11/14/18

No. 18-644

# In The Supreme Court Of The United States

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DAVID C. COTTINGHAM,

*Petitioner*

v.

WASHINGTON STATE BAR ASSOCIATION BOARD OF BOVERNORS, and WASHINGTON STATE DISCIPLINARY BOARD,

*Respondents*

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On Petition for Writ of Certiorari to the Washington State Supreme Court

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## Petition for Writ of Certiorari

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## QUESTIONS PRESENTED

A Washington State Bar disciplinary investigation continued through to suspension, notwithstanding Attorney David C. Cottingham's opposition to unlawful conduct, and his insistence upon judgment descriptions for regulatory approval. Cottingham acted pro se in defense of his family and property title. He had achieved one pretrial legal description and damages due to absence of cause for condemning defendants' title claim, but insisted upon final judgment descriptions locating condemnation afterward. He is suspended for efforts essential to finality while he needed regulatory approval, of an enforceable result without jeopardy under Washington's criminal prohibition of sales. In defense against discipline Cottingham invoked First Amendment protections and a right to oppose illegal conduct impairing his future right of sales and marketing.

The questions are:

SHOULD THIS COURT RESOLVE THE SPLIT IN STATE COURT RESPONSES TO THIS COURT'S PRESCRIBED OBJECTIVE ANALYSIS PROTECTING FIRST AMENDMENT PETITIONING AS DUE PROCESS?

SHOULD STRICT SCRUTINY REQUIRE AN ARTICULATED COMPELLING STATE INTEREST BEFORE REGULATING *PRO SE* ATTORNEY CONDUCT?

MAY A GENERAL STATE INTEREST IN REGULATING ATTORNEY CONDUCT SUBORDINATE FIRST AMENDMENT PETITIONING OPPOSING ILLEGAL CONDUCT?

PARTIES TO THE PROCEEDING

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## PETITION FOR A WRIT OF CERTIORARI

David C. Cottingham hereby petitions the Court for A Writ of Certiorari directed to the Washington State Supreme Court for review of the following Judgment.

## REPORTS, OPINIONS AND ORDERS.

August 16, 2018 Washington State Supreme Court Opinion No. 201,704-5 re David C. Cottingham, Washington Supreme Court, 191 Wn.2d 450, 423 P.3d 818 (2018). (App. 1a - 24a)

August 17, 2018 Correction as to prevailing party in adverse possession, Memorandum from the Temple Of Justice, Interim Reporter of Decisions, "Correction In re Disciplinary Proceeding Against Cottingham, No. 201,704-5 (filed August 16, 2018)," August 17, 2018," at App. 25a.

August 29, 2018 Vacation of Correction Memorandum as to prevailing party in adverse possession, Change Memorandum from the Temple Of Justice, Interim Reporter of Decisions, to Supreme Court Clerk's Office at App. 26a.

October 11, 2018 Washington State Supreme Court Order Denying Further Reconsideration, Washington Supreme Court, at App. 29a.

October 10, 2018 Washington State Supreme Court Order Amending Opinion at App. 27a.

September 27, 2017, Disciplinary Board's Order Adopting Hearing Officer's Decision And Denying Respondent's Motion For Notice Of Judicial And Legislative Fact (App. 77a).

January 20, 2017, hearing officer Findings of Fact, Conclusions Of Law, Mitigating Facts and Recommended Sanction. At App. 166a

## JURISDICTION

### JUDGMENT TO BE REVIEWED:

August 16, 2018 *In re Disciplinary Proceeding Against Cottingham,* 191 Wn.2d 450, 423 P.3d 818 (App. 1-24a); Amended October 10, 2018 (Order Amending Opinion (App. 27a)), Reconsideration denied (Order Denying Further Reconsideration (App. 29a)).

### STATUTORY AUTHORITY.

This Court has jurisdiction to review final judgments or decrees rendered by the Washington State's highest court of last resort, its Supreme Court, under 28 U.S.C. §1257(a) when title, right, privilege, First Amendment immunity and Fourteenth Amendment due process and equal protection are claimed.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

First Amendment, United States Constitution.

> Congress shall make no law ...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

RCW 4.64.030(2)(b) "If the judgment provides for the award of any right, title, or interest in real

property, the first page must also include an abbreviated legal description of the property ...awarded by the judgment, ...and reference to ...where the full legal description is included...."

RCW 4.64.030(3), " ... The clerk may not enter a judgment, and a judgment does not take effect, until the judgment has a summary in compliance with this section...."

RCW 58.17.040(6), Governor's Statement with Veto, Legislative intent rejecting judicially divided land, House Bill No. 383, chapter 134, Washington Laws 1974: ""I am returning herewith without my approval as to items House Bill No. 383 entitled: 'An Act Relating to plats and subdivisions.'" [chapter 134, sec. 2, 4, "Divisions made by court order"]... some developers who have subdivided without receiving an approved plat have gone to court asked for and received a dissolution and ... would put the county in an advisory capacity only and would afford no real protection against the kind of land development practices which are so destructive of county land use planning. Accordingly, I have vetoed that item."

RCW 58.17.300, Misdemeanor Declaration. "Any person, ...who violates any provision of this chapter or any local regulations adopted pursuant thereto relating to the sale, offer for sale, lease, or transfer of any lot, tract or parcel of land, shall be guilty of a gross misdemeanor and each sale, offer for sale, lease or transfer of each separate lot, tract, or parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto, shall be deemed a separate and distinct offense."

RCW 2.48.210 Washington Attorney's Oath "I will support the Constitution of the United States and the Constitution of the state of Washington."

## INTRODUCTION

This petition reviews lawyer discipline applied to true First Amendment petitioning litigation that became necessary only when two statutory condemnation judgment location descriptions could not enter to describe the resulting locations due to material nondisclosure.[1]

Washington disciplines in a manner allowing sham litigation introducing substantive illegality. Discipline deadens the oath to support both constitutions, and retaliates against obedience., as it clears a way for discrimination against federal claims in state courts. During discipline proceedings examining condemnation litigation against Cottingham, Judgment entry was shown obstructed by an opposing counsel's attention to other unpleaded interests without presentation of condemnation judgment finality for local agency approval. Cottingham's opposition to illegal conduct is now disciplined without any compelling state interest tailored to protect petitioning by deafening an ear to objective evidence of unlawful conduct in the regulated field. Washington statutes prohibit sale of platted land without agency approval, requiring judgment descriptions.[2]

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[1] Cottingham's successful petitioning won a pretrial described location by Summary Judgment. After trial he won treble damages for wrongful waste against defendants, available when claimants show no probable cause "to believe that land trespass was committed [on] was his or her own." RCW 64.12.040.

