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 **PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

Plaintiff Scott Lautenbaugh, by and through his attorneys, respectfully moves this Court to enter an Order for class certification pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The grounds for this motion are as follows:

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. 2.

2. Defendants, the Nebraska State Bar Association ("NSBA"), Warren R. Whitted, Jr., Marsha E. Fangmeyer, and G. Michael Fenner (collectively "NSBA")[1] have established, and continue 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 the proposed class members of their First Amendment rights against compelled speech and compelled association, as well as their Fourteenth Amendment right to due process.

3. 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.

4. The NSBA provides two procedures in a failed attempt to protect NSBA members' constitutional rights: (1) a one-sentence procedure on member dues notices that provides, "I do not want any portion of my dues used for lobbying purposes" next to a box, which members may check ("Lobbying Check-Off"), and (2) a grievance procedure that is unavailable to members who utilize the Lobbying Check-Off and pursuant to which the NSBA's own Executive Council makes a final determination regarding the grievance ("Grievance Procedure"). Filing 1 at CM/ECF pp. 10–12; Filing 1-1 at CM/ECF p. 2; Filing 1-4 at CM/ECF p. 2.

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

5. Plaintiff Lautenbaugh proposes a class of all persons who:

   A. Are current, dues-paying members of the NSBA;

   B. Have selected or will select the Lobbying Check-Off procedure or have participated or will participate in the Grievance Procedure in paying their 2012 or 2013 membership dues; and

   C. By selecting the Lobbying Check-Off procedure or participating in the Grievance Procedure, have thereby objected to the use of their dues for political, ideological, or non-germane activities ("non-chargeable activities").

6. The number of persons in this class is approximately 1,100. Filing 1 at CM/ECF p. 11. 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); *In re Madison Associates,* 183 B.R. 206, 215 (Bankr. C.D. Cal. 1995) (joinder of 1,000 plaintiffs is impracticable).

7. There are questions of law and fact common to all members of the class, to wit, whether Defendants may lawfully collect mandatory member 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).

8. 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 set out in *Chicago Teacher's Union, Local 1000 v. Hudson,* 475 U.S. 292 (1986) and *Knox v. Service Employees Intern. Union,* 132 S. Ct. 2277 (2012). *See* Fed. R. Civ. P. 23(a)(3).

9. 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.

10. Plaintiff Lautenbaugh's attorneys are experienced in representing litigants in federal court. Plaintiff Lautenbaugh 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.

11. The NSBA has acted or refused to act on grounds generally applicable to the class. *See* Fed. R. Civ. P. 23(b)(2). Specifically, the NSBA has failed to comply with the constitutional requirements for collecting mandatory membership dues from Plaintiff Lautenbaugh and other class members.

12. Additionally, final declaratory and injunctive relief is appropriate with respect to the class as a whole because the NSBA has refused to provide the same procedural protections to all class members. *See id.*

13. Filed concurrently herewith is a Brief in Support of Plaintiff's Motion For Class Certification, which demonstrates in greater detail the grounds for class certification.

WHEREFORE, Plaintiff Lautenbaugh respectfully requests that this Court enter an Order certifying this case as a class action for the class of persons described above.

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 CLASS CERTIFICATION**

INTRODUCTION

Plaintiff Scott Lautenbaugh seeks declaratory and injunctive relief to redress and prevent the deprivation by Defendants,[1] acting under color of state law, of his rights against compelled speech and compelled association protected by the First and Fourteenth Amendments to the United States Constitution. Specifically, those rights have been violated by the NSBA's

[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. Hereinafter, Defendants will be referred to collectively as the "NSBA."

imposition of mandatory dues as a condition on the right to practice law in the State of Nebraska, a portion of which are used to fund political, ideological, and other non-germane activities ("non-chargeable activities") which Plaintiff Lautenbaugh does not support. The NSBA has also failed to provide the constitutionally required procedural protections to safeguard Plaintiff Lautenbaugh's First and Fourteenth Amendment rights.

Plaintiff Lautenbaugh seeks to represent a class of similarly situated NSBA members who object to use of their member dues for political, ideological, and other non-germane activities. Such members include those approximately 1,100 NSBA members who have opted out of contributing to the lobbying activities of the NSBA on their annual member dues statements, 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) (hereinafter "Hammel, *Mandatory Bar Membership*"). 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 1000 v. Hudson,* 485 U.S. 292, 306 (1986). As demonstrated below, the prerequisites for class certification are present and the proposed class should be certified.

