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No. 97249-4

SUPREME COURT
OF THE STATE OF WASHINGTON

LINCOLN BEAUREGARD,

Respondent,

v.

WASHINGTON STATE BAR ASSOCIATION,

Petitioner.

OPENING BRIEF OF PETITIONER

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I. STATEMENT OF FACTS

A. History of the Washington State Bar Association (WSBA).

In 1888, a group of attorneys formed what would become the Washington State Bar Association. John Rupp, *An Essay in History*, Washington State Bar News 27, 29 (June 1983) (hereafter “*Essay*”).¹ Originally named the Washington Bar Association, the membership renamed it the Washington State Bar Association (hereafter “WSBA”) in 1890, “reveling in the euphoria of new statehood.” Rupp, *Essay* at 29.

The WSBA primarily engaged in advocacy: it successfully urged the University of Washington to create a law school, proposed legal reforms such as to community property laws, and supported the non-partisan election of judges. Rupp, *Essay* at 34. Initially membership was voluntary; no more than a quarter of the State’s lawyers were members. Rupp, *Essay* at 34. Like other voluntary bar associations at the time, the WSBA had no formal regulatory power. Jess Hawley, *Address of Jess Hawley Delivered Before the*

¹ The two histories of the WSBA cited in this brief are not readily available online. PDFs of those authorities have been posted and are available at: <https://www.dropbox.com/sh/g7olsb1tewo9e3p/AABQjuQyx2oWS5CKc5gJlnP5a?dl=0> (last accessed February 10, 2020).

Washington State Bar at Walla Walla, June 21, 1930, 5 Wash. L. Rev. 162, 163-64 (1930) (hereafter “*Address*”)²; *see also* Rupp, *Essay* at 35 (“In the days before the integrated bar, discipline was quite haphazard.”).

Beginning in 1891, the state Legislature enacted a series of laws recognizing and providing that this Court would regulate the admission and discipline of attorneys. *See, e.g.*, Laws of 1891, ch. 55, §§ 8-10; Laws of 1895, ch. 91 § 2 (“No person shall be admitted to practice as an attorney . . . unless he has been previously admitted to the bar by order of the supreme court or of two judges thereof.”); *see also* Laws of 1895, ch. 91 § 3 (recognizing the Supreme Court would establish standards for bar applicants and for admission of an applicant when upon “such examination the court is satisfied that he is of good moral character and has a competent knowledge of the law and sufficient general learning.”); Laws of 1897, ch. 9 § 1.

In 1909, the Legislature created the Board of Examiners, a three-member commission, to “assist” the Court in regulating the Bar application and exam process. Laws of 1909, ch. 139 § 5. In 1917,

² Available at:

https://digitalcommons.law.uw.edu/wlr/vol5/iss4/3/?utm_source=digitalcommons.law.uw.edu%2Fwlr%2Fvol5%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages (last accessed February 10, 2020).

the Legislature purported to substantially expand the powers of the Board of Examiners to regulate both the admission of new attorneys and discipline attorney misconduct, giving it rulemaking authority over admission to the Bar that previously had been this Court's. Laws of 1917, ch. 115 § 13 ("The board shall make such rules as may be necessary to protect those who are preparing for admission to the bar."). In a substantial change from previous laws, the 1917 amendment also gave the Board of Examiners the authority to suspend or annul an attorney's license. Laws of 1917, ch. 115 § 18 (describing the board's subpoena and disciplinary hearing procedures). The statute also granted the Board of Examiners even broader rulemaking authority "to properly carry out the provisions of this act." Laws of 1917, ch. 115 § 21.

The next year, this Court invalidated the 1917 legislation authorizing the Board of Examiners to disbar or suspend attorneys because it violated the separation of powers doctrine. *In re Bruen*, 102 Wash. 472, 478, 172 P. 1152 (1918). This Court held that regulating attorney admission and discipline is an "essentially judicial" function "inherent in the courts," and that the Legislature had impermissibly usurped the Court's inherent power by

purporting to instead grant this authority to the Board of Examiners. *Bruen*, 102 Wash. at 478.

The Court found the disciplinary provisions of the 1917 legislation severable and left the rest of the statute in place. *Bruen*, 102 Wash. at 480-81. But in 1921 the Legislature repealed the 1917 amendments in their entirety and enacted a new statutory scheme that recognized the Supreme Court's authority over discipline. Laws of 1921, ch. 126 §§ 1-23. The 1921 legislation provided that after a disciplinary hearing, the Board of Examiners would submit findings and recommendations to this Court, which would hold its own hearing and "render such judgment as the facts warrant," including suspension, disbarment, or "such other discipline as the court may decree." Laws of 1921, ch. 126 § 18.

