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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**

9 **ROBERT E. CARUSO and SANDRA**
10 **L. FERGUSON,**

11 Plaintiffs,

12 vs

13 WASHINGTON STATE BAR
14 ASSOCIATION 1933, a legislatively
15 created Washington association, State
16 Bar Act (WSBA 1933);

17 WASHINGTON STATE BAR
18 ASSOCIATION after September 30,
19 2016 (WSBA 2017);

20 PAULA LITTLEWOOD, Executive
21 Director, WSBA 1933 and WSBA
22 2017, in her official capacity;

23 ROBIN LYNN HAYNES is the
24 President of the WSBA 1933 and
25 WSBA 2017, in her official capacity;
26 and

27 DOUGLAS J. ENDE, Director of the
WSBA 1933 and WSBA 2017 Office of
Disciplinary Counsel, in his official
capacity;

continued. . .

No. 2:17-cv-00003-RSM

**MOTION FOR SUMMARY
JUDGMENT AND MEMORANDUM
IN SUPPORT**

HEARING DATE: MARCH 17, 2017

ORAL ARGUMENT REQUESTED

MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT - 1
No. 2:17-cv-00003-RSM

1 WSBA 1933 / WSBA 2017 BOARD
2 OF GOVERNORS and
3 BRADFORD E. FURLONG -
4 President-elect (2016-2017),
5 WILLIAM D. HYSLOP - Immediate
6 past President (2016-2017),
7 G. KIM RISENMAY - Governor,
8 District 1 (2015-2018),
9 RAJEEV MAJUMDAR - Governor,
10 District 2 (2016-2019),
11 JILL A. KARMY - Governor, District
12 3 and Treasurer (2014-2017),
13 WILLIAM D. PICKETT - Governor,
14 District 4 (2015-2018),
15 ANGELA M. HAYES - Governor,
16 District 5 (2015-2018),
17 KEITH M. BLACK - Governor,
18 District 6 (2014-2017),
19 ANN DANIELI - Governor, District 7-
20 north (2014-2017), J
21 AMES K. DOANE - Governor,
22 District 7-south (2015-2018),
23 ANDREA S. JARMON - Governor,
24 District 8 (2014-2017),
25 DAN BRIDGES - Governor, District 9
26 (2016-2019),
27 CHRISTINA MESERVE - Governor,
District 10 (2016-2019),
ATHANASIOS P. PAPAILIOU -
Governor, At-large (2016-2019),
MARIO M. CAVA - Governor, At-
large (2014-2017), and
SEAN DAVIS - Governor, At-large
(2015-2018),
Defendants.

MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT - 2
No. 2:17-cv-00003-RSM

1 **MOTION FOR SUMMARY JUDGMENT**

2 Plaintiffs seek summary judgment on the following claims:

3 1. Plaintiffs' rights of freedom of association under the First and Fourteenth
4 Amendments to the United States Constitution are violated by being compelled to
5 be members of the Washington State Bar Association of 2017.

6
7 2. Plaintiffs' rights of freedom of expression under the First and Fourteenth
8 Amendments to the United States Constitution are violated by being compelled to
9 pay dues to the Washington State Bar Association of 2017.

10 3. The Washington Lawyer Discipline System violates Plaintiffs' fundamental
11 rights under the First and Fifth Amendments to the United States Constitution
12 because it does not meet the requirement of strict constitutional scrutiny.

13
14 This motion is based on the files and records herein, Declaration of Sandra L.
15 Ferguson, Declaration of Robert E. Caruso, Declaration of Stephen Kerr Eugster,
16 and the following.

17
18 **MEMORANDUM IN SUPPORT OF MOTION**

19 **I. INTRODUCTION**

20 "Washington State Bar Association" is the legal name of an association created
21 by the State Bar Act, 1933. The legislature created the association as "an agency of
22 the state." This association, this agency, is unique in the state. It is not unique to
23 lawyers. It is an "integrated bar association" and like other integrated bar
24 associations in about 30 states of the United States. The integrated bar has two
25

1 purposes: "regulation of the legal profession and 'improvement of the quality of
2 legal services.'" *Keller v. State Bar of Cal.*, 496 US 1, 13 (1990), quoting in part from
3 *Lathrop v. Donohue*, 367 US 820, 843 (1961).

