No.

20-7226

UNITED STATES SUPREME COURT

John Scannell, *Petitioner*
v.
Washington State Bar Association et al, *Respondents*

ON APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John Scannell
501 S. Jackson, #302
Seattle, Wash., 98104
206-223-0030.

A. Questions Presented for Review

1. Did the Washington State Supreme Court have jurisdiction conduct original disciplinary proceedings against Scannell for obstruction into an investigation as to whether another attorney had practiced unlawfully in another state's court?

2. Could this case be heard by a judge who was a member of the Washington State Bar Association, when under Washington law, the judge is jointly and severally liable for its debts?

3. Can the appellant be denied a position on the ballot for the Washington State Supreme Court when he has practiced law in the State of Washington?

4. Were any of the appellant's claims barred by the Rooker Feldman Doctrine?

5. Were any of Scannell's claims barred by res judicata?

6. Did the Superior Court judge who denied the appellant a place on the ballot because he did not belong to the Washington State Bar Association, violate the appellants rights of free speech and/or rights of association, disassociation, under the 1st amendment and the 14th amendment?

B. List of parties:

i) JOHN SCANNELL, Plaintiff
WASHINGTON STATE BAR ASSOCIATION, STATE OF WASHINGTON, BARBARA A. MADSEN, SUSAN J. OWEN, CHARLES W. JOHNSON, MARY E. FAIRHURST, DEBRA L. STEPHENS, CHARLES K. WIGGENS, STEVEN C. GONZÁLEZ, SHERYL GORDON MCCLOUD, MARY I. YU, UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON CHRIS LANESE,KIM WYMAN,
Defendants

ii) No corporate statement required.

iii) List of all proceedings:

Scannell v. WSBA et al, United States District Court, Western District of Washington Case No. 18-cv-05654-BHS, Judgment entered 3-12-2019

Scannell v. WSBA et al, Ninth Circuit Court of Appeals No. 19-35203, Judgment entered 8-28-2020

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Scannell v. WSBA et al, Ninth Circuit Court of Appeals N. 19-35203, Judgment entered 8-28-2020

E. United States Supreme Court Jurisdiction

i) Scannell appeals the final order dismissing all claims on August 28, 2020 when a motion for rehearing was denied.

ii) The motion for rehearing was timely filed after the final order was issued on May 14,

2020.

iii) No Cross appeals have been filed

iv) The United States Supreme Court has jurisdiction as the action is brought under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, Sherman Antitrust Act in violation of 15 U.S.C. §1

v) Supreme Court Rule 29.4 (b)(c) is inapplicable.

F. Statement of the Case

COMES NOW John Scannell (Scannell) and requests the United States Supreme Court

a. Reverse the trial court's and ninth circuit decision to dismiss his suit, and to remand the case back with an order to assign an out of state judge to hear his case.

b. Set aside the election for the Supreme Court position he ran for and order a new election.

c. Issue an injunction which enjoins the defendants from removing him from the ballot for the Washington judicial position in the future.

In this case Scannell filed a 180 page complaint alleging that the defendants denied him his civil rights by requiring him to join the Washington State Bar Association (WSBA) as a precondition for running for Washington State Supreme Court Justice and for practicing law in the state of Washington *Scannell v. WSBA*, Western Dist. Case #18-05654 BHS (*Scannell v. WSBA II*). In his complaint he has named the Western Division of the United States District Court as a defendant, because the individual judges are all members of the Washington State Bar Association during relevant time periods. Early in the case Scannell sought to disqualify the trial judge Benjamin Settle from hearing the case.

G. Argument

Scannell's disqualification motion is in line with the current practice in the ninth circuit concerning similar suits. In *Marshall v. WSBA Western District of Washington* case #11-5319, In *Pope v. WSBA*, Western District of Washington case #11-05970, and in *Scannell v. WSBA*, Western District of Washington Case #12-00683 SJO, Judge Kozinski assigned out of state judges to hear the cases.

Judge Kozinski's ruling in these three cases is consistent with the case of *Riss v. Angel*, 934 P.2d 669, 131 Wash.2d 612 (Wash. 04/10/1997), which indicates that individual members of an association like the WSBA are individually liable for suits against the organization as a whole.

The defendants claim that John Scannell cannot run for Supreme Court because he is allegedly disbarred and Washington's constitution and laws passed by the legislature require that in order to practice law and run for Supreme Court, he has to belong to the Washington State Bar Association.

As will be shown by the plaintiff, none of these assertions are correct. First Scannell argues he is not disbarred because the court did not have jurisdiction to hold a trial over Scannell's alleged misconduct that occurred in a Virginia court.

Second, even if Scannell was disbarred neither Washington's Constitution nor state statutes require him to have a present license to practice law in order to run for Supreme Court.

Finally, Scannell argues that any law that requires him to join an organization like the Washington State Bar Association in order to practice law or run for Supreme Court is

unconstitutional because it interferes with his constitutional right to associate with organizations of his own choosing.

The United States Supreme Court recently ruled the constitutional rights of union members to dissociate from public unions was greatly expanded in the recent seminal case of *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, 138 S.Ct. 2448, 585 U.S. ___ (2018), Whether attorneys have similar rights of disassociation with respect to mandatory bar associations has never been addressed post Janus, making this a case of first impression.