The 1921 statute remained in effect until the Bar Act of 1933. In 1929, WSBA members had begun a push for a compulsory Bar Association. Alfred J. Schweppe, *A Short History of the Washington Bar*, Washington Bar News 10, 11 (Dec. 1974) (hereafter "*History*").³ The WSBA looked to other states such as California and Idaho, which

³ Available at: <https://www.dropbox.com/sh/g70lsb1ewo9e3p/AABQjuQyx2oWS5CKc5gJlnP5a?dl=0> (last accessed February 10, 2020); see, *supra*, note 1.

had already established compulsory bar associations. Schweppe, *History* at 12; 1975 Att’y Gen. Letter Op. No. 20,⁴ at 3. In 1930, Idaho State Bar Association President Hawley spoke at the WSBA’s convention extolling the benefits of a self-governing body of attorneys, elected by secret ballot based on congressional districts, with general authority to regulate the profession subject to the supervision of the state Supreme Court. *Address*, 5 Wash. L. Rev. at 165-66.

In 1933, the Washington Legislature recognized the model that Hawley had proposed in his 1930 address to the WSBA. *See, e.g.*, Laws of 1933, ch. 94 § 2 (“Objects and Powers”); RCW 2.48.010 (“Objects and Powers”). To oversee the WSBA, the 1933 Bar Act established the Board of Governors (the “BOG”), consisting of the WSBA president and one attorney member elected from each congressional district. Laws of 1933, ch. 94, §§ 5-6.

The 1933 Bar Act served two broad purposes. First, it formalized the WSBA, which until then had been a voluntary organization without any meaningful authority. Second, it ended the Legislature’s experiment with the Board of Examiners and

⁴ Available at: <https://www.atg.wa.gov/ago-opinions/constitutionality-state-bar-act> (last accessed February 10, 2020).

recognized that the judicial branch has regulatory authority over attorneys. The 1933 Bar Act also recognized that the BOG may adopt two broad categories of rules. First, the BOG may adopt internal rules, which do not require this Court's approval, concerning privileges of membership, meetings, the organization of districts or subdivisions, the collection and disbursement of fees, and other matters affecting the function of the WSBA. Laws of 1933, ch. 94 § 7; RCW 2.48.050. Second, the BOG may adopt rules regarding admission to the Bar and enforcing rules of professional conduct that are subject to approval by this Court. Laws of 1933, ch. 94 § 8; RCW 2.48.050,.060.

The 1933 Bar Act was a substantial departure from earlier legislation, and reflects the Legislature's understanding that the regulation of attorneys is a function of the judicial branch. Before the 1933 Bar Act, the legislation set out detailed and specific duties for the Board of Examiners, in addition to standards for attorney admission and professional ethics, *see generally* Laws of 1921, ch. 126 §§ 1-23, and purported to give the Board of Examiners the sole discretion to supplement the statute with its own rules. While this Court could appoint and remove members, it had little authority over the Board of Examiners' decisions. Laws of 1921, ch. 126 § 19.

By contrast, the 1933 Bar Act set out broad powers to further general policy goals, limited only by the WSBA's internal structure and, ultimately, this Court's approval. When it enacted the 1933 Bar Act, the Legislature thus "expressly recognized the primacy of the court in the area of admissions and disbarment when it made the board's powers subject to the approval of the Supreme Court." *In re Schatz*, 80 Wn.2d 604, 607, 497 P.2d 153 (1972).

The 1933 Bar Act "memorializes our legislature's attempt to regulate the practice of law, to acknowledge and formalize the existence of the state bar, to organize admission to practice, and generally to create a framework for the practice of law in Washington State. . . . But the bar act did not arise out of a vacuum; this court and its agents were performing many of these functions. . . . We did not need the state bar act to do this: '[o]ne of the basic functions of the judicial branch of government is the regulation of the practice of law.'" *State v. Yishmael*, 2020 WL 579202, *8, § 37 (February 6, 2020) (citations omitted), quoting *Wash. State Bar Ass'n v. State*, 125 Wn.2d 901, 907, 890 P.2d 1047 (1995).

B. The Board of Governors (BOG) is the governing body of the WSBA. It operates pursuant to Bylaws and subject to this Court’s plenary authority.

