

70-775

No. \_\_\_\_\_

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED  
STATES

JOHN R. MUENSTER,

Petitioner,

Supreme Court, U.S.

FILED

AUG 22 2020

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v.

WASHINGTON STATE BAR ASSOCIATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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## **QUESTIONS PRESENTED**

In 2018, after 44 years of law practice, petitioner permanently cancelled and terminated his membership in the Washington state bar. In 2020, the state supreme court ruled that petitioner could not “resign” unless he signed an involuntary confession to wrongdoing and paid money to the state bar association. The state court cited the state’s rule for enforcement of lawyer conduct (“ELC”) 9.3.

This petition presents the following three questions:

1. Whether petitioner has the right under the Constitution of the United States to permanently quit the state bar association without first obtaining the association’s permission.
2. Whether the Constitution prohibits forcing petitioner to sign a sworn confession to alleged wrongdoing prepared by the bar as a condition precedent to permanently quitting the bar association.

3. Whether the Constitution prohibits forcing petitioner to pay money to the bar association as a condition precedent to permanently quitting the association.

**PARTIES TO THE PROCEEDINGS  
AND RULE 29.6 STATEMENT**

Petitioner on review here, who was Petitioner-Appellant in the court below, is John R. Muenster.

Respondent, who was Respondent in the court below, is the Washington State Bar Association (WSBA), a state agency created by statute.<sup>1</sup>

Petitioner is not a corporation. A corporate disclosure statement is not required under Supreme Court Rule 29.6.

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<sup>1</sup> In the 2019 spring session, both houses of the state Legislature voted to repeal the state bar act. See ESHB 1788. The bill has not been signed into law..

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## INTRODUCTION

After 44 years of practice, Petitioner permanently closed his office and terminated and cancelled his membership in the state bar association (“WSBA”). Later, after Petitioner quit, a bar association hearing officer entered findings adverse to Petitioner in a disciplinary proceeding. On appeal, the state supreme court asserted Petitioner could not “resign” because he had not complied with the state’s rule for Enforcement of Lawyer Conduct (“ELC”) 9.3.<sup>1</sup>

ELC 9.3 is an unconstitutional *quid pro quo* provision. In order to purchase the label of “resignation”, a lawyer is compelled to pay money to a government agency—the bar association. The lawyer must also sign a

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<sup>11</sup> The state court disbarred petitioner instead.

Without a level playing field, there is no justice. It appears that the state supreme court has never published an opinion entering judgment against the WSBA and in favor of the individual lawyer in one of these cases, no matter what the facts were.

sworn confession to alleged wrongdoing. *See* ELC 9.3(b)(1), (2) and (7). Simply quitting without bar permission, even permanently, is prohibited. The rule is invalid.

At the heart of this appeal is the constitutional right to quit. We have two points. First, petitioner has a constitutional right to permanently quit. The WSBA is a trade organization, not an antebellum plantation.

Second, ELC 9.3 is unconstitutional. It purports to prohibit lawyers from closing their practices and permanently terminating their membership in the WSBA without first obtaining the WSBA’s permission and making the requisite forced payments and compelled confession. *See* ELC 9.3(a), (b), (f) and (g). The requirements of (a) bar permission to “resign”, (b) the forced “exit” fees and (c) the sworn confession to wrongdoing—even if wrongdoing is disputed—violate the First, Thirteenth<sup>2</sup> and Fourteenth

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<sup>2</sup> Here is the analogy to slavery: in the antebellum South, slaves had to get the permission of their “master” to quit the plantation. Some slaves had to pay off their “master” in order to get their “freedom papers”.

The Thirteenth Amendment prohibits involuntary servitude. ELC 9.3’s requirements of WSBA permission, a forced confession and a cash payoff in order to exit the bar via “resignation” confirm a form of involuntary servitude prohibited by the Thirteenth Amendment.

Amendments.