When Scannell appealed to the Ninth Circuit, the court repeated the errors of the trial court, including the appointing, without notice to him, of a panel that included a judge that was a member of the Washington State Bar Association. The panel never adequately dealt with any of the substantive issues raised by Scannell and never even announced they were the panel or gave Scannell a chance for oral argument. When he complained, post decision, about the presence of a Washington judge on the panel that was a member of the Washington State Bar Association, the panel simply cited as authority a pro se appeal that never addressed the inherent conflict of interest of having a judge that was a member of the Washington State Bar Association, and therefore, under Washington law, a defendant in the case.

1. THE COURT'S DECISION TO DENY SCANNELL A POSITION ON THE BALLOT CANNOT BE SUSTAINED BECAUSE IT WAS BASED UPON TWO VOID ORDERS.

A. The state order issued by Judge Lease was void because it was untimely.

First the Thurston County Superior Court lost jurisdiction to even issue an order when it did not act within 5 days. Washington's election contest statute requires that the court issue a

final ruling within 5 days of the filing RCW 29A.68.011:

> An affidavit of an elector under this section when relating to a primary election must be filed with the appropriate court no later than two days following the closing of the filing period for such office and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns, or official certification of candidates qualified to appear on the general election ballot, whichever is later, and shall be heard and finally disposed of by the court not later than five days after the filing thereof.

The 5 day requirement for both primary and general election challenges was held to be jurisdictional in *Hatfield v. Greco*, 87 Wash. 2d 780, 557 P.2d 340 (Wa. 12/02/1976).

The district court attempted to get around this, not by ruling on the voidness of the order (ER I:9), but invoking an interpretation of the Rooker-Feldman doctrine that is now disfavored under a recent U.S. Supreme Court precedent. Finding that lower courts had given *Rooker-Feldman* too broad an interpretation, the United States Supreme Court sought in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.* 544 U.S. 280 (2005), to circumscribe that doctrine. Justice Ruth Bader Ginsburg, writing for a unanimous Court, specifically stated how the doctrine had been used improperly to override congressionally conferred concurrent federal/state jurisdiction and to supersede the ordinary application of preclusion law.[1] [2]

In reversing that decision, the United States Supreme Court stressed that *Rooker-Feldman* is strictly a limitation on federal subject matter jurisdiction and is not triggered by parallel state and federal litigation. The Court held that where a party attempts to litigate in federal court a

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[1] *Exxon Mobil Corp. v. Saudi Basic Industries Corp.* has been described by at least one commentator as a seminal case. See Massey, David B, *The High Court Quarterly Review*, Vol. 3, No. 2

[2] The decision followed years of criticism in the academic community that Rooker Feldman had been too broadly interpreted by lower courts. E.g. see Thomas D. Rowe, Jr., *Rooker-Feldman: Worth Only the Powder to Blow It Up?*, 74 Notre Dame L. Rev. 1081, (1999)

matter that it has previously pursued in state court, if it "present[s] some independent claim, albeit one that denies a legal conclusion" reached by the state court, jurisdiction exists and state law preclusion principles will determine if the party prevails." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 at 293 (2005)(quoting *GASH Assocs. v. Village of Rosemont,* 995 F2d 726, 728 (7th Cir. 1993). (2005).[3]

The decision in *Exxon Mobil Corporation* was circumscribed even in "*Lance v. Dennis*", 546 U.S. 459, 463 (2006), where the court ruled that Rooker Feldman was not a federal preclusion principle.

Also, generalized allegations against the state are not subject to Rooker Feldman, see *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602 (9th Cir. 06/06/2005).

The state defendants and the district court claimed if the plaintiff seeks a remedy that undoes the state action, then it is in fact a de facto appeal. However, this fails for the reasons cited in *Skinner v. Switzer*, 131 S. Ct. 1289, 1297 (2011) which says otherwise. In *Skinner,* the plaintiff structured his complaint as a generalized attack on the statutory scheme as construed by the Texas courts, not just an individualized attack as applied to his own case and was allowed to proceed as a result.

Even though in *Skinner, Id.,* the appellant lost in the state court in his effort to undo his conviction, he was allowed to present an alternate federal theory as a method which could

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[3] Justice Stevens, in a recent case *Marshall v. Marshall*, 126 SCr 1735 (2006) (better known as the Anna Nicole Smith case), called for the burial of the probate exception to federal jurisdiction "in a grave adjacent to the resting place of the Rooker-Feldman doctrine", 126 S. Ct. at 1752, a doctrine he declared the Court had interred in *Exxon Mobil Corp. v. Saudi Basic Industries.*, 544 US 280 (2005), and had refused to resuscitate in its recent decision in *Lance v. Dennis*, 126 S.Ct. 1198, 1203 (2006).

eventually undo his conviction, which would also have the effect of reversing the decision in the state court to deny him a remedy:

> If a federal plaintiff 'present[s] [an] independent claim,' " it is not an impediment to the exercise of federal jurisdiction that the "same or a related question" was earlier aired between the parties in state court. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*
> ., at 292--293 (quoting *GASH Assocs. v. Rosemont*, 995 F. 2d 726, 728 (CA7 1993); first alteration in original); see *In re Smith*, 349 Fed. Appx. 12, 18 (CA6 2009) (Sutton, J., concurring in part and dissenting in part) (a defendant's federal challenge to the adequacy of state-law procedures for post-conviction DNA testing is not within the "limited grasp" of Rooker-Feldman). *Skinner* at 1297.