4 The income and assets of the WSBA 1933 is substantial, over \$25.6 million:¹ It
5 includes Income from License Fees amounting to \$13,204,000.00 and Total Cash
6 and Investments of \$12,400,686.00. WSBA *Financial Report (Unaudited)*, Year to
7 Date December 31, 2016. These assets came from member dues and WSBA income,
8 continuing legal education programs, sale of member addresses, etc.

9 The WSBA 1933 Bar Act members, by Act and statute, which exactly like the
10 Act Section involved, own these assets. The "Washington Stated Bar Association"
11 lawyers are the members of the assets. They own the WSBA.²
12
13

14
15 ¹ WSBA Financial Reports (Unaudited), Year to Date December 31, 2016.
16 <http://www.wsba.org/~media/Files/About%20WSBA/Financial%20Info/Dec%202016%20Financial%20Statement%20%20webx.ashx>.

17 ² The Constitution or bylaws of the organization, which
18 have the force and effect of a contract between the
19 organization and its members, may provide for a specific
20 method of distribution of the assets of the organization
21 upon dissolution.

22 The rule, in absence of any provision of the laws of the
23 organization or statute to a different effect, is that the
24 dissolution of such an organization as a body entitles the
25 members thereof at the time of dissolution to a
26 distribution, in accordance with their just interests, of its
27 funds and other property; and this means that upon the
absolute dissolution of the organization, each member in
good standing has a right to an equal share of the net
assets of the organization. [Footnotes omitted.]

6 AM. JUR. 2D *Associations and Clubs* § 60, 495-96 (1997).

1 The WSBA Board of Governors amended the Bylaws of the WSBA on
2 September 30, 2016. The amendments became active on the 1st of January, 2017.
3 The WSBA Executive Director and the members of the Board of Governors thought
4 the amendments would expand the WSBA. The Bylaws as “amended” added to the
5 membership. Lawyers not only had to suffer themselves, they had to welcome
6 limited practice officers (real estate transaction closers – escrow officers) and
7 limited license legal technicians (for the time being, people who fill out family law
8 forms, with more to come in the future as the Supreme Court decides to create new
9 members of the limited license legal technicians (upcoming, estate planning and
10 probate).
11

12 The approving governors of the WSBA BOG were trying to do good. The
13 Executive Director, Paula Littlewood, working closely with justices of the
14 Washington Supreme Court, was seeing her goal become a reality. The goal was
15 the creation of a “Washington State Access to Justice Legal Services Providers
16 Association” come into existence. The goal was reached when the Executive
17 Director and others convinced the Board of Governors that the Supreme Court had
18 required the WSBA to yield to the Supreme Court, which they explained had
19 ultimate and plenary authority over the WSBA. Yielding to what the Supreme
20 Court had done, had imposed upon the WSBA already, the WSBA leadership
21 amended the Bylaws of their organization, to have the WSBA do what the court
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23
24

1 wanted.³ This was divined by looking at what the court by rule, had told the
2 WSBA.⁴

3 The Executive Director and her BOG support have not succeeded. They have
4 neglected to study and appreciate the legal aspects of the WSBA, the “association
5 which is an agency of the state.” They cannot expand the membership so that it is
6 the expanded membership of the Bylaws as amended by the BOG. They cannot
7 make their “Washington State Bar Association” the disciplinary authority for
8 lawyers and the other members of the association. The new WSBA is not the
9 agency of the state, the WSBA of the Bar Act.

10 The new WSBA does not have the imprimatur of the legislature or the court; it
11 is only a creation of the wishful thinking of the Executive Director, certain justices
12 of the Supreme Court, and members of the BOG for whatever reason they have
13 come up with to vote exactly contrary to interests and property rights of the lawyers
14 at the time who were members of the association.