This Court has invalidated similar coercive provisions. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 515, 528-29 (1958) (declaring unconstitutional state requirement that in order to obtain tax exemption, taxpayer had to sign oath pledging that he did not advocate overthrow of the government); *Janus v. AFSCME, Council 31*, 583 U.S. --, 138 S. Ct 2448, 2459-60, 2486, 201 L.Ed.2d 924, 934, 963-64 (2018) (extraction of agency fees from nonconsenting employees unconstitutional).

ELC 9.3 conflicts with the First, Thirteenth and Fourteenth Amendments and this Court's decisions. Several states have similar provisions. We ask the Court to issue a writ of certiorari to address the important constitutional issues presented.

## **OPINION BELOW**

The state supreme court opinion is reproduced in the appendix Pet. App. 1a-11a (“PA\_\_\_” in Appendix documents). It is reported at 195 Wn.2d 276 (2020). The order denying reconsideration is not reported. *See* Pet. App. 12a. The certificate of finality is not reported. *See* Pet. App. 13a.

## **JURISDICTION**

The state supreme court opinion was filed on February 20, 2020. Petitioner timely sought reconsideration by motion. The state court denied reconsideration by order entered March 26, 2020. The certificate of finality was entered March 26, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). *See Order*, Thursday, March 19, 2020, 589 U.S.--.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

The First Amendment, U.S. Const. amend. I, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

The Thirteenth Amendment, U.S. Const. amend. XIII, Section I, provides:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been

duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

The Fourteenth Amendment, U.S. Const. amend. XIV, Section I, provides in pertinent part:

No State shall \*\*\* 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.

## **OTHER PROVISIONS**

Washington state rule for enforcement of lawyer conduct (ELC) 9.3 provides:

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ELC 9.3  
RESIGNATION IN LIEU OF DISCIPLINE

(a) **Grounds.** A respondent lawyer who desires not to contest or defend against allegations of misconduct may, at any time before the answer in any disciplinary proceeding is due, or thereafter with disciplinary counsel's consent, resign his or her membership in the Association in lieu of further disciplinary proceedings.

(b) Process. The respondent first notifies disciplinary counsel that the respondent intends to submit a resignation and asks disciplinary counsel to prepare a statement of alleged misconduct and to provide a declaration of costs and a proposed resignation form. After receiving the statement and the declaration of costs, if any, the respondent may resign by signing and submitting to disciplinary counsel, the resignation form prepared by disciplinary counsel, sworn to or affirmed under oath, which must include the following:

- (1) Disciplinary counsel's statement of the misconduct alleged in the matters then pending.
- (2) Respondent's statement that he or she is aware of the alleged misconduct stated in disciplinary counsel's statement and that rather than defend against the allegations, he or she wishes to permanently resign from membership in the Association.

(3) Respondent's affirmative acknowledgment that the resignation is permanent including the statement:

"I understand that my resignation is permanent and that any future application by me for reinstatement as a member of the Washington State Bar Association is currently barred. If the Supreme Court changes this rule or an application is otherwise permitted in the future, it will be treated as an application by one who has been disbarred for ethical misconduct, and that, if I file an application, I will not be entitled to a reconsideration or reexamination of the facts, complaints, allegations, or instances of alleged misconduct on which this resignation was based."

(4) Respondent's agreement:

(A) to notify all other jurisdictions in which the respondent is or has been admitted to practice law of the resignation in lieu of discipline;

(B) to seek to resign permanently from the practice of law in any other jurisdiction in which the respondent is admitted;

(C) to provide disciplinary counsel with copies of any of these notifications and any responses; and

(D) acknowledging that the resignation could be treated as a disbarment by all other jurisdictions.

(5) Respondent's agreement to:

(A) notify all other professional licensing agencies in any jurisdiction from which the respondent has a professional license that is predicated on the respondent's admission to practice law of the resignation in lieu of discipline;

(B) seek to resign permanently from any such license; and

(C) provide disciplinary counsel with copies of any of these notifications and any responses.