The court indicated that if the appellant was successful in his generalized attack, he would be able to undo the result of the state case, which was to deny him a DNA test. *Id.* at 1298) A similar result was achieved in *Mothershed v. Justices of the Supreme Court, supra.*

Here in his complaint, Scannell has mounted a generalized attack on RCW 2.48.021, a state statute requiring bar membership for attorneys, upon which defendant Lanese based his ruling. This ruling imposes additional restrictions on those that attempt to run for Supreme Court Justice by imposing requirements that are not allowed by Washington's Constitution and violate his right to associate or disassociate under the federal constitution. As a generalized attack on a statute or rule, his claim is not subject to Rooker Feldman.

The district court appeared to argue since Scannell could have attempted an appeal, that somehow made a difference. As stated earlier, there is no requirement to exhaust state remedies when it is a generalized attack. Also, it makes a difference as to whether Scannell had a right of appeal or merely the potential for an appeal. In *Miller v. Washington State Bar Ass'n,* 679 F. 2d 1313 - Court of Appeals, 9th Circuit 1982, the court ruled that since no review is available as of

right in the state courts, it held that such review is available in federal court for consideration of plaintiff's constitutional claim.

B. The order that disbarred Scannell was void for lack of territorial jurisdiction.

The order that disbarred Scannell was void for at least two reasons. The Washington State Supreme Court asserted jurisdiction in this case on the basis of RPC 8.5 which claims that it can assert jurisdiction over an attorney's conduct no matter where it occurs. However, bar status alone is not a sufficient contact to confer long arm jurisdiction. See "*Di Loreto v. Costigan*", 600 F. Supp. 2d 671, 692 (E.D. Pa. 2009), et al.

In addition, RPC 8.5(b) requires the bar and the Washington State Supreme Court, if it chooses, to prosecute an attorney for conduct before another tribunal, to use the rules of the tribunal where the alleged misconduct occurred.

The WSBA and the Washington State Supreme Court used Washington rules and ultimately disbarred for failing to cooperate in a Washington ELC 5.5 deposition which required him to divulge attorney client privileged information to the disciplinary counsel.

A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. *Columbia Power Trades Council v. United States Department of Energy*, 671 F.2d 325, 329 (9th Cir. 03/11/1982), *Great Western Mining & Mineral Co. v. Fox Rothschild* LLP, 615 F.3d 159 (3d Cir. 08/05/2010).

Any party may raise the issue of lack of subject matter jurisdiction at any time. *Skagit Surveyors and Eng'rs, LLC V. Friends of Skagit County* 135 Wn.2d 542, 556, 958 P.2d 962 (1968).

A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer v. Neff*, 95 U. S. 714, 95 U. S. 732-733 (1878).

Justice Holmes wrote that "the foundation for jurisdiction is physical power..." *McDonald v. Mabee*, 243 US 290. In theory, any sovereign had the raw power to adjudicate any dispute how it pleased, as well as the power to enforce its adjudication on persons and things over which it acquired physical power. But historically jurisdictional law was a limit on how far the sovereign would reach to exercise its existing power. It did so for two reasons, first in the hope that other sovereigns would reciprocate in kind and second because such restraint was fair.

Prompted by tension among the states in a federation, the United States adopted a theory of exclusive power based upon territoriality, a theory originated by the Dutch theoretician, Ulric Huber;[4] each sovereign had jurisdiction, exclusive of all other sovereigns, to bind persons and things present within its territorial boundaries.

It was *Pennoyer v. Neff, supra,* that first imposed the power test on American courts, choosing as its authority, the fourteenth amendment to the United States Constitution. But in doing so, it was a step in undermining the power theory by pushing limitations based upon fundamental notions of fairness.

Eventually America began overlaying of a reasonableness test onto the power test, which the Supreme Court first did in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310 in 1945. In that case, the Supreme Court noted that while the due process clause "does not contemplate that a state may make binding a judgment in personam against an individual or

[4] See James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in the 18th Century America,*

corporate defendant with which the state has no contacts, ties, or relations... but to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." *Id* at 219. For this reason, the court ruled that the Due Process Clause permitted the state to exercise personal jurisdiction if the defendant had a certain level of in state activity and the degree of that's activity relatedness to the asserted claim.

The court became even more explicit in *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286. There the court explained with respect to jurisdiction, the Due Process Clause

> can be seen to perform two related, but distinguishable functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The first of these principles "is typically described in terms of 'reasonableness' or 'fairness.' ...Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors" *Id.* at 292. The latter limitation looks to the defendant's contacts with the forum state, and "may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 294. The United States Supreme Court has emphasized that even though technological progress has lessened the burden in showing reasonableness, that has not done away with the concept of territorial jurisdiction restrictions.

> As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U. S. 714, to the flexible standard of *International Shoe Co. v. Washington*, 326 U.S. 310. But it is a

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38 Am. J. Comp. L. 73 (1990)

> mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation omitted.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.
> ...
> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson v. Denckla*, at 357 U. S. 235, 251 and 254.

Furthermore, Rule 4 of the Federal Rules of Civil Procedure (and its amendments) clarifies how the question of territorial jurisdiction should be answered in Federal Court. See *Ahrens* v. *Clark 335 U.S. 188, EEOC* v. *Arabian American Oil Co.,499 US 244*, 248 (1991), and *Rasul v. Bush,*542 U.S. 466 (2004).