[2] RCW 4.64.030(2)(b) App. 247a; RCW 58.17.300, App.

Washington's disciplinary office acted without Modification Judgments[3] describing a final location but sought inference of malice without "*PREI*"[4] and "*BE&K*"[5] analysis and *Bose*[6] review, and directed a hearing officer that Cottingham's motion raising a first amendment defense was "unauthorized."

The Washington Supreme Court Opinion follows dicta from *Bill Johnson's Restaurants*, allowing its hearing officer to infer improper motive "in part," and suspend Attorney David Cottingham for his *pro se* insistence upon regulatory approval by such condemnation judgment locations.

First Amendment protections were urged by Cottingham at each stage of discipline, with citation to authority rendering platted lot sales unlawful. Burdens applicable to First Amendment protection are unapplied. Objective statutory support for genuine belief remains unconsidered and this court's decisions are subordinated by Washington.

To reach and regulate true petitioning, for

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258a.

[3] To avoid confusion with the pretrial Summary Judgement won by Cottingham including a precise location description, "Modified Judgments" refers to the judgments that normally enter after trial modifies a Summary Judgment including condemnation, due to RCW 4.64.030(2)(b) (App. 247a).

[4] *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56-63, 113 S. Ct. 1920, 1926-30, 123 L. Ed. 2d 611 (1993).

[5] *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524-26, 122 S. Ct. 2390, 2395-96, 153 L. Ed. 2d 499 (2002)

[6] *Bose v. Consumers Union Of United States, Inc*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (independent appellate review)

discipline of an attorney defending his own family and property title, pro se, Washington State disciplinary proceedings disregarded regulatory proof that illegal conduct was opposed by attorney Cottingham, supplying citation to RCW 58.17.300 (App. 258a), supportive briefing to the Disciplinary Board,[7] and testimony as well.[8]

Discipline proceedings received striking evidence from opposing counsel rendering interpretation of the conclusions from the condemnation court impossible (App. 62a) without Modified Judgments. He admitted that untried interests related to conclusions and, being withheld, had been untried. He had admitted[9] confusion less specifically to the Washington Court of Appeals. Counsel's disclosure met elements of an unprotected sham condemnation, by material nondisclosure of other interests concretely impairing a final location.

Washington's discipline avoided this court's guidance, instead employing *Bill Johnson's Restaurant's* dicta, to support a subjective, circumstantial inference of malice "in *part*," without protective analysis. A judgment description's location is the *sine qua non* of condemnation. In Washington agency approval is the *sine qua non* for

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[7] Respondent's Corrected Opening Brief, App. 79a.

[8] App. 64a, "Land division that's unapproved by the legislature can't be sold," Cottingham testified.

[9] Interpretation was not possible for Washington's Court of Appeals, which had to remand the conclusions without aid of judgment's legal description, because of conflicting conclusions. Opinion No. 68202-4-I, 177 Wn. App. 1010 (2013); LEXIS 2486, Unpublished. http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=682024MAJ

plat change finality. Petitioning was caused by their absence.

> "The United States supreme court has made it clear that, as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome, it is protected and the case should be dismissed. This bill amends Washington law to bring it in line with these court decisions which recognizes that the United States Constitution protects advocacy to government, regardless of content or motive, so long as it is designed to have some effect on government decision making."

Section 1, Chapter 232, Washington Laws 2002.

This court's pronouncement, correcting *Bill Johnson's* Restaurants dicta, is stronger than the forgoing restatement by Washington's legislature:

> "As long as a plaintiff 's purpose is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively. "

*BE&K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 534, 122 S. Ct. 2390, 2401, 153 L. Ed. 2d 499 (2002)(*"BE&K"*), citing *Professional Real Estate Investors* v. *Columbia Pictures*, 508 U.S. 49 at 60-619 (1993); (*"PREI"*).

## STATEMENT OF THE CASE

Discipline is directed at silencing advocacy for a lawful result after sham condemnation proceedings failing to enter two judgment descriptions for agency approval. Washington encourages both advocacy and reporting as vital to

effective government. The Suspension Opinion (App. 1a-24a) passed over the Governor's veto; passed over Washington's ardent protection of advocacy as vital to effective law enforcement; and particularly ignored the ABA standard defining frivolous effort, adopted in Washington,[10] protecting advocacy:

> "[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law."

Comment Two, RPC 3.1 amended effective April 14, 2015.

The Suspension Opinion employs a different definition of "frivolous" after the hearing officer

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[10] Three acts of Washington's legislature arrive at protection from abuse in judicial proceedings. App. pp. 259a, Laws of 2002; App. 261a, Laws of 1989; and App. 265a, Laws of 2010.

employed none. It identifies no judgment description approved by county planning. It reports only a quantity of property as "condemned," meaning conclusions of law alone, not by entry of condemnation judgment *location* descriptions entered in satisfaction of RCW 4.64.030(2)(b)[11] allowing notice, regulatory approval, county assessment, and lawful sales. Finality by mere conclusions, rather than Modified Judgment location descriptions, could not evoke certainty even from the claimant's attorney during discipline:

> "I don't believe that portion was ever given to us in any of the findings of fact and conclusions of law because I told the judge not to do it because there may be other people that had an interest in that portion and we were not going to get into litigation with other neighbors...."

Testimony in Washington's enforcement proceedings under "ELC 10," by claimant's counsel December 20, 2016. (App. 62a).

Opposing counsel referred to unpleaded condemnation interests withheld, and untried. Final judgment location descriptions had been interfered with and caused all Cottingham efforts. He had just disclosed information which, if presented in pleadings would have eliminated delay and adverse determinations below.

The remand order from the condemnation court much later revealed success, holding that

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[11] Washington's assessor investigation cannot proceed (App. 249a) without plat regulation satisfaction, after judgment statute description compliance and agency approval of judicial change. (RCW 58.17.040(6) and Governor's veto of judicial action disturbing plats).

Cottinghams proved their title.[12] The Washington Supreme Court Suspension Opinion correctly holds that initial petitioning was not frivolous (App.7a) but ignores admissions by opposing counsel that reflect loss of opportunity for trial to finality of all interests. (App. 62a, and in Opinion 68202-4-I at *fn. 11)*), and added effort at attaining a lawful result.

Without disclosure of the unpleaded interests and Modification Judgment locations, Cottingham was as limited in his ability to defend against sanctions as he was to raise injury by misrepresentation and fraud (See, *Kearney*[13]). Testimony (App. 62a). The absence of Modification Judgments and agency approval was strong evidence that that no finality was intended by the condemnation claimants.