BACKGROUND

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). Thus, all attorneys must join the NSBA and pay mandatory bar dues as a condition of practicing law in the State of Nebraska. Therefore, the NSBA 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 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, during the past two years, the NSBA has expended mandatory bar dues to track almost 300 bills and has taken positions on more than 100. Filing 1 at CM/ECF pp. 8–9. Many of the bills on which the NSBA took a position had nothing to do with the regulation and/or improvement of the legal profession. *Id*. 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. 8; *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: (1) sending NSBA staff members to legislative hearings and legislative committee meetings; (2) holding receptions for Nebraska state legislators; (3) drafting proposed legislation (*Memorandum to Executive Council* at 4); and (4) 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*. The first procedure is a one-sentence "check-off" ("Lobbying Check-Off") that is an option on annual dues notices. Filing 1 at CM/ECF pp. 10–11. The second procedure established by the NSBA is a "Member Dues Grievance Procedure" ("Grievance Procedure"). Filing 1 at CM/ECF pp. 11–12; Filing 1-4 at CM/ECF p. 2. NSBA members who use the Lobbying Check-Off procedure may not use the Grievance Procedure. Filing 1-4 at CM/ECF p. 2.

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. Filing 1 at CM/ECF p 3. As such, he is required to pay annual dues to the NSBA.[2] Filing 1 at CM/ECF p. 3; 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 the NSBA has formally opposed, supported, or taken no position on. Filing 1 at CM/ECF pp. 8–10. Like potential class members, Plaintiff Lautenbaugh objects to the use of his mandatory member dues for political, ideological, and other non-germane activities which conflict with his personal beliefs. Filing 1 at CM/ECF p. 10.

ARGUMENT

I. LEGAL STANDARD FOR CLASS CERTIFICATION.

This Court may certify a class action if the potential class satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See Gen. Telephone Co. of the Southwest v. Falcon,* 457 U.S. 147, 161 (1982). Under Rule 23, the potential class must satisfy the following requirements: (1) numerosity; (2) commonality of facts and law; (3) typicality between the class claims and those of the named parties; and (4) adequacy of representation by the named parties

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

and class counsel. Fed. R. Civ. P. 23(a). In addition to satisfying the requirements in Rule 23(a), parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 614 (1997). Rule 23(b)(2) permits class actions for declaratory or injunctive relief, without notice to class members, "where the party opposing the class has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). The plaintiff has the burden of showing that the class should be certified and that the Rule 23 requirements have been met. *Coleman v. Watt,* 40 F.3d 255, 258 (8th Cir. 1994).

II. CERTIFICATION IS APPROPRIATE BECAUSE THE PROPOSED CLASS MEETS THE REQUIREMENTS OF RULE 23(a).

A class representative must be "part of the class and possess the same interest and suffer the same injury as the class members." *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2550 (2011). The four requirements of Rule 23(a) limit the class claims to those fairly encompassed by the named plaintiff's claims. *Id.* Plaintiff Lautenbaugh is one member in a class of approximately 1,100 NSBA members who have either selected the Lobbying Check-Off option or participated in the Grievance Procedure and have, thus, objected to the use of their dues for non-chargeable activities. Filing 1 at CM/ECF p. 10; Hammel, *Mandatory Bar Membership*;. *Memorandum to Executive Council* at 5. Although the decision to object to the use of one's dues for such activities is a matter of individual conscience, and the Court does not presume dissent, it is proper to certify a class of those who do dissent. *Lloyd v. City of Philadelphia,* 121 F.R.D. 246, 249 (E.D. Penn. 1988). In this case, Plaintiff Lautenbaugh and the proposed class members have objected to the extent permitted by the NSBA's current procedures. The proposed class is therefore limited to those who oppose the use of their dues for all non-chargeable activities, and even if the extent of each members' objections is unknown, those members "need not express

their objections before they bring a lawsuit." *Id.* (quoting *Abood v. Detroit Board of Educ.,* 431 U.S. 209, 241–42 (1977)). As demonstrated below, Plaintiff Lautenbaugh is a member of the proposed class and each of the requirements of Rule 23(a) are satisfied.