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17 **II. STATEMENT OF UNDISPUTED FACTS**

18 **A. Washington State Bar Association of the Bar Act, 1933**

- 19
20 1. The Washington State Bar Association was created legislatively by
21 the State Bar Act, Sess. c 94, 1933 (WSBA 1933).
22 2. WSBA 1933 is one of several integrated bar associations created by
23 legislation or court rule under the model of the integrated bar act
24

25 ³ Paula Littlewood, November 2016, NWLawyer.

26 ⁴ APR 12 and 28.

1 proposed by the American Judicature Society in the early decades of
2 the 1900's. *See, e.g., The Integrated Bar Association*, 30 FORDHAM L.
3 REV. 477, 483 (1962); Herbert Harley, *Organizing the Bar for Public*
4 *Service*, 4 OR. L. REV. 1 (1924-1925).

5
6 3. The integrated bar associations have two purposes: "regulation of
7 the legal profession and 'improvement of the quality of legal
8 services.'" *Keller v. State Bar of Cal.*, 496 US 1, 13 (1990) citing
9 *Lathrop v. Donohue*, 367 US 820, 843 (1961).

10 4. As such, WSBA 1933 has two purposes, (a) the regulation of the
11 legal profession, and (b) the improvement of the quality of legal
12 services.

13
14 5. The WSBA 1933 is an agency of the state as an association. RCW
15 2.48.010, 1933 c 94 § 2.

16 6. The WSBA 1933 is a legal entity. RCW 2.48.010, 1933 c 94 § 2.

17 7. The membership of the WSBA 1933 is made up, at any given time,
18 of the lawyers who have been admitted to the bar of the
19 Washington Supreme Court. RCW 2.48.021, 1933 c 94 § 4.

20 8. The WSBA 1933 is an integrated bar association – lawyers must be
21 members in good standing of the WSBA to practice law. RCW
22 2.48.170, 1933 c 94 § 13.

23
24 9. The WSBA 1933 is governed the board of governors of the state bar.
25 RCW 2.48.040, 1933 c 94 § 6.
26

1 10. The WSBA 1933 has the power to discipline all "members of the
2 state bar." RCW 2.48.060, 1933 c 94 § 8.

3 11. The WSBA 1933 board of governors have other powers, RCW
4 2.48.050, 1933 c 94 § 7.

5 12. The compelled membership in and compelled dues to WSBA 1933
6 are said to be justified by the state of Washington's interest in
7 regulating the legal profession and improving the quality of legal
8 services.

9 13. The members of the WSBA 1933 at any given time are the owners of
10 the assets of the association. RCW 2.48.010, 1933 c 94 § 2 and RCW
11 2.48.021, 1933 c 94 § 4.

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14 **B. Washington State Bar Association of 2017.**

15 1. The new WSBA was created when amendments to the Bylaws of
16 WSBA 1933 adopted on September 30, 2016, took effect on January
17 1, 2017 (WSBA 2017). Declaration of S.K. Eugster. Appendix 86
18 and 124. (Appendix).

19 2. WSBA 1933 has been subsumed by WSBA 2017. Bylaw II, B.

20 3. WSBA 2017 purports to be an integrated association. Bylaw II, B.

21 4. WSBA 2017 is governed by a Board of Governors. Bylaw IV, A.

22 5. The membership of the WSBA 2017 consists of lawyers, Limited
23 Practice Officers, and Limited License Legal Technicians. Bylaw I,
24 A. 7, Bylaw III A.
25
26

- 1 6. Lawyers, Limited Practice Officers, and Limited License Legal
2 Technicians are compelled to be members and to pay dues WSBA
3 2017. Bylaw III, I.
- 4 7. The new WSBA 2017 is not an agency of the state of Washington.
- 5 8. The WSBA 2017 is an association without legal entity status.
- 6 9. The members of the WSBA 2017- lawyers, Limited Practice Officers,
7 and Limited License Legal Technicians - cannot practice law or their
8 legal services profession if they are not members in good standing of
9 the New WSBA. Bylaw III, A.3.; Bylaw III B.1.a.
- 10 10. The members of WSBA 2017 are subject to discipline by WSBA
11 2017. Bylaw I, A. and I,B.6.
- 12 11. WSBA 2017 is lacking any substantive basis: It was not created by
13 the Washington State Legislature or by the Supreme Court.
- 14 12. WSBA 2017 is acting under Rules for Enforcement of Lawyer
15 Conduct (ELC).
- 16 13. But, the ELC does not designate WSBA 2017 as the disciplinary
17 authority under the ELC. ELC 1.2 and ELC 1.3 (a).
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1 **C. Comparison – WSBA 1933 to WSBA 2017**

