an immediate rebate of, or advance reduction in, the amount of dues being spent on non-chargeable activities, and without being provided an opportunity to opt in to non-chargeable activities, Plaintiff Lautenbaugh and other class members are being forced to associate with and subsidize the NSBA’s political speech, lobbying efforts, and other non-chargeable activities; and are otherwise deprived of their rights to free speech and free association under the First Amendment.

52. Once Plaintiff Lautenbaugh's dues, and those of other class members, are utilized for non-chargeable activities, their First and Fourteenth Amendment rights are irretrievably infringed and "even a full refund [will] not undo the violation of [their] First Amendment rights." *Knox*, 132 S. Ct. at 2292–93.

53. Accordingly, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law that deprive Plaintiff Lautenbaugh and other class members of rights, privileges and/or immunities secured by the First and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiff Lautenbaugh and other class members under 42 U.S.C. § 1983.

54. Plaintiff Lautenbaugh and other class members have no adequate legal remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights.

55. Plaintiff Lautenbaugh and other class members are therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

SECOND CLAIM FOR RELIEF
(Lobbying Check-Off and Grievance Procedures)
(First and Fourteenth Amendments)

56. Plaintiff Lautenbaugh and other class members reallege and incorporate by reference each and every allegation set forth above.

57. The First and Fourteenth Amendments protect the right of an objecting bar association member to decline to subsidize activities that are not germane to a mandatory bar association's dual purposes of regulating the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 13; *Kingstad*, 622 F.3d at 712–14.

58. Therefore, the First and Fourteenth Amendments require that procedures for the collection of compulsory member dues be narrowly tailored to allow members to object to non-

chargeable expenditures, in order to protect their fundamental rights to freedom of speech and association. *Hudson*, 475 U.S. at 303.

59. Under color of state law, Defendants have collected and continue to collect mandatory member dues, which are used in part to fund non-chargeable activities, without first providing the narrowly tailored procedures required by the First and Fourteenth Amendments.

60. The non-chargeable activities undertaken by the Defendants include lobbying activities and other uses of mandatory member dues that fall outside a bar association's dual purposes of regulating the legal profession and improving the quality of legal services. *Keller*, 496 U.S. at 14.

61. Defendants' Lobbying Check-Off procedure fails to protect the First and Fourteenth Amendment rights of Plaintiff and other class members. See 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 procedure fails to comply with *Keller* and *Hudson*).

62. The Supreme Court has held that procedures for the collection of compulsory member dues must provide the following safeguards, commonly referred to as "*Hudson* requirements": (a) an adequate explanation of non-chargeable activities; (b) a grievance procedure that will provide a reasonably prompt decision by an impartial decision-maker; and (c) a provision for any disputed amounts to be held in an escrow account while challenges are pending. *Hudson*, 475 U.S. at 306–10.

63. Defendants violate the first *Hudson* requirement by failing to provide NSBA members with an adequate explanation of non-chargeable activities, including "the major

categories of expenses, as well as verification by an independent auditor” so that bar members may “gauge the propriety” of the charges. *Id.* at 306, 307 n.18.

64. The Lobbying Check-Off procedure fails to provide bar members with adequate notice of the basis of the NSBA’s calculation of “lobbying purposes,” fails to provide an adequate explanation of the NSBA’s definition of “lobbying purposes,” and fails to provide verification by an independent auditor, thereby violating the first *Hudson* requirement and the First and Fourteenth Amendment rights of Plaintiff Lautenbaugh and other class members. *Id.* at 306–308.

65. Defendants violate the second *Hudson* requirement by failing to establish a grievance procedure that will provide a “reasonably prompt decision by an impartial decisionmaker.” *Id.* at 308. 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 (Exhibit 4), thereby violating the second *Hudson* requirement and the First and Fourteenth Amendment rights of Plaintiff Lautenbaugh and other class members. *Hudson*, 475 U.S. at 306–308.

66. Moreover, a grievance procedure controlled by the association that stands to benefit from receipt of member dues—and is thus an “interested party”—does not satisfy the impartial-decision maker requirement. *Id.* at 306–308.

67. By giving the NSBA’s own Executive Council the final say over any grievances (Exhibit 4), the Grievance Procedure fails to provide an impartial decision-maker, thereby violating the second *Hudson* requirement and the First and Fourteenth Amendment rights of Plaintiff and other class members. *Hudson*, 475 U.S. at 306–308.

68. Additionally, Defendants have written the Grievance Procedure in such a way as to explicitly bar NSBA members who utilize the Lobbying Check-Off procedure from utilizing the Grievance Procedure. Exhibit 4.

69. Defendants violate the third *Hudson* requirement by failing to hold any disputed amounts of bar members' dues in an escrow account while challenges are pending. Neb. Ct. R. § 3-803(D)(2)(b); *Hudson*, 375 U.S. at 310.