None of this authority and none of these cases support the unprecedented power the Washington State Supreme Court now asserts for itself. Under RPC 8.5 Washington's court has proclaimed for itself the right to assert jurisdiction anywhere in the world as long as one of the parties to the dispute is a Washington attorney, ignoring that bar status alone is not a sufficient contact to confer long arm jurisdiction. See *Di Loreto supra.*

The reasoning of the Washington State Supreme Court fails both the reasonableness test and the limits on power imposed by the fourteenth amendment. The defendant Scannell has very little if any connection to the state of Virginia. His only connection to the case is that after the fact, he was King's attorney in a bar complaint filed against King for his activities in Virginia. Scannell was forced to defend his action in Washington, where he had no power to subpoena the primary witnesses to the action in Virginia. In addition, Washington inserted itself into a dispute occurring in a Virginia courtroom allowing it to interfere with an ongoing case by imposing its

rules as to who could practice law in Virginia. If, as in *Hanson v. Denkla supra*, only the states themselves can determine who owns what land in their state, then certainly they should have sole power to regulate what is going on in their own court rooms without interference with foreign states or countries.

Thus, there is total lack of jurisdiction because Washington is not sovereign over land or a court located in Virginia. Territorial jurisdiction is part of subject matter jurisdiction and can't be waived. *State v Dudley*, 581 S.E. 171 (2003).

Furthermore, the Washington State Supreme Court lacked subject matter jurisdiction even under the laws of Washington. As was pointed out in *Burger King Corp. v. Rudzeqiez*, 471 U.S. 462, at 477 "the potential clash of the forum's law with the fundamental substantive social policies may be accommodated through application of the forum's choice of law rules."[5] The Washington State Supreme Court did that by first authorizing, then deriving its authority to discipline attorneys for out of state conduct under its RPC 8.5:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct. (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurs, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a

[5] See *Allstate Insurance Co. v. Hague*, 449 US 302, 307-313 (1981) See generally *Restatement (Second) of Conflict of Laws* §§6,9 (1971)

jurisdiction in which the lawyer reasonably believe the predominant effect of the lawyer's conduct will occur.

In *A Deane Burnside v. Simpson Paper Co.* 123 Wn.2d 93(1994) the court indicated what was needed to demonstrate a court had a lack of subject matter jurisdiction when Simpson Paper asserted that the Washington courts had no subject matter jurisdiction when dealing with non-residents under RCW 49.60. Simpson argued that since RCW 49.60 stated in its purpose statement that the purpose of the statute was to protect "inhabitants", then the court had no jurisdiction to protect non-residents. The court pointed out that RCW 49.60 is not a jurisdictional statute. The superior court derived its powers from Article IV, Section 6 which laid out a broad basis for jurisdiction.

Article IV, Section 4 contains no similar grant of authority for the Supreme Court for attorney discipline. Thus RPC 8.5 is the rule where the Supreme Court, acting in its legislative capacity passed what is the equivalent of the jurisdictional statute and it states that Washington only possesses disciplinary authority if it uses the rules of the jurisdiction where the predominant effect of the rule was.

The Supreme Court never utilized Virginia's rules when disbarring John Scannell or Paul King. *See In the Matter of Paul H. King,* 168 Wash. 2d 888, 232 P.3d 1095. *In re Disciplinary Proceeding against Scannell*, 239 P,3d 332, 339. Given the intent of the subpoenas issued against Scannell were primarily to discover whether King practiced law in Virginia or Scannell aided King in the practice of law in Virginia, the Supreme Court and/or the Washington State Bar Association lacked subject matter jurisdiction to discipline either Scannell or King using Washington disciplinary rules, by the express language of its own disciplinary jurisdiction rule, RPC 8.5.

Here, Washington State sought to maximize the reasonableness of its proceedings, and minimize the inherent conflict of invading another court's exclusive control of its own court system by adopting choice of law rules that would subject the attorney to Virginia rules. As a result, Scannell has shown the unreasonableness of such an approach, when, after being put on notice that Virginia rules would apply, including no oppressive subpoenas under Washington's constitutionally suspect ELC 5.5 deposition procedure, he was suddenly and without warning disbarred for obstruction that could not be charged in Virginia.

Absence of subject matter jurisdiction may render a judgment void where a court wrongfully extends its jurisdiction beyond the scope of its authority. *Kansas City Southern Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (CA8)(1980) (citing *Stoll v. Gottlieb*, 305U.S. 165, 171, 83 L. Ed. 104, 59 S. Ct. 134 (1938)), cert. denied 449 U.S. 955, 101 S. Ct. 363, 66 L. Ed. 2d 220 (1980)

Since the Washington Supreme Court order was void, it is subject to collateral attack. *Picardo v. Peck*, 95 Wash. 474, 164 P. 65, *Cunnius v. Reading School District*, 25 S. Ct. 721, 198 U.S. 458 (U.S. 05/29/1905) citing 1 *Herman on Estoppel*, 64

Even if the issue of subject matter jurisdiction could have been raised in the original proceeding, res judicata would not bar it in a subsequent proceeding if the judgement "would substantially infringe the authority of another tribunal or (governmental) agency," *Hodge v. Hodge*, 621 F.2d 590 (3rd Cir. 05/20/1980) citing *Restatement (2d) Judgments* § 15 (Tent. Draft No. 6, 1979). Here, the Washington State Supreme Court order substantially infringes on the authority of Virginia courts to regulate conduct in their own courtrooms.

Courts have a non-discretionary duty to vacate a void judgment. *Leen v. Demopolis*, 62 Wn. App. 473, 477-78, 815 P.2d 269 (1991) *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980). 11 Wright & Miller: Civil 2d § 2862; 12 *Moore's Federal Practice* § 60.44[5][a].

A motion to vacate under FRCP 60(b)(4) is not subject to the one year or 'reasonable time' requirement. *United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000) Here, where the order is collaterally attacked, the court likewise has a non-discretionary duty to rule the order void and such duty is not subject to any timeliness requirement for the same reason, as the order is a nullity and has no effect.