2 There are significant and consequential differences between WSBA 1933 and
3 WSBA 2017. Here is a comparison:

4

5 CHARACTER	6 WSBA 1933	7 WSBA 2017
8 Source	9 Bar Act 1933 Legal Status 10 (Legal) Entity 11 Association, as an 12 "Agency" of State of 13 Washington	14 Bylaws of 15 September 30, 2016, 16 effective 17 January 1, 2017
18 Entity	19 RCW 2.48.010	20 Common Law Association
21 Members	22 Lawyers	23 Lawyers, LPOs (APR 24 12), and LLLTs (APR 28)
25 Compelled Membership 26 and Compelled Dues	27 Yes	Yes as to all members *
Integrated	Lawyers	No as to all members *

* It is contended WSBA 2017 does not have any power over its members because it was not created by the state of Washington, either by the Legislature or the Supreme Court.

18 **D. Plaintiffs**

- 19 1. Plaintiff Robert E. Caruso is a member of WSBA 1933 and a
20 member of WSBA 2017. Declaration of Robert E. Caruso.
- 21 a. He is a member in good standing of both. *Id.*
- 22 b. He is in imminent danger that WSBA 2017 will seek to
23 discipline him. *Id.*
- 24 c. A grievance against Caruso is under a motion by WSBA 2017
25 ODC to a Review Committee seeking that the matter be
26

1 ordered to hearing. *Id.*

2 2. Plaintiff Sandra L. Ferguson is a member of WSBA 1933 and a
3 member of WSBA 2017. Declaration of Sandra L. Ferguson.

4 a. She is a member in good standing of both. *Id.*

5
6 b. She is in imminent danger WSBA 2017 will seek to discipline
7 her. *Id.*

8 c. A grievance has been filed against her. *Id.*

9 d. WSBA 2017 Office of Disciplinary Counsel is in the process of
10 investigating the grievance. *Id.*

11 **III. STANDARDS**

12 **A. Standing and Related Matters.**

13 **1. *Younger* Doctrine.**

14
15 The *Younger* Abstention Doctrine does not apply. WSBA 2017 discipline
16 proceedings have not been commenced and are not on-going against Plaintiffs.

17 *Younger v. Harris*, 401 U.S. 37 (1971); Declaration of Plaintiff Caruso and
18 Declaration Plaintiff Ferguson.

19
20 Only a "federal court action that would enjoin the proceeding, or have the
21 practical effect of doing so, would interfere in a way that *Younger* disapproves.

22 *Gilbertson v. Albright*, 381 F.3d 965, 978 (9th Cir. 2004).

23 **2. Article III Standing.**

24 To demonstrate Article III standing, Plaintiffs must show that (1) they have
25 suffered an "injury in fact" that is concrete, particularized, actual, and imminent, as
26

1 opposed to conjectural or hypothetical; (2) the injury is fairly traceable to the
2 challenged action of the defendant; and (3) it is likely, as opposed to speculative,
3 that the requested relief would redress the injury. *Lujan v. Defenders of Wildlife*,
4 504 U.S. 555, 560-61 (1992). These requirements are known as injury, causation,
5 and redressability. See *Massachusetts v. E.P.A.*, 549 U.S. 497, 540 (2007) (Roberts,
6 C.J., dissenting). Because Plaintiffs seek "declaratory and injunctive relief only,
7 there is a further requirement that [they] show a very significant possibility of
8 future harm; it is insufficient for [them] to demonstrate only a past injury." *San*
9 *Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). To
10 demonstrate that he has standing to sue for declaratory and injunctive relief,
11 Plaintiff must demonstrate probability of future injury, causation, and
12 redressability. *Lujan*, 504 U.S. at 560-61; *San Diego Cty.*, 98 F.3d 12 at 1126.