70. The Lobbying Check-Off procedure fails to provide adequate remedies to objecting bar members because it reallocates member dues, rather than providing a refund or advance reduction of dues. Neb. Ct. R. § 3-803(D)(2)(b); *Hudson*, 475 U.S. at 310; see *Ellis v. Railway Clerks*, 466 U.S. 435, 444 (1984) (constitutionally permissible options include advance reduction of dues and/or interest-bearing escrow accounts).

71. Reallocation improperly allows Defendants to use NSBA member dues for non-chargeable activities. While the NSBA allegedly reduces the amount of its contracts with outside lobbyists in proportion to the number of NSBA members who select the Lobbying Check-Off option, the NSBA does not reduce the amounts budgeted for NSBA internal lobbying or other non-chargeable activities in proportion to the number of members who select the Lobbying Check-Off procedure. *Memorandum to Executive Council* at 4; Neb. S. Ct. R. § 3-803(D)(2)(b); 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 for *all* non-chargeable activities) (emphasis in original).

72. As a result, the NSBA not only fails to refund or reimburse the portion of Plaintiff Lautenbaugh's and other class members' dues that are used for non-chargeable activities, but

selection of the Lobbying Check-Off also does not operate to exempt member dues from all non-chargeable activities conducted by the NSBA. Therefore, the Lobbying Check-Off procedure violates the third *Hudson* requirement and the First and Fourteenth Amendment rights of Plaintiff Lautenbaugh and other class members. *Hudson*, 475 U.S. at 310.

73. Accordingly, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law that deprive Plaintiff Lautenbaugh and other class members of rights, privileges and/or immunities secured by the First and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiff Lautenbaugh and other class members under 42 U.S.C. § 1983.

74. Plaintiff Lautenbaugh and other class members have no adequate legal remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights.

75. Plaintiff Lautenbaugh and other class members are therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

THIRD CLAIM FOR RELIEF
(Right to Affirmatively Consent)
(First and Fourteenth Amendments)

76. Plaintiff Lautenbaugh and other class members reallege and incorporate by reference each and every allegation set forth above.

77. The First Amendment requires Defendants to give class members, including Plaintiff Lautenbaugh, the opportunity to affirmatively consent to the use of their dues for non-chargeable activities. *See Knox*, 132 S. Ct. at 2290–91.

78. 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.

79. The NSBA's opt-out procedure fails to carefully protect the First Amendment rights at stake and "creates a risk" that mandatory dues paid by bar members "will be used to further political and ideological activities" with which those bar members do not agree. *Id.*

80. Defendants' Lobbying Check-Off procedure requires Plaintiff Lautenbaugh and other class members to affirmatively *dissent* from use of their member dues for "lobbying purposes" and thus falls short of the narrow tailoring necessary to prevent the infringement of the free speech rights of Plaintiff Lautenbaugh and other class members. *Id.* at 2291.

81. Accordingly, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law that deprive Plaintiff Lautenbaugh and other class members of rights, privileges and/or immunities secured by the First and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiff Lautenbaugh and other class members under 42 U.S.C. § 1983.

82. Plaintiff Lautenbaugh and other class members have no adequate legal remedy by which to prevent or minimize the continuing irreparable harm to his constitutional rights.

83. Plaintiff Lautenbaugh and other class members are therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

FOURTH CLAIM FOR RELIEF

(Procedural Due Process)

(Fourteenth Amendment)

84. Plaintiff Lautenbaugh and other class members reallege and incorporate by reference each and every allegation set forth above.

85. The Fourteenth Amendment requires Defendants to provide constitutionally adequate procedures in order to protect class members' rights to procedural due process. "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 Bd. of Educ.*, 903 F.2d 422, 429 (6th Cir. 1990) (internal citations omitted).

86. In the absence of constitutionally adequate procedures, collection of any amount of dues from Plaintiff Lautenbaugh and other class members violates their Fourteenth Amendment due process rights, regardless of whether Defendants have used any portion of their dues for non-chargeable activities. *Hudson*, 743 F.2d at 1192–93 (holding that, even if no improper expenditures were made, fair procedures are required, apart from any procedural safeguards required by the First Amendment); *see also 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”).

87. Defendants’ Lobbying Check-Off and Grievance Procedures are constitutionally inadequate under the mandates of *Hudson* and *Knox*. Therefore, Plaintiff Lautenbaugh and other class members have been deprived of their right to procedural due process under the Fourteenth Amendment.

88. Accordingly, Defendants currently maintain and actively enforce a set of laws, customs, practices, and policies under color of state law that deprive Plaintiff Lautenbaugh and other class members of rights, privileges and/or immunities secured by the Fourteenth Amendment, and, therefore, Defendants are liable to Plaintiff Lautenbaugh and other class members under 42 U.S.C. § 1983.

89. Plaintiff and other class members have no adequate legal remedy by which to prevent or minimize the continuing irreparable harm to their constitutional rights.