The Washington Court's opinion assumes its

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[12] Determination that Cottingham had not proven anything was reversed on remand by the condemnation court. (Order on Remand, App. 245a; Opinion No. 68202-4-I Unpublished, Pretrial Summary Judgment). http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=682024MAJ

[13] Material nondisclosure in condemnation states a prima facie case for civil rights and civil RICO violation as depriving the "litigation of its legitimacy." *Kearney v. Foley & Lardner, LLP,* 590 F.3d 639, 896, 905-906 (9th Cir. 2009)(citing *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 940 (9th Cir.2006); *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998); also, *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1185 (9th Cir.2005); See *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 907 1261 (9th Cir.1982) (holding there is "no first amendment protection for furnishing with predatory intent false information to an . . . adjudicative body")).

hearing officer addressed subdivision as an argument without allocating a burden of proof (App. 11a).[14] But disciplinary counsel had informed that hearing officer that Cottingham's motion and the authority cited were unauthorized. Disciplinary counsel reminded him of limited authority, preventing him from considering dismissal in application of this nation's First Amendment priority. (App. 189a, 195a). The officer's opinion does not address the authorities from Cottingham's motion in the slightest. No record applies any burden to protect petitioning or to assess Cottingham's genuine belief that he was opposing unlawful, unapproved, land division conduct which carried a capacity to deny future authority for sales.[15]

### A. A LUPA PETITION JUDGE RESERVED JUDGMENT REGARDING LAND DIVISION AND OTHER DECISIONS BEYOND BUILDING PERMITTING AS NONFRIVOLOUS, FOR LATER PROOF.

The opposition to plat compliance violations was not found frivolous. An underlying "LUPA" court judge specifically preserved evidence that he did not regard pursuit of "all other" decisions including plat regulation compliance as frivolous, excepting "all other pleaded decisions" *beyond building permitting* when dismissing Cottingham's LUPA petition (App. 236a). The judge protected against future use of its findings as any kind of decision that he considered any "other

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[14] The interest in compliance is "fundamental" in Washington. *Kates. V. Seattle, infra.*

[15] App. 64a, "Land division that's unapproved by the legislature can't be sold," Cottingham testified.

governmental approval required... before [sale]" in petitioning preserved by statute[16] a frivolous inquiry, by *excluding* "other decisions:

> "2. Cottinghams were not personally served with written notice of [interlineation follows quotes:] "any decision of" Whatcom County's issuance of the 2006 building permit [sic] [initials applied]"
>
> "3. "It is likely that written notice of the building permit and ~~all other~~ [sic] decisions [sic] of Whatcom County required no written or actual notice to Cottinghams, [initials applied] pursuant to RCW 36.70C.040(4)(c) and time for Cottinghams to seek judicial review of any the County's [interlineations in follows quotes:] "building permit decision" action began to run on August 17, 2006. [initials applied]."

Para. 2 and 3, App. 236a (pp. 4 and 5, Findings and Conclusions [of *Land Use Petition* Court]).

The message silenced in Cottingham's motion to dismiss (App. 189a) and his Answer (App. 203a) to Washington disciplinary proceedings is his belief that Washington has long notified that agency approval is required for platted lot change,[17] and has long notified that without agency approval every offer of sale is a gross misdemeanor.[18]

Cottingham cannot satisfy regulators and

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[16] Washington preserves the possibility of agency entries affecting " other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used," as proper for petitioning at RCW 36.70c.020(2)(b). App. 272a.

[17] Governor's veto message, Ch, 134 Laws of 1974, and RCW 58.17.040(6), App 252a.

[18] RCW 58.17.300 (1969 ex.s. c 271 § 32), App. 258a.

avoid sale restrictions with a mere quantity to represent for agency due process, approval, rejection and finality. Division, whether including untried other interests or not, is thus far private, unapproved, allocation and unlawful conduct without approval.[19]

Objective evidence that protected petitioning effort genuinely opposed unlawful conduct without regulatory compliance is manifest but unaddressed.

### B. ERROR WAS ASSIGNED, REMEDIAL FEES WERE REQUESTED, AND MATERIAL WITHHOLDING OBVIATED A STIPULATION.

The Washington Suspension Opinion erroneously reports that findings were verities, unchallenged. This is incorrect. Findings were challenged by *substantial* assignments of error (App. 79a – 165a). Briefing to the State Supreme Court must state "objections" and was met by "objections." Review according to the scope appropriate for First Amendment encroachment should certainly have reached them as challenged findings. *Bose v. Consumers Union Of United States, Inc,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (independent appellate review). The rule applicable to briefing to the Supreme Court is specific as to "objections," and is backed by authority for sanctions. (ELC 12.6(a), App. 290a).

As to remedial fees the court's Opinion informs that "[t]his action was not a civil rights action brought under 42 U.S.C. § 1983." (App. 24a). But Cottingham's briefing to the Disciplinary Board raised *and requested* this remedy (App. pp.151a, 152a, 164a, and 164a) after First Amendment

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[19] RCW 58.17.300 at App.258a.

protection was denied. Washington's high court has reported 42 U.S.C. § 1983 remedies as properly raised and lost in discipline See *Eugster v. Washington State Bar Ass'n.* 198 Wn. App. 758, 397 P.3rd 131 (2017)( 42 U.S.C. §1983 remedies apply and are *lost if not raised* in disciplinary proceedings).[20] They are an appropriate remedy for quasi criminal discipline continued in denial of Petitioning immunity, ignored and punished, here.

As to a stipulation that underlying decisions were correct, it could not include decisions that were not made because claimants withheld notice of the existence of others interested and private allocation of property to them, as reflected at App. 62a.

### C. WASHINGTON DISREGARDS LEGISLATIVE ENCOURAGEMENT AND STANDARDS PROTECTING BREATHING ROOM.

Petitioning is legislatively protected as proper in Washington under several statutes.[21] And encouraged under the proper standard. During all underlying efforts charged, "frivolous" had the Washington definition found in Comment Two to RPC 3.1. That definition was not applied in discipline. (See, instead, at App. 11a. "A frivolous position is one that a lawyer of ordinary competence

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[20] In Answer (App. 203a) and Briefing to the Board, the issue was raised and preserved. (App. 79a)

[21] RCW 36.70c.020, *et seq.*; RCW 4.24.50, *infra* (legislative intent, sec. 1, 2, chapter 234, Washington Laws 1989); RCW 4.24.510, (legislative intent adopting language of U.S. Supreme Court, sec. 1, 2, chapter 232, Washington Laws 2002); RCW 4.24.525, (legislative intent, sec 1, Chapter 118, Washington Laws of 2010, *et seq.*)

would recognize as being devoid of merit.").