2. THIS CASE SHOULD HAVE HAD AN OUT OF STATE FEDERAL JUDGE AS REQUESTED BY THE PLAINTIFF AS WELL AS A PANEL OF OUT OF STATE JUDGES ON THE NINTH CIRCUIT PANEL.

The plaintiff's request, is in line with the current practice in the ninth circuit concerning similar suits. In *Marshall v. WSBA* Western District of Washington case #11-5319, on page 12 of a complaint filed on April 22nd 2011, Marshall requested all Washington judges disqualify themselves because of their membership in the WSBA. On May 2, 2011, Judge Kozinski appointed Judge Conti out of the Northern District of California to hear the case.

In *Pope v. WSBA*, Western District of Washington case #11-05970, on page 11 of a complaint filed on November 24, 2011, Pope requested all Washington judges disqualify themselves because of their membership in the WSBA. On December 14, 2011, Judge Kozinski appointed Judge Molloy out of the District of Montana to hear the case.

In *Scannell v. WSBA*, Western District of Washington Case #12-00683 SJO, John Scannell brought a motion to assign an out of state judge on 6-8-2012. On 7-2-2012, Judge Kozinski assigned the case to Judge James Otero of the Central District of California.

Judge Kozinski's ruling in these three cases is consistent with the case of *Riss v. Angel*, 934 P.2d 669, 131 Wash.2d 612 (Wash. 04/10/1997), which indicates that individual members of an association like the WSBA are individually liable for suits against the organization as a whole.[6]

The reasoning behind the need for disqualification is explained by an age-old proposition derived from the civil law: "Nemo debet esse judex in propria causa."[7]

In addition, since the plaintiff has brought the same motion in his previous case, most, if not all of the parties here are prevented under the principles of collateral estoppel from litigating the issue here again as most if not all are members of the WSBA.

In order for a prior judgment to be entitled to collateral estoppel effect, five elements must be met:

1) The issue sought to be precluded from relitigation must be identical to that decided in a former proceeding;

2) The issue must have been actually litigated in the former proceeding;

3) It must have been necessarily decided in the former proceeding;

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[6] That case in turn, cited *Nolan v. McNamee*, 82 Wash. 585, 144 P. 904 (1914), which pointed out that in Washington, at common law, members of unincorporated associations have been held jointly and severally liable for all debts of the association. While *Riss* allowed for a narrow exception for "non-business, non-profit" associations, where only members who participated in the decision could be held liable, this exception has never been applied to a business related nonprofit such as the bar association. There also has been no exception for judges who participate in making the decision by making judicial decisions

[7] Latin, and a fundamental principle of natural justice which states that no person can judge a case in which he or she is party or in which he/she has an interest. The principles of natural justice were derived from the Romans who

4) The decision in the former proceeding must be final and on the merits; and

5) The party against whom preclusion is sought must be the same as, or in privity with the party to the former proceeding. *Clark v. Bear Stearns & Co., Inc.* , 966 F .2d 131 8, 1 320 (9th Cir. t992);

Judge Settle should also be disqualified for how he handled this case. Though a judge's adverse in-court comments regarding an individual are ordinarily not considered to be disqualifying per se, the fact that a judge's remarks have been made in a judicial context does not insulate them from scrutiny;[8] The most fundamental exception is that a judge may not make comments that reflect actual bias[9] - either for or against a party[10]. A logical basis for inferring bias may exist when a judge's remarks, though uttered in a judicial capacity[11], connote a "fixed opinion"[12] or "closed mind"[13] with respect to the merits of a case.[14] This is particularly true where such comments are made at a state of the proceeding when a judge would not normally be expected to have formed a fixed opinion about the dispositive facts.[15]

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believed that some legal principles were "natural" or self-evident and did not require a statutory basis.

[8] See *in re Chevron USA Inc.*, 121 F.3d 163, 166 (5th Cir. 1997); *Loranger v. Stierman*, 10 F.3d 776, 780 (11th Cir. 1994).

[9] See *Gardiner v. A.H. Robins Co., Inc.* 747 F.2d 1180 (8th Cir. 1984)(a finding of bias is not precluded merely because a judge's remarks are made in a judicial context.)

[10] *Parliament Ins.Co. v. Hanson*, 676 F.2d 1069(5th Cir. 1982)

[11] *Liteky v. U.S.* 114 S. Ct. 1147, 1157 (1994)

[12] Cf. *Cleveland Bar Assn. v. Clearly*, 93 Ohio St.3d 191, 200-201, 754 N.E.2d 235 (2001)(noting that the term "bias or prejudice" implies "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment" on the judge's part as opposed to "an open state of mind which will be governed by the law and the facts.)

[13] See *U.S. v. Cohen*, 644 F. Supp. 113, 116 (E.D. Mich. 1986); *Riverside Mar. Remanufacturers, Inc. v. Booth*, 2005 Ark. App. LEXIS 767, *6-7 (2005)(in making certain comments, the trial judge, although recognizing that Riverside had yet to present its case, gave the appearance of having a mindset that that could not be reconciled with the proposition that that he was committed to hear all relevant evidence and arrive at a judicious result.)

[14] See *Mitchell v. Maynard*, 80 F.3d 1433, 1450(10th Cir. 1996) (finding an appearance of bias where the judge said plaintiff's claims were frivolous and "a waste of the of the jury's time")

[15] Cf. *Wright v. State*, 628 So. 2d 1071, 1073 (Ala. Crim. App. 193)("in situations where premature remarks are made, a red flag is raised".).