90. Plaintiff Lautenbaugh and other class members are therefore entitled to declaratory and permanent injunctive relief. 28 U.S.C. §§ 2201, 2202.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Scott Lautenbaugh, on behalf of himself and the class he seeks to represent, respectfully requests the following relief:

1. Entry of judgment declaring that Plaintiff Lautenbaugh and other class members have First Amendment rights against compelled speech and compelled association, and therefore have a constitutional right to prevent Defendants from using their member dues on non-chargeable activities;

2. Entry of judgment declaring that Defendants' Lobbying Check-Off and Grievance Procedures are unconstitutional, and that using mandatory dues for non-chargeable activities while maintaining such policies deprives Plaintiff Lautenbaugh and other class members of rights, privileges, and/or immunities secured to them by the First and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiff Lautenbaugh and other class members under 42 U.S.C. § 1983;

3. Entry of judgment declaring that Defendants' practice of using an opt-out procedure for funding non-chargeable activities is unconstitutional, and using mandatory dues for non-chargeable activities while maintaining an opt-out procedure rather than an opt-in procedure deprives Plaintiff Lautenbaugh and other class members of rights, privileges, and/or immunities secured to them by the First and Fourteenth Amendments, and, therefore, Defendants are liable to Plaintiff and other class members under 42 U.S.C. § 1983;

4. Entry of judgment declaring that Defendants' Lobbying Check-Off and Grievance Procedures fail to comply with *Hudson* and thus deprive Plaintiff Lautenbaugh and other class

members of their Fourteenth Amendment right to procedural due process, and, therefore, Defendants are liable to Plaintiff Lautenbaugh and other class members under 42 U.S.C. § 1983;

5. Entry of preliminary and permanent injunctions against Defendants prohibiting the collection of mandatory member dues from Plaintiff Lautenbaugh and other class members unless and until procedures that properly safeguard the First and Fourteenth Amendment rights of Plaintiff Lautenbaugh and other class members are adopted;

6. Award Plaintiff Lautenbaugh and other class members their costs, expenses, and attorneys' fees in accordance with law, including 42 U.S.C. § 1988; and

7. Award Plaintiff Lautenbaugh and other class members such further relief as is just and equitable.

DATED this 10th day of October 2012.

Respectfully submitted,

s/ Steven J. Lechner
Steven J. Lechner, Esq.
James M. Manley, Esq.¹
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
Phone: (303) 292-2021
Fax: (303) 292-1980
lechner@mountainstateslegal.com
jmanley@mountainstateslegal.com

Attorneys for Plaintiffs

¹ Application for admission to the U.S. District Court for the District of Nebraska pending.

EXHIBIT 1

2012 Dues Statement

NSBA

6868



Nebraska
State Bar
Association

635 S. 14th Street
P.O. Box 81909
Lincoln, NE 68501
402-475-7091
402-475-7098 - Fax
www.nesbar.com

DUES PERIOD: January 1, 2012 to December 31, 2012
INSTRUCTIONS: Review all information and note any changes.

NSBA MEMBER NO.	STATEMENT DATE	PAYMENT DUE DATE	TOTAL BILLED AMOUNT	TOTAL AMOUNT ENCLOSED
	November 15, 2011	January 1, 2012		

First Dues Notice

IDENTIFYING INFORMATION

Name
Firm
Address
City, State Zip
Phone
Fax
E-Mail

Required Tax Notice: Contributions to the Nebraska State Bar Association are not tax deductible as charitable contributions for income tax purposes. However, they may be tax deductible as ordinary and necessary business expenses subject to restrictions imposed as a result of association lobbying activities. The nondeductible portion of your 2012 dues - the portion which is allocable to lobbying - is 5%.

Legislative Checkoff: I do not want any portion of my dues used for lobbying purposes. Check here

Trust Account Information: The affidavit on file with the NSBA identifying any trust account I use to administer client funds is correct. **NOTE** - if you checked this item **DO NOT** complete the Trust Account Affidavit.

For survey purposes only: I prefer to receive NSBA correspondence by e-mail. YES NO

DUES SUMMARY

1 Supreme Court Disciplinary Assessment **IF YOU ARE TRANSFERRING MEMBERSHIP CATEGORIES, CHANGE AMOUNT DUE.**
 Active Members (except Military Active) \$ 60.00
 Inactive Members (except Emeritus Inactive) \$ 30.00

TOTAL DISCIPLINARY ASSESSMENT

2 Nebraska State Bar Association Dues **IF YOU ARE TRANSFERRING MEMBERSHIP CATEGORIES cross out and fill in the new category and amount. Note, CIRCLE below the desired EFFECTIVE date of Transfer.**

***See notes on inside page relating to transfers.

Postmarked date OR **Jan. 1st, 2012**

2A Current NSBA Membership Category: Adjustments: Refer to the back page to see whether you need to make changes to your membership category.