A. The Proposed Class Is Sufficiently Numerous That Joinder Of All Members Is Impracticable.

The proposed class here is sufficiently numerous, and the impracticability of joining every member or litigating individual suits so great, that the class should be certified. In order to satisfy the first Rule 23(a) requirement, numerosity, a plaintiff must establish that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). A number of factors are relevant to this inquiry, the most obvious of which is the number of persons in the proposed class. *Paxton v. Union Nat. Bank,* 688 F.2d 552, 559 (8th Cir. 1982). A court may also consider "the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members." *Id.* at 559–60. Whether the numerosity requirement has been met depends on the facts of each case. *General Tel. Co. v. EEOC,* 446 U.S. 318, 330 (1980).

Here, the number of persons in the proposed class—approximately 1,100 NSBA members—is significantly greater than other classes certified in the Eight Circuit. *See Arkansas Ed. Ass'n v. Board of Ed. Of Portland, Ark. School Dist.,* 446 F.2d 763, 765 (8th Cir. 1971) (holding that a class of 20 plaintiffs was sufficiently numerous); *Christina A. ex rel. Jennifer A. v. Bloomberg,* 197 F.R.D. 664 (D.S.D. 2000) (holding that a class of 89 is a number "large in itself"); *Bradford v. AGCO Corp.,* 187 F.R.D. 600, 604 (W.D. Mo. 1999) (holding that a class numbering between 20 and 65 people satisfied the numerosity requirement).

The impracticability of joinder in this case is clear. Besides the large number of proposed class members, the amount of the individual claims in this case is very small and this is an action

seeking declaratory and injunctive relief for constitutional violations, as opposed to monetary damages. Although the NSBA members who utilize the Lobbying Check-Off or the Grievance Procedure may be identifiable from NSBA records, the proposed class is so large that joinder of each member would be costly and time consuming. *See Lockwood Motors, Inc. v. General Motors Corp.,* 162 F.R.D. 569, 575 (D. Minn. 1995) (rejecting the defendant's argument that 400–500 plaintiffs were known and readily identifiable by name and address as sufficient to defeat numerosity, because "in the face of these numbers, joinder would unquestionably be difficult, if not impossible"); *In re Madison Associates,* 183 B.R. 206, 215 (Bankr. C.D. Cal. 1995) (joinder of 1,000 plaintiffs is impracticable); *Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir. 1993) (holding that "impracticable does not mean impossible," and that the difficulty in joining as few as 40 class members should raise a presumption that joinder is impracticable).

The inconvenience of trying individual suits would also be impracticable. *Paxton,* 688 F.2d at 559–60. The primary remedy sought is vindication of Plaintiff Lautenbaugh's and other class members' constitutional rights, in the form of declaratory and injunctive relief. Seeking such relief on an individual basis would not only waste judicial resources, but likely prevent vindication of other class members' constitutional rights based on the cost-prohibitive nature of bringing individual suits seeking declaratory and injunctive relief.

B. There Are Questions Of Law And Fact Common To All Class Members.

The central questions of law and fact raised in this case are common to all members of the class; hence, the class should be certified. Rule 23(a) requires that questions of law or fact be common to the class. Fed. Civ. P. R. 23(a)(2). Such questions do not have to be common to every member. *Christina A.,* 197 F.R.D. at 667 (citing *Paxton,* 688 F.2d at 561). Commonality may be satisfied "where the question of law linking the class members is substantially related to

resolution of the litigation even though the individuals are not identically situated." *Paxton,* 688 F.2d at 561. Where a suit questions the constitutionality of policies and procedures adopted by a defendant and imposed upon the class, commonality is satisfied. *Id.*

In this case, there is no doubt that the question of law linking the proposed class members is substantially related to resolution of the litigation. The NSBA's violation of proposed class members' First and Fourteenth Amendment rights stems from the NSBA's failure to provide constitutionally adequate procedures under the mandates of *Hudson* and *Knox v. Service Employees Intern. Union,* 132 S. Ct. 2277 (2012). Indeed, all NSBA members who utilized the Lobbying Check-Off or Grievance Procedure have been deprived of the notice, disclosures, impartial grievance procedure, and refund or reduction of their member dues to which they are entitled under *Hudson;* and deprived of the opt-in procedure to which they are entitled under *Knox*. Filing 1 at CM/ECF pp. 18–19; *see also Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir. 1998) (holding that a defendant's standardized conduct toward class members, such as a generalized policy that affects all class members in the same way, is sufficient to satisfy commonality). Thus, the common question in this case is whether the NSBA procedures—the Lobbying Check-Off and the Grievance Procedure—result in a deprivation of Plaintiff Lautenbaugh's and other proposed class members' constitutional rights. Issuance of injunctive and declaratory relief to halt the NSBA's unconstitutional actions until proper procedures are adopted will resolve the proposed class members' constitutional claims.