Where a judge makes comments reflecting an intention to deprive a party of a legal right - judicial disqualification,[16] or at least a hearing to determine if disqualification is warranted, may be mandated.[17]

Here Judge Settle denied the Plaintiff due process by first announcing that he would set up a briefing schedule after Judge Martinez made his ruling, leading the plaintiff to believe he would get a chance to reply to the State defendant's argument. Relying on this order, Scannell delayed his response so he could give the court the most current update on the printing of the ballots. (ER II, 14)

Then Judge Settle based his ruling on a factual finding that had no support in the record nor any basis in reality, giving the appearance of having a mindset that could not be reconciled with the proposition that he was committed to hear all relevant evidence and arrive at a judicious result.

4. RES JUDICATA BARS NONE OF THE PLAINTIFFS CLAIMS.

The defendants' and the court cite to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) for the principle that the res judicata applies when the suit arises out of the "the same transactional nucleus of facts" but then go on to argue that Scannell's suit should be dismissed on a "similar transactional nucleus of facts". They cite to no authority for the latter proposition (because it does not exist). In

[16] See *Pastrana v. Charter*, 917 F. Supp. 103, 108(D.P.R. 1996)

Washington, courts may assume that where no authority is cited, counsel has found none after search. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

The Ninth Circuit Court of Appeals has made similar rulings: See *Acosta Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992); see also *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *Meehan v. County of L.A.*, 856 F.2d 102, 105 n.1 (9th Cir. 1988).

The facts cited by the defendants and in district court decision, were used to support a completely different nucleus of facts in *Scannell v. WSBA I*, than the ones in this complaint which arose because the state refused to put Scannell on the ballot(*Scannell v. WSBA II.*) As argued later in this brief, his being placed on the ballot does not require him to presently have the right to practice law. This issue could not have been raised earlier because at the time Scannell litigated the suit, he had not run for the Washington State Supreme Court so it could not have been litigated.

Even if Washington's Constitution required a present ability to practice law res judicata does not apply even if it could have been raised earlier because it would "substantially infringe the authority of another tribunal or (governmental) agency," *Hodge v. Hodge supra.* As stated earlier, the defendants' have provided no authority as to how res judicata could transform a void order (a nullity), into something that has the force of law and since they can provide no authority, the court should assume that none exists.

The vast majority of facts that are cited in the plaintiff's complaint have arisen since that suit was litigated.

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[17]See *Goldberger v. Goldberger*, 96 Md. App. 313, 624 A.2d 1328, 1332(1993)

The court claimed res judicata applied without considering any of differences in the claims. According to the reasoning of the court, because John Scannell lost a suit concerning his disbarment ten years ago, the WSBA was free to commit any wrongdoing it wished against Scannell until he dies as long as they base their justification on the fact he was disbarred' because it originated from the same transactional nucleus of facts. This is an absurd result that needs no rebuttal because it is based upon nonsensical reasoning.

The court also said Scannell was barred from arguing his disbarment was void because of res judicata, but fails to cite where this voidness was raised and litigated before. Even if it had, neither the defendants nor the court can explain how res judicata could apply when considering Hodge supra, because it infringes on another tribunal's jurisdiction. As before, because neither the defendants nor the court can provide any authority, this court should assume there is no authority for their argument.

5. DEFENDANT LANESE'S RULING VIOLATES ARTICLE I, SECTION 29 OF THE WASHINGTON STATE CONSTITUTION, BECAUSE IT IS BASED UPON RESTRICTIONS THAT ARE NOT PART OF WASHINGTON'S CONSTITUTION.

The article that describes qualifications for a judge, is Article IV, Section 17, which states:

> No person shall be eligible to the office of judge of the supreme court, or judge of a superior court, unless he shall have been admitted to practice in the courts of record of this state, or of the Territory of Washington."

The language is unambiguous. If the framers had intended that present admission to practice was required, they would have stated so. The language would have been much simpler such as "No person shall be eligible to the office of judge of the supreme court or a superior court unless he is admitted to practice law in the courts of record in this state." That would have

been much simpler, and would have directly led to the interpretation Lanese adopted. However, that is not the language the framers chose and the reason they chose that language was because of the constitutional provision mentioned Article IV, Section 19. They realized that judges do not have the right to practice law when they are judges, so they chose language that was consistent with that reality.

Unger argued that the case was controlled by *State ex rel. Willis v. Monfort*, 93 Wash. 4, 159 Pac. 889 (1916).

However, *Willis* is no longer good law in Washington as it has been superseded by more current case law that takes into consideration Article I, Section 29. That section states: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."

The meaning of this provision and the rules for interpreting constitutional provisions are now well established and uniformly consistent in Washington state since *Willis*: *State ex rel. Anderson v. Chapman*, 86 Wn. 2d 189, 191-192, 141 P. 892 (1975) found:

> The first rule of constitutional construction which we should consider is the rule that if a constitutional provision is plain and unambiguous on its face then no construction or interpretation is necessary or permissible. In *State ex rel. Evans v. Brotherhood of Friends,* 41 Wn.2d 133, 247 P.2d 787 (1952) the court (per Finley, J.) said in part at page 145: "It is a cardinal principle of judicial review and interpretation that unambiguous statutes and constitutional provisions are not subject to interpretation and construction." In *State ex rel. O'Connell v. Slavin,* 75 Wn.2d 554, 452 P.2d 943 (1969) the court (per Rosellini, J.) said in part at page 557: "If the constitutional language is clear and unambiguous, interpretation by the courts is improper." In *State ex rel. Swan v. Jones*, 47 Wn.2d 718, 289 P.2d 982 (1955) the court (per Finley, J.) said in part at page 722: "`[W]here the intention is clear there is no room for construction and no excuse for interpolation or addition.'" The last quoted language was quoted by the court from *United States v. Sprague*, 282 U.S. 716, 75 L. Ed. 640, 51 S. Ct. 220, 71 A.L.R. 1381 (1931).
>
> Another rule which is important to this matter is that the provisions of a