However Washington Professional Rules encourage a meaning less likely to end in discipline, inspired by the developed expectations of the litigator. Comment Two of RPC 3.1 (App. 284a)

> 'The filing ...is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery [and] is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument."

The position that RCW 4.64.030(2(b) judgment location definitions have not entered and condemnation appears to have been misused without a plan for legitimate agency approval or any judgement's location description for entry is supported by the record, and by the admission to interests of others from opposing counsel in the discipline proceedings. So is the argument that no court has found pursuit of plat regulation notice and compliance frivolous.

If a lawyer should not anticipate the need to pursue judgment finality when only conclusions have located condemnation the diligence rule must change, but not at the expense of First Amendment Protection. Cottingham should not be disciplined to another standard after the fact of his service under another, leaving that comment's assurance as a "trap for the wary as well as the unwary."

(*Gentile*).[22] Great distance lies between assuring *before* discipline that "action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail," and afterward that a frivolous "position is one that a lawyer of ordinary competence would recognize as being devoid of merit."

Washington was also encouraging reporting the public concern to any branch of government.[23] Reporting of plat regulation violation as unlawful conduct is assured Washington's protection. Washington had long restricted judicial finality as to whether an additional lot was created.[24]

Washington acted to encourage security for reporting to any branch of government, assuring of its policy that "[i]nformation provided by citizens concerning potential wrongdoing is vital to effective law enforcement and the efficient operation of government...." Sec. 1, Chapter 234, Washington Laws 1989, pg. 1120 (App. 261a). It granted immunity to encourage reporting "regarding any matter reasonably of concern" to any branch of government (sec. 2, *id.*), to "protect the free flow of information from citizens to their government" (sec. 4, *id.*). In 2002 Washington extended its safe

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[22] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)*Gentile, v. State Bar of Nevada*, 501 U.S. 1030, 1054, pp. 1065-1075, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991) , and *Matter of Steven James Foster*, 253 P.3rd 1244 (Colo. May 23, 2011)(citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)).

[23] Sec. 2, Ch. 232, Washington Laws 2002; Section 1(a), (d) Chapter 118, Washington Laws 2010 App. 118a.

[24] (Governor's veto message, Ch, 134 Laws of 1974, and RCW 58.17.040(6), App 252a)

harbor, assuring that protection of petitioning extends "as long as the petitioning is aimed at procuring favorable government action, result, product, or outcome" (Section 1, Chapter 232 Laws of 2002 regular session laws of Washington State, 57th legislature, SHB 2699, App. 259a). Washington was encouraging "advocacy to government, *regardless of content or motive*, (App. 259a) so long as it is designed to have some effect on government decision making." (Sec. 1, ch. 232 Laws of 2002) (App. 261a).

Washington's legislature desired to quell fear of judicial system abuse (App. 265a) protecting the exercise of "constitutional rights of freedom of speech and petition for the redress of grievances" (sec. 1, ch. 118 Washington Laws 2010, App. 265a) and to protect the right of citizens "to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process." (sec. 1(d), *ibid*). Washington's encouragement extends to "[a]ny oral statement made, or written statement or other document submitted, in a ... judicial proceeding or other governmental proceeding authorized by law," *id.* sec. 2, (2)(a) Chapter 118, Laws of 2010 (App. 265a).

## REASONS REVIEW SHOULD BE GRANTED

### A. WASHINGTON'S SUSPENSION METHOD DIRECTLY CONTRAVENES THIS COURT'S PRESCRIBED OBJECTIVE ANALYSIS PROTECTING PETITIONING, DUE PROCESS, AND EQUAL PROTECTION.

Non-attorneys always enjoy protection for

report of, and opposition to, unlawful conduct in Washington. They enjoy freedom to speak on matters affecting their livelihood and right to defend their homes and families. Washington's discipline would intrude upon these rights only against attorneys as a class without articulating any enhanced interest, such that many of these rights may be lost to fear. Intrusive delay, regulation and second guessing by regulators an exercise of the right of petition after efforts serving constitutional values is injury. The denial of equal protection is unanticipated when taking the oath of office.

Although protection has already been announced and successfully applied in other fields and states, Washington authorizes itself to apply a label assuring that no weight be assigned to the need for First Amendment protection if a single a hearing officer can be found to regard effort as frivolous, unguided by sham evidence and First Amendment jurisprudence. This court should grant certiorari and review the extent to which lawyer discipline burdens the right of petition in Washington, in order to declare the exercise substantially and unconstitutionally burdened, requiring remedial care. This court's BE&K and PREI appraisals should be prescribed for preservation of the right of petition in Washington. Due process requires immediate and continuing dismissal opportunity.

Uniformity in the protection accorded the right of petition for lawyers requires that the states employ predictable manner of assessment whether their conduct may be appraised as frivolous, interfering with the administration of justice have attorneys lose the right to protect family and title in Washington, ignoring any obligation to articulate a

compelling state interest, contrary to this court's pronouncements. *NAACP v. Button*, 371 U.S. 415, 435 (1963) (rejecting loss of equal protection for attorneys).

Washington encourages reports to every branch of government that as the pursuit of needed integrity. But Washington has decided against balancing the State interest in regulating lawyers' First Amendment petitioning protection. Its decision conflicts with decisions of this court protecting First Amendment petitioning. If allowed in this nonuniform manner, any state's highest courts might inappropriately use *Bill Johnson's Restaurants*[25] dicta result-oriented discipline giving. States which wish to take leave from objective evidence to employ the various "frivolous" litigation labels, including dismissals from shortened LUPA deadlines hostile to federal guaranteed notice may be predicted without assessment of the parts that finding the parts that are objectively reasonable, and without contribution to the vitality of debate and integrity of the courts, even without *Bose*[26] review, PREI assessment and BE&K balancing. To say the least, use of a "frivolous" label guarantees the absence of discussion essential in democratic society and public concern litigation.

The ease of a "but for" test, which this court did not prohibit in BE&K as a charging option would impose at least some appearance of a burden in Washington Discipline.

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[25] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U. S. 731, 747 (1983).

[26] *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984).

Here, "frivolous" label avoided the essential public protection arrived at by allowing discussion and action upon a belief that an attorney is opposing unlawful conduct under the appraisal required under BE&K Construction, and rolled unacceptably forward toward other counts to presume damage to justice without appearance of testimony from the condemnation claimants.