C. Plaintiff Lautenbaugh's Claims Are Typical Of The Claims Of Other Class Members.

The third Rule 23(a) requirement, typicality, is satisfied here because the claims or defenses of the representative party are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality requires that the claims of the named plaintiff emanate from the

same event or be based on the same legal theory as the claims of the class members. *Midwestern Machinery v. Northwest Airlines, Inc.,* 211 F.R.D. 562, 569–70 (D. Minn. 2001). The Eighth Circuit has interpreted typicality to mean that there are "other members of the class who have the same or similar grievances as the plaintiff." *Alpern v. UtiliCorp United, Inc.,* 84 F.3d 1525, 1540 (8th Cir. 1996).

Here, Plaintiff Lautenbaugh's claims are the same as those of the proposed class members: The NSBA's failure to provide procedures that comply with the requirements of *Hudson* and *Knox* violates the First and Fourteenth Amendment rights of bar members who do not want their mandatory dues used for non-chargeable activities. Like the members of the proposed class, Plaintiff Lautenbaugh is a member of the NSBA, pays annual mandatory dues as required by Neb. Ct. R. § 803(D)(1), and objected by checking the Lobbying Check-Off option on his 2012 NSBA annual member dues form in an attempt to exempt his dues from use for non-chargeable activities. Filing 1 at CM/ECF p. 11. And, like the members of the proposed class, Plaintiff Lautenbaugh was deprived of his First and Fourteenth Amendment rights by the NSBA's failure to: (1) provide proper notice and explanation of the use of member dues for non-chargeable purposes; (2) provide an unbiased grievance procedure; (3) provide an advance reduction or refund of member dues used for non-chargeable purposes upon objection; and (4) provide an opt-in procedure as opposed to an opt-out procedure. *Knox,* 132 S. Ct. at 2290–91; *Hudson,* 475 U.S. at 306–08, 310. Because Plaintiff Lautenbaugh's claims against the NSBA are identical to the claims of the proposed class members, the typicality requirement is satisfied.

D. Plaintiff Will Adequately Represent The Proposed Class.

The fourth Rule 23(a) requirement, adequate representation, is satisfied here because Plaintiff Lautenbaugh, the representative party, "will fairly and adequately protect the interests of

the class." Fed. R. Civ. P. 23(a)(4). The standard for meeting the adequacy requirement in the Eighth Circuit is a two-pronged test: "(1) whether the representatives and their attorneys are able and willing to prosecute the action competently and vigorously, and (2) whether each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge." *Midwestern,* 211 F.R.D. at 570; *see also Paxton,* 688 F.2d at 562–63.

Plaintiff Lautenbaugh and his attorneys easily meet this standard. Plaintiff Lautenbaugh's attorneys are experienced in representing litigants in federal court. Filing 1 at CM/ECF pp. 7–8. These attorneys are provided *pro bono* by a national charitable legal foundation and are experienced in representing parties in constitutional rights litigation. *Id*. Plaintiff Lautenbaugh's attorneys are therefore well qualified to serve as class counsel and will competently and vigorously prosecute this action. *See id*.

It is also highly unlikely that the goals and viewpoints of the proposed class members will diverge. There is no indication that there is any conflict, or potential for future conflict, between Plaintiff Lautenbaugh and the other class members. Plaintiff Lautenbaugh shares the class's interest in procuring declaratory and injunctive relief to remedy the NSBA's unconstitutional procedures. There is no indication that his interest in remedying the NSBA's procedures will be at the expense of other class members or will be, in any other way, antagonistic to the class's interests because Plaintiff Lautenbaugh and the class members have identical interests in protecting their First and Fourteenth Amendment rights, rights that have been violated by the NSBA's inadequate procedures. *See Paxton,* 688 F.2d at 563 (finding adequate representation requirement met when the plaintiffs shared the interests of the class and there was no indication those interests would become antagonistic to those of the class).