15 Plaintiffs argue that compulsory WSBA 2017 membership and dues violate
16 their constitutional freedoms of association and speech. The Association
17 uncontrovertibly assesses compulsory bar dues and requires membership in order to
18 practice law in Washington. These restrict and compel speech and association in
19 ways that Plaintiffs allege are unconstitutional. They have thus alleged concrete and
20 particularized harm. *Lujan*, 504 U.S. at 560.

22 Moreover, these alleged constitutional violations are sure to persist unless the
23 law is changed or enforcement is enjoined. *San Diego Cty.*, 98 F.3d 10 at 1126. This
24 satisfies the injury element of standing.

25 Enforcement of the bylaws of the WSBA 2017 cannot be disputed. That
26

1 enforcement of the WSBA 2017 causes the alleged burden on Plaintiffs'
2 constitutional rights, and that enjoining its enforcement would redress those
3 alleged constitutional harms. This establishes causation and redressability, the
4 final two elements of standing. *Massachusetts v. E.P.A.*, 549 U.S. at 540.

6 3. Ripeness.

7 A case is ripe in the constitutional sense if it “present[s] concrete legal issues,
8 presented in actual cases, not abstractions.” *Montana Envir. Information Center v.*
9 *Stone-Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) citing *Colwell v. HHS*, 558 F.3d
10 1112, 1123 (9th Cir.2009) (internal quotation marks omitted).

11 In a declaratory judgment action, the inquiry “depends upon ‘whether the facts
12 alleged, under all the circumstances, show that there is a substantial controversy, between
13 parties having adverse legal interests, of sufficient immediacy and reality to warrant the
14 issuance of a declaratory judgment.’” *Montana Envir. Information Center v.*
15 *Stone-Manning*, *supra* citing *United States v. Braren*, 338 F.3d 971, 975 (9th Cir.2003)
16 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

17 This case does not involve “abstract disagreements.” The issues presented are
18 “definite and concrete, not hypothetical or abstract.” *Ray Charles Found. v.*
19 *Robinson*, 795 F.3d 1109, 1117 (9th Cir., 2015) (quoting *Thomas v. Anchorage Equal*
20 *Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir.2000) (en banc)).

23 IV. SUMMARY OF ARGUMENT

24 The Younger Doctrine does not apply. Plaintiffs have standing because they
25 are under immediate threat of WSBA 2017 discipline system action. Plaintiffs have
26

1 standing because their constitutional rights are being infringed under the
2 circumstances of what is required of them by WSBA 2017.

3 WSBA 2017 cannot require anything of Plaintiffs, not membership, not dues,
4 not submission to discipline asserted against them by WSBA 2017. WSBA 2017
5 was not created by any action of the state of Washington, whether by the State
6 Legislature or the State Supreme Court.
7

8 Plaintiffs' right of non-association under the First Amendment is being
9 violated. In addition, Plaintiffs' right of freedom of speech and expression is being
10 violated.

11 **V. ARGUMENT**

12 **A. Terminology: Two Bar Associations, WSBA 1933 and WSBA 2017.**

13 The term "Washington State Bar Association" is the name given to the
14 integrated bar association created by the State Bar Act of 1933. RCW 2.48.010.
15 Members consist only of Washington lawyers. It is referred to herein as WSBA
16 1933.
17

18 The term "Washington State Bar Association" is the name given to the
19 association in the amendments to the Bylaws of WSBA 1933 on September 30,
20 2016, effective January 1, 2017. The name is a misnomer because the association is
21 not a "bar association," rather is an association of legal services providers.
22

23 Membership consists of Lawyers, Limited Practice Officers, and Limited License
24 Legal Technicians. Bylaw I, A. 7. This association is referred to herein as WSBA
25

1 2017.