A Washington court's plenary authority to regulate attorney conduct must not by rule or otherwise avoid constitutional protection and must not do so after strong evidence that due process was denied in a manner indicating sham denial of opportunity for trial. (App. 62a). But Washington's Court and this Suspension Opinion holds to previous Washington rulings that free speech guaranties do apply in disciplinary cases. *In Re Donohoe*, 90 Wn.2d 173, 580 P.2d 1093 (1978).

Certiorari should declare the BE&K and PREI analysis as required for protection of petitioning from circumstantial inference in the presence of a statutory scheme

This court's *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 246 F.3d 619 (2002) assessment remains the better protection for public concern litigation amidst regulatory complexities:

> "As long as a plaintiff 's purpose is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively. See, *id.* at 60-61,"

*BE&K*, at 534, citing *Professional Real Estate Investors*, 508 U. S., at 60-61.

This court should require that First Amendment protection conform to the BE&K and PREI assessments to render attorney discipline predictable and to avoid use of inference when readily available objective evidence allows

appropriate protection.

> " Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force."

*Id.* (BE&K) at 532 (citations omitted).

By appraising efforts as "in part" frivolous, Washington informs of great risk that the judiciary will control the vitality of debate

## B. WASHINGTON'S DECISION CONFLICTS WITH OTHER STATES, AND CERTIORARI SHOULD BE GRANTED TO ESTABLISH UNIFORMITY AMONG THE STATES ON PROTECTION OF FIRST AMENDMENT PETITIONING AND ACCESS TO COURTS.

### 1. COLORADO CLEARLY APPLIES THIS COURT'S PRESCRIBED BALANCING FOR PROTECTION OF FIRST AMENDMENT PARTICIPATION, APPLYING PREI AND BE&K.

As seen in *Matter of Steven James Foster*, 253 P.3rd 1244 (Colo. May 23, 2011), The Supreme Court of Colorado[27] (App. 30a - 59a) will not allow detailed but perfunctory conclusions as establishing improper motivation without specific evidence that an attorney *actually* desired to vex and annoy. Colorado's high court rejects board conclusions resting on the "unfortunate attributes" of litigation which would aptly describe many cases.

Colorado follows this court in emphatically

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[27] *Matter of Steven James Foster*, (*unpub.*), 253 P.3rd 1244 (Colo. May 23, 2011).

rejecting the loss of immunity[28] by the fact of licensing as an attorney, accepting full de novo review.

> "In its decision, however, the Board ruled that attorneys' First Amendment protections "do not immunize [them] from the application of the Colorado Rules of Professional Conduct," intimating that attorneys may in fact be disciplined for conduct protected by the First Amendment. We categorically reject this conclusion. The U.S. Supreme Court plainly stated in *NAACP v. Button* that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 371 U.S. 415, 439 (1963) (citing In Re Sawyer, 360 U.S. 622 (1959); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252, 77 S.Ct. 772, 1 L.Ed.2d 810 (1957). Moreover, the rights protected by the First Amendment are at the very heart of conduct protected against regulatory infringement. See Louisiana ex rel. *Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("[R]egulatory measures, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."), quoted with approval in Button, 371 U.S. at 439."
>
> "Because the Board's decision implicates questions of constitutional fact and law, we must evaluate de novo whether the

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[28] *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963).

> proceedings below properly afforded Foster the substantive and procedural protections of the First Amendment. See *Kuhn v. Tribune–Republican Pub. Co.*, 637 P.2d 315, 318 (Colo.1981) (citations omitted)."

(App. 36a). Colorado first recognizes according to PREI that consideration of the subjective prong of the sham exception is improper if the objective prong is not first satisfied, citing *Prof. Real Estate Investors, Inc., v. Columbia Pictures*, 508 U.S. 49, 60–61 (1993). The Colorado demonstrates reluctance to circumstantially infer frivolousness on "evidence of a litigant's genuine desire to secure favorable relief, unless the litigant's argument is so wholly devoid of conceivable merit that the litigant's proffer of proper motivation has no credibility."

First Amendment protection in Colorado meets this court's BE&K standard applied to unsuccessful lawsuits.

Colorado's court will not tolerate aggregate conduct assessment as proof that conduct prejudicially affected the administration of justice, as it questions a "mosaic" theory can collectively rise to the level of baselessness." Colorado scrutinizes to determine whether the Board actually found "aggregate conduct was sufficiently non-frivolous to satisfy the objective prong of the sham exception to the First Amendment." Colorado dismissed when it could not find cumulative or aggregate conduct prejudicial to justice." It will dismiss the charges violated under RPC 8.4(d) aggregate and/or mosaic theory of misconduct through the course of litigation charging a cumulative effect prejudicial to the administration of justice."

Colorado discipline allows summary judgment. However, its high court still expresses concern that early determinations should have shown constitutional merit, followed by opportunity for dismissal in protection of first amendment petitioning, as well as balancing after requiring a specific articulated, adequate state interest.

### 2. KANSAS REQUIRES BALANCING AND ADEQUATE STATE INTEREST AND IDENTIFICATION OF THE INTERESTS OF JUSTICE TO PROTECT FIRST AMENDMENT PETITIONING

> "It is only in those instances where unbridled speech amounts to misconduct which threatens a significant state interest, that a state may restrict a lawyer's exercise of personal rights guaranteed by the Constitutions. *Spevack v. Klein*, 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 1 L.Ed.2d 796, 77 S.Ct. 752, 64 A.L.R.2d 288 (1957); *Konigsberg v. State Bar*, 353 U.S. 252, 1 L.Ed.2d 810, 77 S.Ct. 772 (1957); *In re Sawyer*, 360 U.S. 622, 3 L.Ed.2d 1473, 79 S.Ct. 1376 (1959)."
>
> " When conflict occurs between the regulatory powers of government, as for example the subsequent imposition of discipline for misconduct by a state-licensed attorney, and the individual liberty to speak and publish, a reconciliation must be effected requiring a careful weighing and balancing of the respective interests. Such

> measures of regulation are not prohibited where justified by a valid governmental interest within the administration of justice, and when the measures are not intended to control the content of speech but only incidentally limit its unfettered exercise."

*State v. Russell,* 227 Kan. 897, 900-901, 610 P.2d 1122, 1126 (1980).