III. CLASS CERTIFICATION IS APPROPRIATE BECAUSE THIS CASE MEETS THE REQUIREMENTS OF RULE 23(b)(2).

In addition to the threshold requirements of Rule 23(a), a class action is only appropriate if one of the circumstances set forth in Rule 23(b) is also present. *Amchem,* 521 U.S. at 614. Here, Plaintiff Lautenbaugh moves for class certification under Rule 23(b)(2) because "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Moreover, Rule 23(b)(2) certification is "especially appropriate for civil rights cases." *Ranschburg v. Toan,* 540 F. Supp. 745, 748 (W.D. Mo. 1982); *see also Coley v. Clinton,* 635 F.2d 1364, 1378–79 (8th Cir. 1980) (holding that Rule 23(b)(2) is "an especially appropriate vehicle for civil rights actions" and reversing the district court's denial of class certification); *Walters v. Reno,* 145 F.3d 1032, 1047 (9th Cir. 1998) (citing the Advisory Notes to Rule 23 for the principle that civil rights actions "are precisely the sorts of claims that Rule 23(b)(2) was designed to facilitate").

In this case, the NSBA has acted in the same way toward all proposed class members, and in such a way that declaratory and injunctive relief compelling the NSBA to comply with constitutional mandates will provide class-wide relief. The NSBA's failure to provide constitutionally adequate procedures uniformly deprives proposed class members of their rights against compelled speech and association and their right to procedural due process under the First and Fourteenth Amendments.

Additionally, this is a civil rights action brought under 42 U.S.C. § 1983 wherein Plaintiff Lautenbaugh and proposed class members are exclusively seeking declaratory and injunctive relief to remedy class-wide constitutional violations. The Eighth Circuit has held that "[i]f the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested,

the action usually should be allowed to proceed under subdivision (b)(2)." *DeBoer v. Mellon Mortg. Co.,* 64 F.3d 1171, 1175 (8th Cir. 1995) (*citing* 7A Charles A. Wright et al., *Federal Practice and Procedure* §1775 at 470 (1986)).

Furthermore, several courts have recognized that *Hudson* violations inherently cause class-wide injuries to all dues-payers who attempt to exempt their dues from being expended on non-chargeable activities. *See Murray v. Local 2620,* 192 F.R.D. 629, 636–37 (N.D. Cal. 2000) (certifying a class after finding that claims for injunctive and declaratory relief predominated); *Leer v. Washington Educ. Ass'n,* 172 F.R.D. 439, 452–53 (W.D. Wash. 1997) (finding the unconstitutionality of defendant's *Hudson* procedures consisted of action or refusal to act "on grounds generally applicable to the plaintiff class"); *George v. Baltimore City Public Schools,* 117 F.R.D. 368, 372 (D. Md. 1987) (holding that the injunctive and declaratory relief sought and the constitutional rights at issue compelled class certification). Perhaps most informative to the instant case, in *Swanson v. University of Hawaii Professional Assembly,* 212 F.R.D. 574, 578 (D. Haw. 2003), a group of union members brought an action alleging that the union's procedures violated their First and Fourteenth Amendment rights. The defendant union had sent identical *Hudson* letters to all class members and collected funds from those members in violation of their constitutional rights, and the class sought an injunction preventing collection of such funds until the defendant sent a legally sufficient *Hudson* notice. *Id.* Based on these facts, the court found Rule 23(b)(2) certification appropriate because "injunctive relief . . . would apply equally to the class as a whole." *Id.* The case at bar is very similar to *Swanson* in that there is a uniform injury suffered by NSBA members who attempted to exempt their dues from use for non-chargeable activities by either checking the Lobbying Check-Off or participating in the Grievance Procedure.. While there are unquestionably varying degrees to which proposed class members'

personal views differ from the political or ideological views supported by the NSBA, the constitutional injury of being compelled to speak or associate to any extent (as well as the injury caused by deprivation of procedural due process) is shared by all proposed class members.

Therefore, this case is exemplary of a Rule 23(b)(2) action because the NSBA's policies and procedures affect all members of the class, including Plaintiff Lautenbaugh; remediation of the injury caused by NSBA's policies and procedures requires declaratory and injunctive relief; and Plaintiff Lautenbaugh does not seek monetary damages for himself or the class.

CONCLUSION

Plaintiff Lautenbaugh has met the burden of showing that the Rule 23 requirements have been met and that the proposed class should be certified. *Coleman,* 40 F.3d at 258. Accordingly, Plaintiff Lautenbaugh respectfully requests this Court grant his Motion for Class Certification.

DATED this 12th day of October 2012.

Respectfully submitted,

s/ Steven J. Lechner

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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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