> constitution are mandatory unless otherwise stated. The general rule is stated in 16 C.J.S. *Constitutional Law* § 61 (1956) wherein it is said: "Generally, constitutional provisions are to be construed as mandatory unless, by express provision or by necessary implication, a different intention is manifest." In this state the constitution itself expresses that rule in even more forceful language. Washington Const. Article. I, § 29 reads: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." That provision likewise being clear and unambiguous has been the subject of comparatively few judicial comments. The provision is mentioned in a few cases including *State ex rel. Smith v. Neal*, 25 Wash. 264, 65 P. 188 (1901); *State ex rel. Lemon v. Langlie,* 273 P.2d 464 (1954)*;* and in a concurring opinion (per Finley, J.) in *State v. Williams*, 530 P.2d 225 (1975); a dissenting opinion (per Utter, J.) in *Department of Revenue v. Hoppe*, 512 P.2d 1094 (1973); and a dissenting opinion (per Wright, J.) in *State ex rel. Graham v. Olympia*, , 497 P.2d 924 (1972).

So the rule in this state is clear. An unambiguous constitutional provision is mandatory.

Under the construction rules for constitutional law in all the states, the only exception if by express language or necessary implication a different intention is manifest. This general construction rule has been further limited in Washington State. The necessary implication of a different intention must also by mentioned in the constitution: *State ex rel. Lemon v. Langlie*, 45 W.2d 82, 97, 273 P.2d 464 (1954) found: Like all other sections of our state constitution, these provisions are mandatory, since the section contains no express declaration to the contrary (Art. I, § 29).

So the defendants' argument that the Washington State Constitution requires a present ability to practice law before one can run for Washington State Supreme Court as suggested by *Willis* is refuted by the fact that *Willis* has been superseded, overruled, and/or clarified by the above authority which interpreted Article I, Section 29. In addition, the court's conclusion that someone must be a member of the bar in order to run, was not a criteria when the constitution was adopted and is not explicitly mention either.

A state statute governing the qualifications for public office may not add to or subtract from the qualifications established by the state constitution. *Araki v. Hawaii*, 314 F 3d. 1091 (9th Cir. 2002)

As argued later in this motion, the requirement to join the bar also violates Scannell's constitutional right to disassociate from organizations he disagrees with.

6. THE COURT'S DECISION TO REQUIRE WSBA MEMBERSHIP IN ORDER TO RUN FOR SUPREME COURT VIOLATES SCANNELL'S RIGHT TO NONASSOCIATION UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

While it may be true that at the present time Washington has a unified bar under both state law and court rules, these statutes and rules violate Scannell's constitutional right to disassociate guaranteed under the United States Constitution.

It is undeniable that the right to not associate with an organization is a fundamental right deserving strict scrutiny. *Roberts v. United States Jaycees* 48 U.S. 609, 623 (1984). It is also true that that mandatory bar membership and mandatory dues present issues under the first amendment because lawyers are forced to pay dues in order to practice law. "These requirements implicate the First Amendment freedom of association, which includes the freedom to choose not to associate, and the First Amendment freedom of speech, which also includes the freedom to remain silent or to avoid subsidizing group speech with which a person disagrees." *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708, at 712-713 (7th Cir. 2010). In a plurality decision, in *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961), the United States Supreme Court upheld mandatory bar membership and dues after considering these First and Fourteenth Amendment rights, reasoning:

> Both in purport and in practice the bulk of State Bar activities serve the function, *or at least so Wisconsin might reasonably believe*, of elevating the educational

> and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. *Id (Emphasis added)*

Although *Lathrop* was plurality decision, in *Keller v. State Bar of California* 496 U.S. 1, 4 (1990) the United States Supreme Court ruled that "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar.". "[T]he compelled association and integrated bar are justified by the state's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13. Following the reasoning of these cases, the Ninth Circuit Court of Appeals has held that "a state may constitutionally condition the right of its attorneys to practice law upon the payment of membership dues to an integrated bar." *O'Connor v. State of Nev.*, 27 F.3d 357, 361 (9th Cir. 1994) (citing *Lathrop*, 367 U.S. at 843; *Keller*, 496 U.S. at 4); see also *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002) (treating it as a given that integrated bars can charge mandatory dues), *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999) (treating *Lathrop* as holding that "the regulatory function of the bar justified compelled membership").

While at first glance, these decisions appear to support the WSBA's position, on closer inspection, these cases do not withstand scrutiny when applied to the Washington State Bar Association. Each of these decisions bases it decision on the basis of the record before them, and each decision uses that record to justify a conclusion the regulatory function of the bar compelled membership. None of the records had allegations of the type in this case, where the regulatory functions of the WSBA are used to regulate the press, or to punish and/or reward friends and enemies of the bar leadership instead of basing their regulation on actual misconduct. "Thus,

absent a state bar that differs appreciably from those at issue in *Lathrop* and *Keller*, compelled membership in a state bar association is constitutional". *Morrow*, 188 F.3d at 1177.