(6) Respondent's agreement that when applying for any employment or license the

respondent agrees to disclose the resignation in lieu of discipline in response to any question regarding disciplinary action or the status of the respondent's license to practice law;

(7) Respondent's agreement to pay any restitution or additional costs and expenses ordered by a review committee, and attaches payment for costs as described in section (f) below, or states that the respondent will execute a confession of judgment or deed of trust as described in section (f).

(8) Respondent's agreement that when the resignation becomes effective, the respondent will be subject to all restrictions that apply to a disbarred lawyer.

(c) Public Filing. Upon receipt of a resignation meeting the requirements set forth above, and the costs and expenses and any executed confession of judgment or deed of trust required under section (f), disciplinary counsel will endorse the resignation and promptly causes it to be filed

with the Clerk as a public and permanent record of the Association.

(d) Effect. A resignation under this rule is effective upon its filing with the Clerk. All disciplinary proceedings against the respondent terminate except disciplinary counsel has the discretion to continue any investigations deemed appropriate under the circumstances to create a record of the respondent's actions. The Association immediately notifies the Supreme Court of a resignation under this rule and the respondent's name is forthwith stricken from the roll of lawyers. Upon filing of the resignation, the resigned respondent must comply with the same duties as a disbarred lawyer under title 14 and comply with all restrictions that apply to a disbarred lawyer. Notice is given of the resignation in lieu of discipline under rule 3.5.

(e) Resignation is Permanent. Resignation under this rule is permanent. A respondent who has resigned under this rule

will never be eligible to apply and will not be considered for admission or reinstatement to the practice of law nor will the respondent be eligible for admission for any limited practice of law.

(f) Costs and Expenses. If a respondent resigns under this rule, the expenses under rule 13.9(c) are \$1,500 and respondent must consent to the entry of an order assessing these expenses under rule 13.9(e). Disciplinary counsel may file a claim under section (g) for costs not covered by this amount.

(g) Review of Costs, Expenses, and Restitution. Any claims for restitution or for costs and expenses not resolved by agreement between disciplinary counsel and the respondent may be submitted at any time, including after the resignation, to a review committee in writing for the determination of appropriate restitution or costs and expenses. The Lawyers' Fund for Client Protection may request review including a determination by the review committee of whether any funds

were obtained by the respondent by dishonesty of, or failure to account for money or property entrusted to, the respondent in connection with the respondent's practice of law or while acting as a fiduciary in a matter related to the respondent's practice of law. The review committee's order is not subject to further review and is the final assessment of restitution or costs and expenses for the purposes of rule 13.9 and may be enforced as any other order for restitution or costs and expenses. The record before the review committee and the review committee's order is public information under rule 3.1(b).

[Adopted effective January 1, 2014; amended effective September 1, 2017.]

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## **STATEMENT OF THE CASE**

### **A. Petitioner's notice of cancellation of membership to the state supreme court, 11-18-2018.**

Via letter to the Chief Justice dated November 18,

2018, Petitioner exercised his constitutional right under the First and Fourteenth Amendments to close his practice, exit the profession and permanently cancel his membership in the Washington State Bar Association (“WSBA”). Pet. App. 15a-18a, CP 94-97, 197-198, 204-207.<sup>3</sup>

**B. Petitioner’s notice of cancellation of membership to bar association, 11-18-2018.**

Via letter to the Status Changes section of the WSBA dated 11-18-2018, Petitioner cancelled his membership. Pet. App. 42a, CP 120-121. Petitioner enclosed a copy of his 11-18-2018 letter to the Chief Justice. *Ibid.* He requested a refund of his 2018 dues on a *pro rata* basis. *Ibid.*

In a letter dated 11-21-2018, the WSBA stated that Petitioner’s “request to resign” had been “denied”. Pet. App. 67a, Supp. CP 3.<sup>4</sup> The letter cited “WSBA Bylaws, Sec. III.H”. *Ibid.*

Via reply to the WSBA dated 11-25-2018, Petitioner reiterated that he had closed his practice and exited the profession. He did not “request” to “resign”. Pet. App. 45a-

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<sup>3</sup> “CP” refers to the “Clerk’s Papers”, documents submitted to the state supreme court for the appeal. As noted, “PA” appears on the numbered documents in Petitioner’s Appendix.