2B NSBA Section Dues: NSBA sections are optional. See back page for section dues information.
 Current Section membership:

TOTAL NSBA SECTION DUES

3 NSBA - The Nebraska Lawyers Foundation Voluntary Contribution
 Volunteer Lawyers Project (VLP) Fund
 Minority & Justice Implementation Committee (MJIC) Fund
 Nebraska Lawyers Assistance Program (NLAP) Fund
 Nebraska Continuing Legal Education (NCLE) Fund
 To be used where NLF has greatest need

TOTAL NSBA - THE NEBRASKA LAWYERS FOUNDATION CONTRIBUTIONS

4 Nebraska State Bar Foundation Voluntary Contribution
 Voluntary Contributing Member Dues \$ 25.00
 Voluntary Sustaining Member Dues \$ 75.00
 Voluntary Enhanced Fellow Dues Minimum \$ 100.00

TOTAL NEBRASKA STATE BAR FOUNDATION DUES

5 TOTAL NSBA Dues, Section Dues, Assessments, and Voluntary Contributions:

5A Late Fees:
 Applies after January 1, 2012 \$ 25.00
 Applies on or after February 1, 2012 \$ 50.00
 Applies on or after March 1, 2012 \$ 75.00

Effective Jan. 1, 1999, and each year thereafter, a late fee of \$25.00 shall be assessed each Active or inactive member whose dues are received after Jan. 1. A late fee of \$50.00 shall be assessed on dues received on or after Feb. 1, and a late fee of \$75.00 shall be assessed on dues received on or after March 1.

5B Total Amount:
 No adjustments: If you made no adjustments, pay the total amount billed.
 Adjustments: If you made adjustments, add all the amounts in sections 1-5 and enter here.

Make check payable to NSBA or complete the credit card information -->

EXHIBIT 2

LEGISLATIVE PROGRAM & POLICY STATEMENT

Nebraska State Bar Association

I. SCOPE

1. The legislative program of the Nebraska State Bar Association, and its Committees and Sections, shall be the initiation, support, opposition, or comment on legislative matters before the Nebraska Legislature, the Congress of the United States, or the Federal or State Executive Departments consistent with the purposes of the Association. The purposes of this Association are to improve the administration of justice; to foster and maintain high standards of conduct, integrity, confidence, and public service on the part of those engaged in the practice of law; to safeguard and promote the proper professional interests of the members of the Bar; to provide improvements in the education and qualifications for admission to the Bar, and for the study of the Science of Jurisprudence and Law Reform, and the continuing legal education of the public; to carry on a continuing program of legal research; and to encourage cordial relations among the members of the Bar; all to the end that the public responsibilities of the legal profession may be more effectively discharged.

2. The Association's legislative or policy activities will generally be related to the following subjects:
 - Regulating and disciplining lawyers;
 - Improving the functioning of the courts including issues of judicial independence, fairness, efficacy and efficiency;
 - Making legal services available to society;
 - Regulating lawyer trust accounts;
 - The education, ethics, competence, integrity and regulation of the legal profession;
 - Providing law improvement assistance to elected and appointed government officials;
 - Issues involving the structure and organization of federal, state and local courts in or affecting Nebraska;
 - Issues involving the rules of practice, procedure and evidence in federal, state or local courts in or affecting Nebraska;
 - Issues involving the duties and functions of judges and lawyers in federal, state, and local courts in or affecting Nebraska;
 - Issues involving the allocation of judicial resources;
 - Issues involving judicial compensation and benefits, selection and retention;
 - Issues involving budget appropriations for the court system;
 - Safeguarding and promoting the proper professional interests of the members of the Bar; or
 - Safeguarding the public from the unauthorized practice of law.

3. Prior to the Association taking a position on broader issues of social policy, issues that have strong political overtones, issues where the Association may be viewed more as a special interest group rather than a body of experts, issues where other attorney or judge affiliated interest groups have strong views, or on issues where the members may have divergent views, the Association must balance taking a position with (1) how and to what degree the matter really affects the vital concerns of lawyers, (2) whether the issue is divisive or will result in creating factions within the profession, and (3) what the likelihood is that the Association's efforts will be successful. The fact that the views of the members of the Association may be divergent regarding a given issue does not prohibit the Association from taking a position on proposed legislation if the taking of a position is justified taking into account the considerations set forth in this paragraph.

II. AUTHORIZATION FOR ACTION

1. The House of Delegates, by a majority vote of the members present and voting, shall establish Association positions on legislative matters within the legislative policy of the Association. When time does not permit the House of Delegates to establish legislative positions, legislative positions of the Association shall be established by a majority vote of the voting members of the Executive Council of the Association present and voting, or by the President or in his or her absence or inability to act, by the President-Elect of the Association where time does not permit obtaining the approval of the voting members of the Executive Council. Failure to receive a majority vote to support or oppose legislation or the policy shall not be considered adoption of the contrary position.
2. **Committees and Sections:** Any Committee or Section of the Association desiring the Association to sponsor legislation shall inform the Legislation Committee through the Legislative Counsel or Executive Director of the Association of the exact nature of the legislation proposed no later than September 1. A copy of the proposed bill or policy will be presented for consideration to the Legislation Committee at its fall meeting. Committees and Sections of the Association shall provide: (1) the specific legislation or policy, if any, which is proposed, (2) a summary of existing law, (3) principal known proponents and opponents of the legislation or policy, and, if possible, a brief statement of the reasons for opposition or support by the other interests, (4) a list of any other Committees or Sections of the Association which may have an interest in the legislation or policy, and (5) the position which the Committee, Section or group recommends be adopted by the Association.