2 **B. WSBA 2017 Does Not Have State Impowerment as an Integrated**
3 **Association of Legal Service Providers.**

4 Defendants claim WSBA 2017 has power over Plaintiffs. WSBA 2017 says
5 they have the power to compel Plaintiffs to be members of the association, pay dues
6 to the association and be subject to discipline by the association. The association
7 has no such powers. They have not been given to it by the state legislature or the
8 Washington Supreme Court. It was created by the adoption of a set of bylaws
9 creating the association and based upon “amendments” to the WSBA 1933 Bylaws.
10

11 Defendants assert WSBA 2017 is, in effect, an expanded WSBA 1933. They
12 believe membership may be extended beyond lawyers, and expanded as to its power
13 to discipline the members of the expanded membership.

14 The integrated bar association aspects of WSBA 1933 do not carry over to the
15 new association of WSBA 2017. WSBA 1933 was created by an act of the
16 legislature, the Bar Act. The act provisions set forth elements critical to creation of
17 an integrated bar association – it was given a name, it was a legal association with
18 power to sue and be sued, and to purchase and sell and dispose of its assets; it was
19 an agency of the state of Washington, its members were limited to lawyers, it was
20 given the state power to discipline lawyers, its members, and those lawyers from
21 other states. Further more, the owners of the assets of the WSBA 1933 are the
22 lawyers, the members of the Washington State Bar. *See* footnote 2 above.
23
24

25 Although the WSBA 1933 and its assets have been subsumed by WSBA 2017,

1 taken over by the WSBA 201, it is still a separate legal entity. But the legal
2 character of integration of lawyers of WSBA 1933 has not been extended or
3 transferred to WSBA 2017, nor can it be.

4 The WSBA 2017 "Washington State Bar Association" simply has no authority
5 of the state of Washington over Plaintiffs.
6

7 **C. Even If Characterized as an Integrated Association of Lawyers,
8 Limited Practice Officers and Limited License Legal Technicians,
9 WSBA 2017 Would be Unconstitutional.**

10 Let us assume for the sake for the purposes of discussion that the Association
11 is an integrated Association which has the purposes of an integrated bar association
12 – a membership compelled to be members of the Association and compelled to pay
13 dues to the Association and subject to the disciplinary authority of the Association.
14 Still, the result would be the same. It would not compel membership and payment
15 of dues, nor would it be able to subject the lawyers to discipline under its authority.

16 **1. *Lathrop v. Donohue.***

17 *Lathrop v. Donohue, supra*, cannot be used, nor its plurality holding
18 expanded to decide the issues before the court. In *Lathrop v. Donohue*, a plurality of
19 the court held compelled membership in an integrated bar association did not
20 violate a lawyer's right to freedom of association. *Lathrop v. Donohue* does not
21 apply to this case. However, it might be claimed it does.
22

23 Such a claim would be this: *Lathrop* held a integrated bar association does not
24 violate a lawyer's right of freedom of association. The argument will be *Lathrop*
25

1 should be extended to the situation at hand. The argument is not compelling for
2 several reasons.

3 Furthermore, questions have been raised as to whether *Lathrop v. Donohue*
4 should be overruled. *Eugster v. Washington State Bar Association*, Case No.
5 C15-0375JLR (Dist. Court, WD Wash. 2015). The case is now on appeal to the 9th
6 Circuit, Case No. No. 15-35743.

8 **2. Strict Constitutional Scrutiny.**

9 WSBA 2017 does not meet strict constitutional scrutiny. Strict scrutiny is a
10 form of judicial review that courts use to determine the constitutionality of certain
11 laws. To pass strict scrutiny, the legislature must have passed the law to further a
12 "compelling governmental interest," and must have "narrowly tailored the law" to
13 achieve that interest. See *Knox v. Service Employees Intern. Union*, *infra* at 19.

15 **3. Fundamental Rights and Strict Scrutiny.**

16 "Regulations that impinge on fundamental rights are subject to strict
17 scrutiny." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Circuit 1984) citing
18 *Harper v. Virginia Board of Elections*, 383 U.S. 663, 670 (1966).