### 3. NEVADA MINIMIZES STATE INTERESTS WHEN ABUSE OF AUTHORITY MUST BE CONFRONTED.

Pertinent latitude would likely allow response to sham litigation in Nevada, which rejects any lower standard of scrutiny when an attorney finds it necessary to confront abuse of authority, adjusting the professional standard to accommodate needs of justice when justice appears misused. *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1054, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991). Balancing of the state interest was even discussed as inappropriate against the prejudice to administration of justice:

> "The cases cited by our colleagues to support this balancing, *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.,* 496 U.S. 91 (1990); *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447 (1978); and *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), involved either commercial speech by attorneys or restrictions upon release of information that the attorney could gain only by use of the court's discovery process. Neither of those

> categories, nor the underlying interests which justified their creation, were implicated here. Petitioner was disciplined because he proclaimed to the community what he thought to be a misuse of the prosecutorial and police powers. Wide-open balancing of interests is not appropriate in this context."

*Id.* at 1052.

Nevada requires regulators to demonstrate the least limitation of liberty that is required to achieve an end supported by a legitimate state interest,

> " At the very least, however, we can say that the Rule which punished petitioner's statements represents a limitation of First Amendment freedoms greater than is necessary or essential to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood.

*Id.* at 1058.

### C. WASHINGTON SWEEPS INTO PROTRACTED DISCIPLINE WHAT RPC 3.1 AND COMMENT TWO ENCOURAGE AS LEGITIMATE.

This Court should grant certiorari in review of uncontrolled lawyer discipline in Washington. Washington adopted ABA standards creating a safe harbor for litigation's breathing room, and Washington adopted Comment Two of RPC 3.1, encouraging petitioning without concern for failing. (App. 284a). Washington legislation is equally protective. By denying hearing to Cottingham's First Amendment dismissal motion (App. 189a,

195A) Washington demonstrates that it will sweep all encouraged petitioning exercise into prolonged investigation after encouraging a safe harbor for petitioning. Nothing could chill the will of attorneys or stifle vitality of debate any more than this.

Attempts to restrict or burden the exercise of First Amendment rights must be narrowly drawn." *Broadrick v. Oklahoma*, 413 U.S. 601, 611, 903 S. Ct. 2908 (1973). When a State undertakes to restrain unlawful advocacy, it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights. *Speiser v. Randall*, 357 U.S. 513, 520-29 (1958).

The constitutional defect of an overbroad restraint on speech lies in the risk that the wide sweep of the restraint may chill protected expression.

Washington provides no clearly articulated policy protecting First Amendment petitioning and proceeds no farther than the "frivolous" exception standard, citing Bill Johnson's Rests., 461 U.S. at 741; (1983). By ending its assessment without balancing its interests against the national interest in Washington discipline demonstrates no limits upon encroachment into the field of protected petitioning, even when sham use of condemnation has been testified to have included interests of untried others. Dismissal motions cannot apply any degree of protection in Washington. (App. 195), and federal protection from this court is required

This court has prescribed that regulatory efforts should cease for the impact upon petitioning when conduct being opposed is illegal. *BE&K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 525, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002). Proper petitioning protection will rarely disregard genuine desire to test the legality of the conduct.

This Court's latest pronouncement asserts that belief in opposition to illegal conduct complete defense against punishment of unsuccessful efforts, regardless of motive. *BE&K, 527, 536-37.* So does Washington's legislature.[29] So does Colorado in lawyer discipline. *Matter of Steven James Foster*, 253 P.3rd 1244 (Colo. May 23, 2011)

Petitioning insisting upon a final judgment's described location is redress following public concern and in the public interest. Participation for agency appeal and agency approval or rejection records is also the direct target of Washington regulation, preclusion by timing[30] for access made most difficult without a final judgment location. Unlawful conduct without such a judgment must remain protected. It was protection of title as well. Washington's legislature actually encourages reporting and petitioning. Discipline is commenced without even a condemnation judgment's description in Washington.

### D. EQUAL PROTECTION IS DENIED WITHOUT OPPORTUNITY FOR PROMPT DETERMINATION OF CONSTITUTIONAL MERIT, FOR IRREPARABLE CONSTITUTIONAL HARMS WITHOUT THE PROTECTION OF MOTION PRACTICE

Equal Protection requires that laws affecting First Amendment interests be narrowly tailored to their legitimate objectives. *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968); generally, *Dunn v. Blumstein*, 405 U.S., at 342 -343, 92 S.Ct.,

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[29] *Matter of Steven James Foster*, 253 P.3rd 1244 (Colo. May 23, 2011)(citing *NAACP v. Button*, 371 U. S. 415, 433 (1963).

[30] RCW 36.70c.040(4)(c) App. 252a.

at 1003. Discipline without regard to First Amendment petition protection denies equal protection of the laws and marks forbidden intrusion into the field of free expression. The duty to preserve First Amendment liberty is nondelegable.[31] It is speech on "matters of public concern" that is 'at the heart of the First Amendment's protection. *Dun & Bradstreet*, 472 U.S. at 758-59 (footnote omitted) (internal quotation marks omitted) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)). Speech is entitled to heightened First Amendment protection. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). For non-attorneys, speech on areas of public concern must remain just as protected as for citizens.

Yet, when attorney discipline is the issue, Washington has relaxed its own burden to allow regulation under a general interest without demanding any compelling articulated interest in a different classification.

### E. REGULATION CAN BE NARROWLY DRAWN.

Washington can easily authorize hearing officers to decide constitutional issues as soon as

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[31] *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991)(quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984))(constitutional responsibility for review cannot be delegated to the trier of fact, whether that fact finding be performed in the particular case by a jury or by a trial judge).

they emerge. It can easily require charging that establishes probable cause and constitutional merit, and can easily take a substantial step toward petition protection by requiring an allegation that no First Amendment right of petition is involved, thus framing the inquiry and shouldering an allegation that no First Amendment right of petition is involved, thus framing the inquiry and shouldering the burden of proof. Until it does however, Washington substantially denies first amendment liberty by oppressive investigative delay without guidance to its officers. Washington denies first amendment liberty by oppressive investigative delay without guidance to its officers.

With no allegation that Cottingham did not constantly demonstrate his belief in plat regulations, beyond building permitting, and pursue relief from Washington's statutory denial of authority to sell platted property lawfully without agency approval of a final judgment's description, Washington applied years of oppressive investigative delay that accomplish denial of First Amendment liberty. *White v. Lee*[32]. *City of Houston Texas v. Hill*, 482 U.S. 451 at 467, 107 S.Ct 2502, 96

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[32] *White v. Lee*, 227 F.3rd 1214 (9th cir. 2000) (determining extended investigation as "unquestionably" having chilled the exercise of their First Amendment rights in opposing a zoning agency determination). "Informal measures, such as "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation," can violate the First Amendment also." *Id* *"[G]*overnment officials violate this provision when their acts "would chill or silence a person of ordinary firmness from future First Amendment activities." *Mendocino Environmental Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999).