The plaintiff contends that he is now providing the court with just such a record in this case, which has plausible allegations that for over ten years, a criminal enterprise has taken over the bar ER II, 21§2.4 and has targeted minorities ER II, 21, §2.3, 22, §2.7; 27, §2.22; 34§2.56; 35-36, §2.57-2.64; 44-45 §§2.121-2.122) sole practitioners, and enemies of the enterprise ER II, 21, §2.5; 26-31,§§2.20-2.41; rather than basing its disciplinary system on actual misconduct. None of the aforementioned cases had a record of a bar association which uses bribery (ER II, §§2.70-2.71; 39§§2.79-2.80), extortion (ER II, 33, §§2.47-2.50; 34,§§2.51-2.55; 36, §§2.65-2.67, 37. §§2.68-2.69, 39§§2.77-2.78; 40§2.81 to cover misconduct by public officials, (ER II; 31§§2.39-2.41) nor interferes with freedom of the press by disbarring attorneys of publications who do not adhere to its imposed guidelines of political correctness ER II 80-147), nor hold kangaroo proceedings where defendants are muted out of the proceedings, (ER II, 101,§52), or disbar attorneys who refuse to divulge attorney-client privilege information to officials who are attempting to prosecute their clients. (ER II; 40-44, §§2.82-2.120)

None of the cases involve the failure of a bar association to sanction an attorney who cannot account for several hundred thousand dollars of client funds she gained control over, (ER II, 96, §37), then using that attorney (ER II, 97, §40; 98-102, 104-107, §§42a- 53, §§59, 60) as a judge to retaliate against a reporter for exercising her rights under the first amendment (freedom of the press).

None of the cases involve a citizen who attempted to apply for a legal tax deduction, but ended up being sanctioned over $200,000 because his attorney was forced to withdraw on the

eve of trial because of an extortion attempt orchestrated by the bar association. (ER II, 168-192, §§1-120)

None of the above cases involve unethical judges such as the two Supreme Court justices and the disciplinary counsel who held ex parte contacts with the decision makers in pending disciplinary proceedings with the intent of fixing the cases in advance. (ER II, 51-66 , §§2,168-2.248). Presumably, none of the cases involved bar associations where over 40% of discipline comes out of one county (ER II, 102, §54), where the RICO enterprise is centered, who are using the disciplinary process to further their own corrupt ends. None of the cases involve federal judges who refuse to disqualify themselves over direct conflicts of interests and who use the proceedings to limit their own liability.

None of the above cases have a bar association that justifies its activities entirely on the basis that it is immune from our laws, our federal and state constitution, even though the state constitution absolutely forbids such immunities.

In addition, just before this case was filed, the United States Supreme Court ruled in *Janus v. American Federation of State, County, and Municipal Employees, Council 31, No. 16-1466, 585 U.S. ___ (2018),* ruled that such compelled association is unworkable in the case of mandatory membership in public unions. For the same

reasons as in that decision, mandatory membership is unworkable for bar associations.

Compulsory subsidies such as mandatory bar association dues "cannot be sustained unless two criteria are met." *Knox v. Service Emps. Int'l Union, Local 1000 ("SEIU"),* 132 S. Ct. 2277 (2012). First, all coerced association must be justified by a "compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*

Second, even in the "rare case" where coerced association is found to be justified, compulsory fees "can be levied only insofar as they are a 'necessary incident' of the 'larger regulatory purpose which justified the required association.'" *Id.*

Starting with *Lathrop* and continuing with *Keller*, mandatory bar associations have never been measured under the focused analysis required by *Knox*. Instead, it has approved mandatory bar associations on the basis of what a state "might reasonably believe." *Lathrop*.

The logic of these decisions is that mandatory bars are needed so that attorneys can be compelled to fund their own disciplinary systems. *Harris*, 134 S. Ct. at 2643–44; *Keller*, 496 U.S. at 14; *Lathrop*, 367 U.S. at 843. However, Compelling attorneys to pay for the cost of regulating the practice of law can be achieved by means that do not impinge on the constitutional right to disassociate, which is present when there is mandatory bar association membership: 19 states already do it without compelling membership at all.[18]

12. AN INJUNCTION SHOULD BE ISSUED PENDING FINAL RESOLUTION OF ALL THE ISSUES IN THIS CASE.

The standard for injunction requires Scannell, as the moving party, to show 1) a likelihood of success on the merits; 2) that irreparable harm is likely to be suffered in the absence of preliminary relief; 3) that the balance of equities tips in his favor; and, 4) that injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here Scannell has shown numerous reasons that is extremely likely he will win on the merits. He will suffer irreparable harm because, he will effectively be prevented from running for judicial office. Finally, both equities and public interest favor the injunction. A strong public policy exists in

[18] See *In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 170–71; Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with Hudson and Keller*, 1 TEX.

favor of eligibility for public office, and the constitution, where the language and context allow, should be construed so as to preserve this eligibility. *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 413 P.2d 972 (1966).

CONCLUSION

For the reasons respectfully presented in this brief, this case should be remanded back to the Western District. An out of state judge from this circuit should be assigned to adjudicate the case to its conclusion. In the interim, this court should issue an injunction restraining the defendants from unlawfully removing him from the ballot for any judicial election in Washington State, and a new election ordered for position two of the Washington State Supreme Court.

Dated this 16th day of February, 2020,

s/ *John Scannell*
John Scannell,

TECH J. TEX. ADMIN. L. 23, 24 n.1 (2000)