20 Plaintiffs as lawyers and otherwise, have fundamental rights which are at
21 stake here.

22 One fundamental right is that of freedom of association and non-association
23 under the First and Fourteenth Amendments. Ever since *NAACP v. Alabama*, 357
24 U.S. 449 (1958), freedom of association has been a fundamental right deserving of
25

1 First and Fourteenth Amendment protection. Correspondingly, "[f]reedom of
2 association . . . plainly presupposes a freedom not to associate." *Schneider v. New*
3 *Jersey*, 308 U.S. 147, 161 (1939).

4 In *Roberts v. United States Jaycees*, 468 US 609, 622 (1984), the court said "we
5 have long understood as implicit in the right to engage in activities protected by the
6 First Amendment a corresponding right to associate with others in pursuit of a wide
7 variety of political, social, economic, educational, religious, and cultural ends."
8 Citing *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 907-909, 932-933 (1982);
9 *Larson v. Valente*, 456 U. S. 228, 244-246 (1982); *In re Primus*, 436 U. S. 412, 426
10 (1978); *Abod v. Detroit Board of Education*, 431 U. S. 209, 231 (1977).

11 Liberty, in its broadest sense, is a fundamental right. *United States v. Salerno*,
12 481 U.S. 739,750 -51 (1987); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 799 (9th
13 Cir., 2014) (dissent).

14 Plaintiffs have a fundamental right to freedom of speech and expression under
15 the First and Fourteenth Amendments to due process of law under the Fifth and
16 Fourteenth Amendments. Due process encompasses certain "fundamental" rights.
17 *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). Respondents' "substantive due
18 process" claim relies upon our line of cases which interprets the Fifth and
19 Fourteenth Amendments' guarantee of "due process of law" to include a substantive
20 component, which forbids the government to infringe certain "fundamental" liberty
21 interests at all, no matter what process is provided, unless the infringement is
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1 narrowly tailored to serve a compelling state interest. *See, e. g., Collins v. Harker*
 2 *Heights*, 503 U. S. 115, 125 (1992); *Salerno, supra*, at 746; *Bowers v. Hardwick*, 478
 3 U. S. 186, 191 (1986).

4. Strict Scrutiny and its Application.

6 The Nebraska Supreme Court issued a per curium decision in *In re Petition for*
 7 *Rule Change to Create Voluntary State Bar of Nebraska*, 286 Neb. 1018 (2013). The
 8 court discussed strict scrutiny in the context of the fundamental rights of First
 9 Amendment freedom of speech and expression. Quoting from *Knox v. Service*
 10 *Employees Intern. Union*, 132 S.Ct. 2277, 2289 (2012) the court said:

11 We made it clear that compulsory subsidies for private speech
 12 are subject to exacting First Amendment scrutiny and cannot
 13 be sustained unless two criteria are met.

14 First, there must be a comprehensive regulatory scheme
 15 involving a "mandated association" among those who are
 16 required to pay the subsidy. *Id.*, at 414, 121 S.Ct. 2334. Such
 17 situations are exceedingly rare because, as we have stated
 18 elsewhere, mandatory associations are permissible only when
 they serve a "compelling state interes[t] . . . that cannot be
 achieved through means significantly less restrictive of
 associational freedoms." *Roberts, supra*, at 623, 104 S.Ct. 3244.

19 Second, even in the rare case where a mandatory association
 20 can be justified, compulsory fees can be levied only insofar as
 21 they are a "necessary incident" of the "larger regulatory
 purpose which justified the required association." *United*
 22 *Foods, supra*, at 414, 121 S.Ct. 2334.

5. Mandatory Association and Strict Scrutiny.

24 In *Knox*:, the first requirements of strict scrutiny —
 25

1 First, there must be a comprehensive regulatory scheme
2 involving a "mandated association" among those who are
3 required to pay the subsidy. *Id.*, at 414, 121 S.Ct. 2334. Such
4 situations are exceedingly rare because, as we have stated
5 elsewhere, mandatory associations are permissible only when
6 they serve a "compelling state interes[t] . . . that cannot be
7 achieved through means significantly less restrictive of
8 associational freedoms." *Roberts, supra*, at 623, 104 S.Ct. 3244.

9 Does the supposed compelled or mandated association of Plaintiff in WSBA
10 2017 meet strict scrutiny? Is there a "compelling state interes[t] . . . that cannot be
11 achieved through means significantly less restrictive of associational freedoms?"