<sup>4</sup> “Supp. CP” refers to the Supplemental Clerk’s Papers petitioner designated, which were numbered and filed with the state supreme court on or about August 28, 2019.

46a, CP 124-125. Petitioner reiterated his request for a pro rata dues refund. *Ibid*, CP 125. Further, he noted that he had the right to quit, that the “bylaw” cited by the WSBA letter did not apply, and that the WSBA could not prohibit Petitioner from exiting the organization as he had done. *Ibid.*, CP 125. Petitioner relied on the First Amendment as discussed in *Janus v. AFSCME, Council 31*, --U.S.--, 138 S. Ct. 2448, 201 L.Ed.2d 924 (2018). *Ibid*.<sup>5</sup>

Via letters dated 11-18 and 11-21-2018, Petitioner advised the hearing officer in WSBA case no. 16#00008 as follows:

- (a) that he had closed his practice, exited the profession, and disavowed his membership, Pet. App.34a-40a, CP 113-119;
- (b) that ELC 9.3 (which requires a confession from a lawyer as a condition of “resignation”) and bylaws section 3(H) do not apply, Pet. App. 37a-38a;
- (c) that the WSBA as currently structured is illegal, Pet. App. 34a; and

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<sup>5</sup> In a response dated 11-26-2018, the WSBA advised that Petitioner’s “profile” had been updated to reflect his disavowal of membership. His request for a pro rata refund was denied.

(d) that the WSBA lacks jurisdiction in this matter and that dismissal is required. Pet. App. 34a-35a. CP 149.

After petitioner terminated and permanently cancelled his membership in the Washington bar in November, 2018, and notified the hearing officer, the hearing officer purported to file an untimely, after-the-fact decision recommending disbarment, even though petitioner had previously quit. *See* Pet. App. 1a.

**C. Petitioner's memorandum urging dismissal, 12-26-2018**

(8) By way of follow-up on his letters to Chief Justice Fairhurst and the hearing officer, petitioner filed a memorandum with exhibits with the WSBA/Board, urging dismissal of the matter. Pet. App. 19a-49a, CP 98-128. Petitioner challenged the constitutionality of ELC 9.3 under the First and Fourteenth Amendments. Pet. App. 19a, CP 98. The memorandum was refiled in the appeal to the board as petitioner's brief. *See* Section D below.<sup>6</sup>

**D. Petitioner's Notice of Appeal to the disciplinary board, 12-28-2018.**

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<sup>6</sup> This bar case arose from a fee dispute matter pending in state court. Petitioner contended that the bar case should be resolved in the same forum, the state court. Pet. App. 23a-25a.

(9) On December 28<sup>th</sup>, 2018, Petitioner timely filed and served a notice of appeal to the disciplinary board (“board”) from the after-the-fact recommendation of the hearing officer in this matter. Pet. App.57a-66a, CP 164-173. In Petitioner’s notice of appeal, Petitioner sought dismissal of the proceeding for lack of jurisdiction. His previously-filed memorandum for dismissal for lack of jurisdiction, attached to his notice of appeal, served as his briefing before the board. Pet. App. 50a-51a, CP 129-130.

**E. Petitioner’s Notice of Appeal to the state supreme court, 5-30-2019.**

Petitioner filed his notice of appeal to the state supreme court on May 30, 2019. Pet. App. 71a ff; *See* CP 197ff. In the notice and attached documents, petitioner asserted his constitutional right under the First and Fourteenth Amendments to the United States Constitution to close his practice, exit the profession and cancel his membership in the bar association. Pet. App. 71a-73a, CP 197. Petitioner asserted that the compulsory proceedings described in the ELC are unconstitutional under the First and Fourteenth Amendments, citing *Janus v. AFSCME*, *supra*. *See* Pet. App. 75a, CP 214.