Any Committee or Section of the Association that desires the Association to take a specific position on pending legislation will inform the Legislation Committee through the Legislative Counsel or Executive Director of the Association of the exact nature of the legislation proposed and its recommended position as soon as is practicable after the introduction of the legislation.

3. **Members of the Association:** Any individual member of the Association that desires the Association to have legislation introduced is encouraged to inform the Legislation Committee through the Legislative Counsel or the Executive Director of the Association of the nature of the legislation proposed prior to the beginning of a legislative session.
4. Prior to establishing a legislative position, the Association and its leadership should make a reasonable effort to encourage as wide a participation of the membership as is possible in formulating positions, and respect divergent opinions of subgroups within the legal profession. Once a legislative position is established, the members of the Association, especially Sections and Committees, should be informed of such positions.
5. Nothing in this policy shall be construed to prevent members of the Association from presenting their own personal views concerning any legislative matter.

III. IMPLEMENTATION

1. The Committee on Legislation shall monitor legislation proposed before the Nebraska Legislature and shall advise and make recommendations to the Executive Council and House of Delegates with regard to matters which are within the legislative policy of the Association. The Committee shall also advise and assist the President with regard to all legislative matters coming before the Association. In carrying out its functions, the Committee shall be provided with a retained member of the Association known as the Legislative Counsel and shall request the input and assistance of the other Committees and Sections of the Association.
2. Unless otherwise authorized in the bylaws of the Association, no member, Committee, or Section shall represent the Association before the Nebraska Legislature, the Congress of the United States, or the Federal or State Executive departments on legislative matters unless authorized to do so by the House of Delegates, the Executive Council, the President, or the President-elect of the Association.

*Adopted by NSBA
House of Delegates on
October 23, 2008.*

EXHIBIT 3



G. Michael Fenner
James L. Koley
Professor of Constitutional Law

February 15, 2012

Jane Schoenike
Executive Director
Nebraska State Bar Association
635 S. 14th St.
Suite 200
P.O. Box 81809
Lincoln, NE 68508

Dear Director Schoenike:

The Nebraska State Bar Association (NSBA) has asked me for an opinion on the constitutionality of the NSBA's method of protecting the free-speech rights of its members while the NSBA exercises its own free-speech right. My opinion is that the current system is constitutional.

I. BASIC PRINCIPLES OF CONSTITUTIONAL LAW

The NSBA is an integrated bar.¹ Regarding integrated bar associations and the First Amendment, courts are clear on three things: First, The fact that membership in a state bar association is required as a condition to obtaining a license to practice law and that members are required to pay annual dues does not itself violate the First Amendment rights of those members.²

¹ Black's Law Dictionary (9th ed. 2009) ("*integrated bar*. A bar association in which membership is a statutory requirement for practicing law; a usu. statewide organization of lawyers in which membership is compulsory in order for a lawyer to have a law license. — Also termed *unified bar*.) (bold highlight omitted). Nebraska's state bar was unified by the Supreme Court of Nebraska. *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). This makes no difference as a matter of constitutional law. *See, e.g., State ex rel. Comm'n on Unauthorized Practice of Law v. Yah*, 281 Neb. 383, 389, 796 N.W.2d 189, 195 (2011) ("This court has the inherent power to define and regulate the practice of law and is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law.").

² "[A] State may constitutionally condition the right to practice law upon membership in an integrated bar association[.]" *Keller v. State Bar of California*, 496 U.S. 1, 8 (1990), and compel "the . . . payment of reasonable annual dues[.]" *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961) (plurality opinion); *see also, id.* at 849 (Harlan, J., concurring); *Keller*, 496 U.S. at 8. This does not violate members associational or speech rights.

Jane Schoenike, Executive Director
Nebraska State Bar Association
February 15, 2012
Page 2

Second, integrated bar associations have their own right to speak; the NSBA has the same right to speak as an individual, a governmental body, or a corporation or a union.³

Third, it is clear that members' mandatory dues can be used for the general support of the association and for advocacy by the association on issues that are germane to the association's purpose, which, broadly speaking, includes "regulating the legal profession and improving the quality of legal services."⁴ Such use of dues does not infringe the free-speech rights of its members.

Fourth, it is just as clear that members of an integrated bar association have a First Amendment right not to be compelled to financially support non-germane political or ideological speech with which they disagree.⁵

Regarding the issue at hand, then, we have these two competing interests: the NSBA's freedom of speech, its right to have its voice heard in the marketplace of ideas, and its members' right not to be compelled to pay dues that will be spent to promote non-germane political speech with which they disagree.