12 The answer is in the negative for several reasons.

13 The state of Washington has a compelling interest in regulating Lawyers,
14 Limited Practice Officers, and Limited License Legal Technicians. This interest is
15 no different than the state's interest in regulating doctors and medical
16 professionals, architects, land surveyors, engineers, etc. See the listing of
17 professionals listed in RCW Title 18.

18 Is there any need to force a Washington professional into a mandatory
19 association of the profession so that the association may regulate and discipline the
20 professional? The mandatory association for lawyers is the only such association.

21 Here, a new mandatory association is purported to be created by WSBA 2017
22 for the purpose of regulation and discipline, not only of Lawyers, but also of Limited
23 Practice Officers and Limited License Legal Technicians.

24 There is no need for the WSBA 2017 to discipline. Professional discipline
25 systems take place without a mandated association. Indeed, the American Bar

1 Association in a report to the WSBA 1933 stated that the lawyer discipline function
2 should not be performed by the association. Declaration of S.K. Eugster at 3-4.
3 The ABA has criticized the connection. *Id.* and Appendix 167.

4 It is common in the United States to have the lawyer discipline function
5 provided by a system which is entirely independent of bar associations of lawyers.
6

7 Is it possible to achieve the interest by “significantly less restrictive of
8 associational freedoms.”

9 Another important point here is that there is no substantive act on the part of
10 the state of Washington, either by legislation to or Supreme Court rule.

11 **6. Compelled Dues and Strict Scrutiny.**

12 In *Knox*, the second aspect of strict scrutiny —

13
14 Second, even in the rare case where a mandatory association
15 can be justified, compulsory fees can be levied only insofar as
16 they are a "necessary incident" of the "larger regulatory
purpose which justified the required association." *United
Foods, supra*, at 414.

17 Note the compelled dues must be a “necessary incident” to the “larger
18 regulatory purpose” of the “required association.”

19 Thus, the guiding standard is whether the dues are necessary for regulation
20 and discipline. Obviously, they are not because the WSBA 2017 has no authority to
21 discipline Lawyers, Limited Practice Officers and Limited License Legal
22 Technicians.
23

1 **7. Strict Scrutiny and the WSBA 2107 Discipline System.**

2 The Discipline System of the new Washington State Bar Association does not
3 meet strict constitutional scrutiny. This is so because the System is imposed upon
4 Plaintiffs have fundamental rights are being violated under the First amendment,
5 and as a result, they cannot be required to be members of the Association, thus the
6 Discipline System cannot be applied to them.
7

8 Also, the Discipline System, in and of itself, does not meet strict scrutiny. The
9 system does not meet strict scrutiny.

10 And what a discipline system it is. The Washington Lawyer Discipline System
11 (ELC) is an obvious violation of a lawyer’s right to procedural due process of law
12 under the Fifth and Fourteenth Amendments. Why? Because it is an elementary
13 requirement of due process that discipline systems must be fair. No person, no
14 entity such an integrated associaton can be the judge and prosecutor in its own
15 case. The system is entirely in the hands of the bar association – it controls, its
16 Executive Director controls the selection of all persons who play the part from the
17 office of disciplinary council to the hearing officers, to the members of the
18 disciplinary board, to the members of the review committees. If the impartiality of
19 the system, the people to make up the system as judicial officers, can be reasonably
20 questioned, the officers have to recuse themselves. Declaration S.K. Eugster 3-9.
21
22

23 **VI. CONCLUSION**

24 Plaintiffs’ motion for summary judgment should be granted.
25

1 March 1, 2017

2
3 Respectfully submitted,

4 EUGSTER LAW OFFICE PSC

5 s/ Stephen Kerr Eugster

6 Stephen Kerr Eugster, WSBA #2003

7 Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court Western District of Washington trial court CM/ECF system on February 28, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the trial court CM/ECF system.

I further certify that on February 29, 2017, by previous agreement of counsel, I emailed, the foregoing document, including its appendix to counsel listed below at their respective e-mail addresses:

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