L.Ed.398 (1987)(delaying federal adjudication of fundamental First Amendment liberties itself can itself accomplish denial of those rights.

In Washington attorneys who lose motions and appeals will never be able to avoid threat of an entire burdensome discipline process by proof they believed in the public concern and regulatory scheme, opposing unlawful conduct by insisting upon judgment location. In Washington, a burden of demonstrating wisdom or credibility of the regulatory scheme will remain assigned to the attorney charged.

"[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government,"[33] and retaliation by government for exercise of the right of access to the courts implicates the Petition Clause as well.

### F. WASHINGTON HAS ARTICULATED NO HEIGHTENED INTEREST IN REGULATING LAWYER CONDUCT JUSTIFYING LOSS OF THE PERSONAL EXERCISE OF FIRST AMENDMENT REDRESS PETITIONING ESSENTIAL TO PROTECTION OF TITLE AND FAMILY.

No ambiguity used to exist as to whether enforcement would appraise litigation as a whole or

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[33] *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011)((quoting *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 896-97, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984) and citing *BE&K Constr. Co. v. Nat'l Labor Relations Bd.*, 536 U.S. 516, 525, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); Bill Johnson's Rests., 461 U.S. at 741; 1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

its parts before success measured by a judgment's described result. If enforcement can apply amidst sham evidence, during denial of due process delaying final judgment's entry regardless of objective belief in the regulatory scheme, a heightened and compelling state interest is required with the application of strict scrutiny. Attorneys must otherwise withdraw when doubt as to success arises, contrary to ethical rules[34].

## G. WASHINGTON ENFORCEMENT METHODS EMPLOYED ARE NOT THE LEAST RESTRICTIVE MEANS OF ACHIEVING REGULATORY GOALS.

Washington discipline process guarantees prolonged investigations and unconstitutionally deficient attention to petitioning protection by merely restating the fact of sanctions, judicially applied in the heat of trial for circumstantial inference of ill will. Absent guidance from this court Washington's method is friendly to "sham litigation," and attorneys who race for sanctions, regardless of a final judgment. Meanwhile the absence of a judgment result is characteristic of illegitimacy, as in *Kearney v. Foley Lardner LLP.*

Washington will not allow summary judgment or motions to dismiss after entry of an answer in ELC proceedings.[35] A clear prescription that preserves constitutional due process without damaging interference by protracted discipline[36]

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[34] See RPC 3.1, Comment Two, App 284a.

[35] ELC 10.1(a) App. 286a, ELC 10.10(c) App.287a; Special Disciplinary Counsel's Response To Motion To Dismiss, App. 195a.

[36] *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.

need not offend Washington's preference, but its practice and require prompt hearings. A look beyond the complaint to preserve First Amendment liberty does not convert the motion into one for summary judgment, so long as the rule is not perceived as limiting such hearing officer authority. See, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (explaining the distinction). By such a procedure a hearing officer need not even presume the truthfulness of the disciplinary complaint's allegations, but could pass the timing analysis under the Fourteenth Amendment guarantee of due process discussed in *Mathews v. Eldridge*, 424 U.S. 319 (1976)

The enforcement rules reach a substantial amount of constitutionally protected conduct, for facial invalidity. *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *Kolender v. Lawson*, 461 U.S. 352, 359, n. 8, 103 S.Ct. 1855, 1859, n. 8, 75 L.Ed.2d 903 (1983)(cited in *Gentile*).

Strict scrutiny is required when conduct and enforcement rules reach personal petitioning, but also because they usurp Washington's articulation of a fundamental interest in plat regulations.

Although written to control litigator conduct for clients, RPC standards and ELC enforcement procedures broadly threaten enforcement as to protected public speech under certainty no greater than mere clear preponderance (ELC 14.1(b)) on matters of public concern without standards limiting enforcement.

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2000)(investigation alone chills First Amendment participation).

## H. WASHINGTON'S INTEREST IN REGULATION OF LAWYER CONDUCT IS INSUFFICIENT TO INTRUDE UPON THE PERSONAL RIGHT TO PETITION, SEEK ACCESS TO COURTS AND OPPOSE ILLEGAL CONDUCT.

Washington's general interest in regulating attorneys will not justify discipline within the scope of an attorney's First Amendment rights, acting *pro se, for his family and property. Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Authority to regulate lawyer conduct is all too easily to silence the message that final judgment descriptions are required statutory due process, but the message served finality and state policy. It is protected and encouraged in Washington as vital to effective law enforcement.

Washington State has not articulated a specific interest in mitigating a "substantive evil" that erodes the goals of "true professionalism" among lawyers. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460–62 (1978)(citing Bates, 433 U.S. at 368).

Washington's Disciplinary Office compelled a response to protracted investigation and disciplinary proceedings concerning readily available litigation records while Attorney Cottingham asserted that condemnation proceedings were abused unless aimed at an ending in a judgment's agency approved description.

Washington's highest court adopted a discipline recommendation arising from a hearing officer who was told he was not to consider a First Amendment dismissal motion and its authority,[37]

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[37] App. 195a, App. 286a, ELC 10.10(c) (App. 287a)

because Washington by no rule or guidance accords a responsibility to hear any balancing of burdens[38] protective of First Amendment petitioning. A party's attorney informed no fees were charged.

Without aiming to address the objective belief in regulated finality, discipline was pursued and achieved under the Washington Disciplinary Board by ignoring Cottingham's motion to dismiss and its First Amendment petitioning authorities[39] including objective statutory evidence.[40] Washington's criminal declaration statute (RCW 58.17.300, App. 258a) was cited in Cottingham's dismissal motion (App. 189a) with authority revealing the interest in notice of land division compliance as "fundamental" (*Kates v. Seattle*, 44 Wn. App. 754; 723 P.2d 493 (1986)).

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[38] App. 289a.

[39] *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 246 F.3d 619 (2002); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984); *Gentile, v. State Bar of Nevada*, 501 U.S. 1030, 1054, pp. 1065-1075, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

[40] RCW 4.64.030(2)(b)(Judgment description); RCW 58.17.300(sales declared criminal without Agency approval over whether division appears (App. 258); payment is for owners after a condemnation trial. Wash. Const. Art 1 §16.

## I. UNTIL A JUDGMENT ENTRY DESCRIBES THE LOCATION OF CONDEMNATION, SUSPENSION IS ARBITRARY PUNISHMENT FOR PERSISTENT OPPOSITION TO ILLEGAL CONDUCT, ADMINISTERED WITHOUT CLEAR STANDARDS OR FINALITY.