**F. Additional record references in the briefing for Rule 14 (g)(1).**

Petitioner argued that forcing him to pay bar fees and remain a bar member after he had quit would appear to run afoul of the Thirteenth Amendment. Petitioner contended that the Thirteenth Amendment codifies the right to quit for purposes of constitutional law. *See* Petitioner's Opening Brief at 15-17, Pet. App. 69a-70a .

In the briefing below, petitioner again contended that via his letter to the Chief Justice dated November 18, 2018, Petitioner exercised his constitutional right under the First and Fourteenth Amendments to close his practice, exit the profession and cancel his membership in the state bar association. *See* Petitioner's Reply Brief at 2, Pet. App. 83a. Petitioner contended that the bar association's claim of lifetime jurisdiction over persons admitted to practice in the state conflicted with the constitutional right to quit in the First, Thirteenth and Fourteenth Amendments. *See* Petitioner's Reply Brief at 17-18, Pet. App, 84-85a.

The Thirteenth Amendment protects the right to quit the legal profession. The First and Fourteenth Amendments prevent the bar association from requiring petitioner to remain subject to its jurisdiction. *See* Petitioner's Reply Brief at 17-18, Pet.App. 84a-85a.

The state supreme court rejected petitioner's constitutional arguments. The court stated that petitioner

had to comply with ELC 9.3 in order to resign. *Decision* slip opinion at 8-9, Pet. App. 8a-9a. The court rejected the claim that mandatory bar membership is unconstitutional under the First and Fourteenth Amendments. *See Decision* at 9, Pet. App. 9a. Finally, the state court rejected petitioner's Thirteenth Amendment argument. *See Decision* at 9-10, Pet. App. 9a-10a.

## **REASONS FOR ALLOWANCE OF THE WRIT**

The Court has held that states may require lawyers to join and pay dues to bar associations under some circumstances. *See Keller v. State Bar*, 496 U.S. 1, 13-14 (1990). However, the Court has never held that a bar association can prohibit a lawyer from closing his practice and permanently quitting--unless the lawyer pays the bar money and signs a sworn confession to wrongdoing. ELC 9.3 imposes "a form of compelled speech and association" which burdens First Amendment rights. *See Knox v. Service Emps, Int'l Union, Local 1000 ("SEIU")*, 132 S. Ct. 2277, 2289 (2012). No "compelling state interest" justifies wielding such power.

To the contrary, this Court has invalidated state provisions which coerced sworn statements from citizens in exchange for a supposed benefit or forbearance from the

government agency. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 515, 528-29 (1958) (declaring unconstitutional state requirement that in order to obtain tax exemption, taxpayer had to sign oath pledging that he did not advocate overthrow of the government); *Torcaso v. Watkins*, 387 U.S. 488, 489, 496 (1961) (striking down state constitutional provision requiring public employees to declare belief in God); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (striking down a loyalty oath which was a prerequisite for public employment).

This Court has also invalidated state provisions which required the extraction of agency fees from non-consenting employees. *See Janus, supra; see Keller, supra.*, at 13-14.

The state supreme court's decision here conflicts with these two important lines of cases. The conflict will continue to fester unless the Court acts--other states have adopted provisions similar to Washington state's ELC 9.3. *See, e.g.*, Delaware Law.R. of Disciplinary Proc. 17; LASC Rule XIX, Louisiana Rules for Lawyer Disciplinary Enforcement; Rule 26, Montana Rules for Lawyer Disciplinary Enforcement; Rule 215, Pennsylvania Rules of Disciplinary Enforcement.

## CONCLUSION

The petition should be granted. *See* Supreme Court Rule 10(c). The case should be heard and decided on the merits. In the alternative, after issuing the writ, the Court should vacate the judgment below and remand the case to the state supreme court for consideration in light of the *Speiser* and *Janus* lines of cases.

Respectfully submitted

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