II. THE QUESTIONS PRESENTED

The first question, then, is this: Does the system currently employed by the NSBA respect the free-speech rights of both the NSBA and its members? If the answer to that question is negative, this second question arises: What system does respect the free-speech rights of both?

III. CONSTITUTIONAL LAW AS APPLIED TO THE FACTS

A. NSBA LOBBYING ACTIVITIES

To the extent that the NSBA uses dues money to advance non-germane political views, to take positions on political issues, that is done overwhelmingly, if not exclusively, through the NSBA's lobbyists.⁶ NSBA members who do not want part of their dues to be spent on political or ideological advocacy with which they disagree can make that known by marking so on the

³ *Keller, supra*. See also, e.g., *Citizens United v. Federal Election Comm'n*, 558 U.S. ____ (2010) (corporations and other artificial persons have full First Amendment free-speech rights); *Pleasant Grove City, Utah v. Sumnum*, 555 U.S. 460 (2009) (government and its agencies have a First Amendment free-speech right to communicate their own message); *Rust v. Sullivan*, 500 U.S. 173 (1991) (same as *Sumnum*).

The Free Speech Clause of the First Amendment applies here by incorporation into the Due Process Clause of the 14th Amendment.

⁴ *Keller*, 496 U.S. at 13 (1990).

⁵ *Id.* (the bar may not use mandatory dues of objecting members to fund activities of an ideological nature that are not germane to "regulating the legal profession [or] improving the quality of legal services.").

⁶ There are "costs" in addition to lobbying. Those are discussed in part III (B), *infra*.

Jane Schoenike, Executive Director
Nebraska State Bar Association
February 15, 2012
Page 3

line that appears in a box in the upper right-hand corner of the first page of the dues statement. If that line is checked, then the amount of money paid to the NSBA's lobbyists is reduced by the pro-rata share of the dues of all such objecting members.

To my knowledge, this method of accommodating the association's own rights and those of its members—decreasing the amount of money paid to the lobbyists—is unique. No questions asked. This pro rata reduction in lobbyists' fees is automatic if the line is checked.

It is my opinion that such a system does not infringe the First Amendment rights of objecting members. No member is compelled to support or finance any non-germane political or ideological view with which the member disagrees; NSBA does not use any objecting member's dues to pay for non-germane political or ideological advocacy with which the member disagrees. Furthermore, none of the objecting member's money goes to pay for political or ideological advocacy with which the member does agree. And, as a matter of fact, none of the objecting member's dues goes to support *germane* lobbying activities.

All that the NSBA is required to do is this: not use an objecting member's dues to support non-germane political or ideological views with which the member disagrees. What the NSBA does do is this: reduce the amount paid to its lobbyists based on the complaining member's share of *all* of the lobbyists' activities, including *those that are germane* to "regulating the legal profession and improving the quality of legal services."⁷ The NSBA is doing more than the Constitution requires.

As I said, it is my opinion that such a system does not infringe the First Amendment rights of objecting members. Even if it did, however, it would not violate the First Amendment; a court would apply strict scrutiny, a.k.a., the compelling state interest test. Applying that test, the NSBA would have to show that it has a compelling reason for what it is doing and that its means are narrowly tailored to achieving that compelling end. Were it called upon to do so, it is my opinion that the NSBA could satisfy that test. First, the compelling interest here is protecting the NSBA's right to speak—including speech related to "regulating the legal profession and improving the quality of legal activities"—while respecting its members right not to be compelled to finance speech on non-germane political issues. Second, the NSBA's method is sufficiently narrowly tailored to achieve that end while respecting the speech rights of objecting members. As opposed to all of the other systems, the NSBA actually reduces the amount of money spent on NSBA advocacy: NSBA lobbyists get paid less. *None* of the objecting member's money goes to the lobbyist—not directly and not indirectly.

That is: Other integrated bar associations have adopted an "opt-out" or "check-off" scheme under which members who do not want their dues spent promoting (non-germane) political ideas with which they disagree can deduct from their dues payment an amount of money

⁷ The dues statement does not report that the pro-rata share of the dues of all objecting members will reduce the amount paid to the lobbyist.

Jane Schoenike, Executive Director
Nebraska State Bar Association
February 15, 2012
Page 4

proportionate to the amount of money the bar spends on such advocacy. Others have a dues rebate system where under the members wishing to opt-out pay the full amount of their dues and are reimbursed an amount of money proportionate to the amount the bar spends on such advocacy. To the extent that the money collected in dues (whether the member exercises the right to opt-out or not) is fungible, one could argue that under the other systems some of the member's dues will still leak into the pockets of the lobbyists. That is, the money to pay the lobbyist will have to come from somewhere; it cannot come from the pocket of the opting-out member, so it will come from the pockets of non-objecting members; increasing their contribution to the lobbyist and will decrease their contribution to the rest of the costs associated with running the association; therefore, some of the opting-out member's money will have to go to make up for the shifting of part of the non-objecting member's dues.