Cottingham is the only party with a judgment's location description for notice, and the potentially condemning claimants have sold to that description. Use of the record to suspend Cottingham denies due process as irrational and constitutionally arbitrary.

Discipline has been grounded in a notion that normal ill will, common in litigation, allows a reasonable man standard.[41] The Opinion does not apply this court's view that "[a]s long as a plaintiff 's purpose is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively." *BE&K*. Cottingham's effort pursued the public concern.[42] The court's finding that his effort was "*in part*"[43] improperly motivated is constitutionally insufficient. Cottingham fully supported the substance of his unheard motion to

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[41] *Cf. Professional Real Estate Investors, 508 U.S., at 69, 113 S.Ct. 1920, cited in BE&K Constr. Co. v. NLRB,* 536 U.S. 516, 534 246 F.3d 619 (2002).

[42] *NAACP v. Button*, 371 U.S. 415, 433 (1963)( "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 371 U.S. 415, 439 (1963) (citing *In re Sawyer*, 360 U.S. 622 (1959); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 353 U.S. 252 (1957)).

[43] Suspension Opinion, App. 5a.

dismiss.[44] No general state interest in discipline must subordinate our First Amendment's contributions.

Except for this discipline Washington has never retreated from protecting its concern that costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues. *Henne v. City of Yakima*, 182 Wn. 2d, 447, 341 P.3d 284 (2015).

A Board dominated by market participating attorney members (Hearing, App. 67a; Order, App.78) who are competitors[45] discharging the state's sovereignty must only supervise by clearly articulated policy that protects First Amendment petitioning.

Objective statutory evidence of plat regulations and the compliance required for

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[44] "Land division that's unapproved by an agency isn't marketable, according to the Legislature", proceedings December 20, 2016, App.64a; RCW 58.17.300 App. 258a; Cottingham Answer To Formal Complaint, App.203a; Cottingham Motion To Dismiss, App. 189a; Board Hearing Record September 8, 2017, App. 66a).

[45] *c.f.*, *North Carolina Dental Board Examiners v. F.T.C.*, 135 S.Ct. 1101, 191 L.Ed. 2d 35 (2015)(citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975); *Calif. Liqour Dealers Assn. v. Midcal Aluminum, Inc.* 445 U.S. 97, 105 (congressional intent expressed in "state action" doctrine requires demonstration of active supervision ensure sovereign accountability under delegated discretion, to avoid the distinct danger that a state may use color of authority to pursue private interests in restraining trade in lieu of implementing goal; and such a Board's burden of recording proof of discharging the active supervision).

litigated finality supports a First Amendment defense that cannot be subordinated by circumstantial inference of improper motive without loss of federally guaranteed supremacy. A duty of independent review[46] is only delegable to a hearing officer as accountable, sovereign "state action" *only* upon discharge of clear articulation of state policy and active supervision,[47] which must protect First Amendment petitioning liberty. Otherwise Washington unaccountably allows combination of its board in violation of anti-trust (15 U.S.C §§1-45).

## CONCLUSION

Certiorari must review use of punishment to quiet use of the personal right of petition for purposes of judgment-located finality. Washington has so far departed from ensuring federally guaranteed access, participation, and petition liberties as to discriminate against federal claims.

Lawyer discipline here applied what was frivolous under shortened LUPA bar deadlines amidst denial of material disclosure impairing finality.

Washington's highest court has adopted a discipline recommendation arising after hearing

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[46] *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984), cited in *Gentile, v. State Bar of Nevada*, 501 U.S. 1030, 1054, pp. 1065-1075, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

[47] *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015) (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791, (1975)); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980);

officer was told he was not to consider the First Amendment or legal certainty of summary judgment. Washington guides differently by no rule requiring its hearing officers authority to determine constitutional merit or apply any balancing for report to the court protecting First Amendment petitioning. The burden essential to First Amendment protection must be clarified for national uniformity and breathing room when opposing illegal conduct.

Washington attorneys obey an oath to support both constitutions. This court's declaration should declare Washington procedure unprotective of First Amendment immunity and invalid, and require Washington to amend its process to record its discharge of a preliminary burden by determinations of constitutional merit after an articulated state interest before charging professional misconduct under these three codes (RPC 3.1, RPC 4.4, and RPC 8.4).

Charging must avoid abuse by including elements that affirmatively allege the absence of First Amendment petitioning is not involved in the conduct disciplined.

Washington must be directed to hear dismissal motions as soon as they are presented and to record application of a heightened burden of proof, assigned to the state, that applies balancing protective of First Amendment petition, participation, demonstrating access to courts and administrative agencies, for misconduct determined only in the absence objective evidence supporting belief in the petitioning, and without resort to subjective inference. Washington therefore be directed to structurally require and supervise procedure that assigns a clearly articulated early charging burden burden raising *absence of* First

Amendment petition exercise before bringing professional misconduct proceedings of a quasi-criminal nature, and burdening exercise with years of investigation and discipline.

The court should also remand to the Washington Superior Court for entry of an order restraining prosecution of the pending complaint and adoption of rules to ensure application of review demonstrating protection of First Amendment petitioning by application of appropriately heightened burdens at charging and proof with opportunity for dismissal and hearing officers fully authorized.

Respectfully Submitted this 13th day of November, 2018.

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Petitioner P.O.Box 229140 4538 Fremont Street Bellingham, Washington 98229
360 733-6668

APPENDIX A - OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW, WASHINGTON STATE DISCIPLINE, WASHINGTON SUSPENSION OPINION, AUGUST 16, 2018 WASHINGTON STATE SUPREME COURT

**FILED**
IN CLERKS OFFICE
SUPREME COURT a
STATE OF
WASHINGTON
AUG 16, 2018
FAIRHURST, J. Chief Justice

This opinion was filed for record at 8:00 A.M. on Aug.16, 2018 for, SUSAN L. CARLSON SUPREME COURT CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| In the Matter of the Disciplinary Proceeding Against DAVID CARL COTTINGHAM an Attorney at Law. | No. 201,704-5<br>En Banc<br>File Aug 16, 2018 |

WIGGINS, J.—Attorney David C. Cottingham embarked on a five-year boundary line dispute against his neighbor. His pursuit involved two lawsuits, four judicial appeals, two administrative appeals, countless motions, years of delay, unnecessary and wasteful expenditure of judicial resources, injury to his neighbors, and nearly $60,000 in sanctions for CR 11 violations. As a result, the Office of Disciplinary Counsel (ODC) charged Cottingham with violating the Rules of Professional Conduct (RPC). At the conclusion of the proceedings, the Washington State Bar Association (WSBA)