Those systems do not reduce the amount of money spent on advocacy; they just shift where that money comes from. Under those systems, association lobbyists get paid the same no matter how many members opt-out.

NSBA's system, on the other hand, decreases the amount of money paid to the lobbyist; no funds need be shifted around. NSBA's system is less restrictive of the objecting member's free-speech rights than the other systems described. It is the least restrictive way of honoring the free-speech rights of members and those of the association itself.

I do not mean to say, or even suggest, that those other systems are unconstitutional. I only mean to say that the NSBA's system is, in my opinion, even more clearly constitutional than those are.

As one court put it, in the context of union dues, the Supreme Court has "emphasized that well established First Amendment principles prohibited the union from requiring an individual 'to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.' Such expenditures must be financed by 'employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.'"⁸ This translates nicely to fit the issue at hand: "[W]ell established First Amendment principles prohibit[] the [NSBA] from requiring an individual 'to contribute to the support of [a non-germane] ideological cause he may oppose as a condition of [practicing law in the State of Nebraska].' Such expenditures must be financed by '[members] who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of [their license to practice law].'"

The NSBA's current system is, in my opinion, a way of doing just that, and the way that most perfectly protects the rights of any objecting members.

⁸ *Acevedo-Delgado v. Riveria*, 292 F.3d 37, 40-41 (1st Cir. 2002) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235, 236 (1976)).

Jane Schoenike, Executive Director
Nebraska State Bar Association
February 15, 2012
Page 5

B. NSBA NON-LOBBYING ACTIVITIES

In addition to lobbying, there are other “costs” associated with NSBA speech related activities. One is officers’ time. Officers sometimes attend legislative committee hearings in support of, or opposition to, a Legislative Bill, but member money is not spent on such activities. No member is forced to fund this. And, even if objecting members’ funds were used in connection with officer appearances before legislative committees, objecting members are opted-out of all lobbyist expenditures, including those that are germane to the association’s purpose. As regards lobbying, the opt-out is more generous than the Constitution requires. There is nothing to indicate that these kinds of incidental expenditures, if there are any, exceed that overage.

There are photocopying costs and staff time related to preparation of documents used by the Legislative Committee and the Executive Council when they are deciding, among other things, whether topics are germane, but it can hardly be imagined that reasonable expenses associated with the determination of germaneness would be found to violate the First Amendment.

I am not aware of any other ways in which the NSBA spends dues money on political or ideological speech activities. But, to be safe, if members believe that there are expenses other than lobbying that violate *Keller*, then the NSBA has a grievance procedure that allows objecting members to raise the issue, to be heard, and to get relief.

IV. A PARTLY CONTRARY OPINION

Let me address a partially contrary opinion from the Seventh Circuit Court of Appeals, *Kingstad v. State Bar of Wisconsin*.⁹ *Kingstad* concludes “that the State Bar may use the mandatory dues of objecting members to fund only those activities that are reasonably related to the State Bar’s dual purpose of regulating the profession and improving the quality of legal services, whether or not those same expenditures are also non-ideological and non-political.”¹⁰

I believe *Kingstad* is a misinterpretation of *Keller* and its progeny. For one thing, *Keller* talks, over and over, about political and ideological speech—speech fully protected by the First Amendment. For another, *Kingstad* ignores the bar association’s independent right to its own freedom of speech. Bar associations have an independent right to freedom of their own speech, even mandatory bar associations. And even to the extent a mandatory bar association is considered a state actor, government has an independent right to its own free speech, to communicate its own message. So do unions, even mandatory ones. So do corporations, even though shareholders may disagree with what they are saying (though, of course, no one mandates

⁹ 622 F.3d 708, (7th Cir. 2010).

¹⁰ *Id.* at 718 (these dual purposes include things such as running television advertisements to improve the public image of lawyers; *id.*).

Jane Schoenike, Executive Director
Nebraska State Bar Association
February 15, 2012
Page 6

that they be shareholders).¹¹ Each has the full rights of persons when it comes to First Amendment rights. Their exercise of their right is only trumped when the core value rights of the mandatory members are breached, and the core values are political and ideological speech.

Furthermore, *Keller* states the following, and this is quoted in *Kingstad*:

“Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and *those activities having political or ideological coloration which are not reasonably related to the advancement of such goals*, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.”¹²

In 2001, eleven years after *Keller*, in *United States v. United Foods*, the Supreme Court states that “[t]he central holding in *Keller* . . . was that the objecting members were not required to give *speech subsidies for matters not germane* to the larger regulatory purpose which justified the required association.”¹³ In *United Foods*, mushroom producers were forced to pay an assessment to subsidize speech with which they disagreed: speech advertising mushrooms. *United Foods* involved a regulation the sole purpose of which was to force speech, and heavily protected commercial speech, at that. It did not involve an association with general purposes and its own free speech rights, but simply a federal regulation forcing them to pay money into a fund the sole purpose of which was to present a message—a commercial-speech message—with which the plaintiffs disagreed. To use the above *United Foods* characterization of *Keller* to support a limitation on non-ideological and non-political speech expenditures takes the characterization out of context and tries to make it stand for too much.¹⁴

¹¹ See note 3, *supra*.

¹² *Kingstad*, 622 F.3d at 715 (quoting *Keller*, 496 U.S. at 15-16) (emphasis added).

¹³ 533 U.S. 405, 414 (2001) (emphasis added).

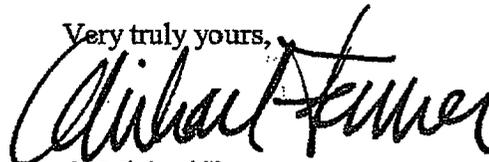
¹⁴ It has been argued that *Keller* “holds that all activities of the mandatory bar, not only political or ideological activities, must be germane to the purposes identified in *Keller* in order to be funded with mandatory dues. See, e.g., *Kingstad* . . .” (Quoting letter from member of the NSBA.) While *Kingstad* contains contradictory language, some of which can be read to support this conclusion, nowhere does *Keller* or *Kingstad* say that the bar cannot spend *any* mandatory dues on nonpolitical, non-ideological activities that are not germane to its purpose, but only that it cannot spend the money of objecting members. Regarding *Kingstad*, at some places it contains language that supports one position and, at other places, language that supports the other. This is either not a careful use of language or a misinterpretation of *Keller*. See *United Foods*’ statement of “[t]he “central holding in *Keller*, quoted in

Jane Schoenike, Executive Director
Nebraska State Bar Association
February 15, 2012
Page 7

* * *

One final note. Some law firms gather up, and pay, NSBA dues statements and the lawyers in the firm never see them; if the lawyer does not see the statement, then he or she cannot personally check the opt-out line. This is a problem internal to the law firm and not a constitutional violation by the NSBA. Dues statements can be delivered to the individual attorney along with the attorney's other mail (either directly from the USPS or through the law firm's internal mail delivery system); the attorney can opt-out or not; and the attorney can return the dues statement (either directly to the NSBA or to the responsible person in the attorney's firm). Even if this minimal inconvenience were attributable to the NSBA, it would not rise to the level of a violation of the First Amendment. I take this to be a proposition that need not be proved by citation of authority. The fact that there are costs associated with speech—renting a hall; paying for printing pamphlets, yard signs, and billboards; purchasing a computer; screening certain materials from children; arranging transportation to the site of the rally . . .—these things do not violate the speaker's rights under the Free Speech Clause.

Very truly yours,



G. Michael Fenner
James L. Koley '54 Professor
of Constitutional Law

the text accompanying note 13, *supra*). In any event, I see no evidence that NABA members are forced to pay for non-germane activities—political or ideological or otherwise. They are allowed to opt out.

EXHIBIT 4

Committee on Member Dues Grievance

The Committee shall review member grievances challenging the use of member dues to support Bar activities, and make recommendations with regard thereto to the Executive Council. It shall continually review decisions affecting members' rights under the First and Fourteenth Amendments, and shall advise the Executive Council of recommended changes in practice or procedure which would avoid infringing upon a member's First and Fourteenth Amendment rights.

MEMBER DUES GRIEVANCE PROCEDURE

1. The Executive Council shall appoint a Members Dues Grievance Committee consisting of three members of the Nebraska State Bar Association. Committee members may not be officers of the Nebraska State Bar Association, members of the House of Delegates, Executive Council or serve on the Legislative Committee.

2. For the purpose of this member dues grievance procedure, a grievance is defined as a claim by a member that the member's current dues are being used to fund an activity that violates a member's free speech or association rights under the First and Fourteenth Amendments to the Constitution of the United States.

3. A member may file a dues grievance by filing a written statement with the President of the Nebraska State Bar Association. The written statement shall specify the activity or activities being challenged and provide the factual basis and any legal authority or arguments that support the member's position. A member who has elected to have deducted from the member's dues payment for lobbying activities pursuant to Article III, 4(b) may not file a dues grievance challenging lobbying activity.

4. Any grievance filed under this policy shall be submitted to the Members Dues Grievance Committee. The Committee shall review a grievance and submit its recommendation to the Executive Council at the Council's next regularly scheduled meeting. Such recommendation shall analyze whether the grievance constitutes a violation of a member's First or Fourteenth Amendment rights. If the recommendation concludes a violation exists, the Committee shall recommend to the Executive Council whether the House of Delegates and Executive Council should cease such activity or refund that portion of the grievant's dues expended for said activity.

5. Within thirty days after receiving a report from the Members Dues Grievance Committee, the Executive Council shall make a final determination regarding the grievance.

6. The grievant will be provided a copy of the Member Dues Grievance Committee's recommendation, together with the action of the Executive Council.