The core provisions of the 1933 Bar Act and the structure and authority of the BOG remain largely the same today. As set out in the WSBA Bylaws, “[t]he Board of Governors (BOG) is the governing body of the Bar. It determines the policies of the Bar and approves its budget each year. Subject to the plenary authority and supervision of the Washington Supreme Court and limitations imposed by Statute, Court Rule, Court Order, or case law, the Board possesses all power and discretion on all matters concerning the WSBA. The Board may delegate the exercise of its authority but that does not constitute a transfer of it. The Board’s authority is retained and may be exercised at any time upon a majority vote of the Board.” (CP 77)⁵

Among its duties, the BOG “selects the Bar’s Executive Director and annually reviews the Executive Director’s performance.” (CP 78) “The Executive Director is appointed by the BOG, serves at the direction of the BOG, and may be dismissed at any

⁵ The WSBA Bylaws are reproduced at CP 48-119 and are available at: https://www.wsba.org/docs/default-source/about-wsba/governance/proposed-bylaw-amendments/bylaws-amended-may-17-2018-1.pdf?sfvrsn=ba3c04f1_17 (last accessed February 10, 2020).

time by the BOG without cause by a majority vote of the entire BOG. If dismissed by the BOG, the Executive Director may, within 14 days of receipt of a notice terminating employment, file with the Supreme Court and serve on the President, a written request for review of the dismissal. If the Supreme Court finds that the dismissal of the Executive Director is based on the Executive Director's refusal to accede to a BOG directive to disregard or violate a Court order or rule, the Court may veto the dismissal and the Executive Director will be retained." (CP 82)

The BOG and each Governor also remain subject to the will of the membership. "Any Governor may be removed from office by member recall. A recall vote is initiated by an Active member filing a petition for recall with the Executive Director [that] set[s] forth the basis for the recall; and contain[s] the names and signatures of the Active members supporting the petition." (CP 94) Further, although the BOG "sets the policy for the Bar," membership referenda can be used to "affect policy," including reversing or modifying a final action of the BOG. (CP 101) In addition, "[a]ny member may timely petition the BOG to declare any BOG final action voidable for failing to comply with the provisions of these Bylaws. Any member may

petition the BOG to stop violations or prevent threatened violations of these Bylaws.” (CP 99)

The BOG has operated pursuant to an Open Meetings Policy contained in the WSBA Bylaws. “All meetings of the BOG or other Bar entity must be open and public and all persons will be permitted to attend any meeting, except as otherwise provided in these Bylaws or under court rules.” (CP 96) The Bylaws provide that the BOG may meet in executive session to “evaluate the qualifications of an applicant for employment as Executive Director or General Counsel, or for appointment to a position with the Bar or on a Bar entity; to review the performance of the Executive Director; or to receive or evaluate complaints regarding Officers, Governors, Bar staff, or appointees to other Bar entities.” (CP 97) This Court’s GR 12.4(d)(2)(A) exempts from public access “[r]ecords of the personnel committee, and personal information in Bar records for employees, appointees, members, or volunteers of the Bar to the extent that disclosure would violate their right to privacy.”

C. The BOG terminated Paula Littlewood as WSBA Executive Director in early 2019.

Paula Littlewood had been the Executive Director of the WSBA since 2007. By 2018, her compensation was \$272,184 a year.⁶ Ms. Littlewood's employment was subject to annual review and terminable at will by the BOG. (CP 78, 82) E-mail communications from 2018 reflect friction among the BOG and with its staff (*see, e.g.*, CP 31-36, 437-38); one Governor objected to the "minimization of the Board as mere volunteers [as] a large source of our current friction." (CP 32) On September 21, 2018, this Court announced its decision to undertake a comprehensive review of the structure of the Bar, directed that all BOG action on proposed Bylaw amendments be deferred until further notice from the Court, and notified the BOG "that the Court by a majority vote supports the Executive Director as the principal administrative officer of the Bar." (CP 37-38)

The BOG terminated Ms. Littlewood's employment in executive session on January 17, 2019, effective March 31, 2019. On March 7, 2019, the BOG affirmed Ms. Littlewood's termination in a

⁶ Available at: <https://www.documentcloud.org/documents/5838531-LittlewoodCompensation-Redacted.html>, retrieved from: <https://www.seattletimes.com/seattle-news/judge-rules-washington-state-bar-association-subject-to-open-meetings-law/> (last accessed February 10, 2020).

public meeting, on a vote of 9 to 4. 3/17/19 WSBA BOG Public Session Meeting Minutes.⁷

Some WSBA staff, members of the Bar, former and current judicial officers, and others were upset by Ms. Littlewood's termination. (See, e.g., CP 44-46, 164-287) Justices Madsen, Wiggins, and Johnson wrote to the BOG on March 13, 2019 urging it to "rescind" Ms. Littlewood's termination and to "reconsider its decision to 'go in a different direction,'" noting that in the past the BOG had formed task forces or work groups to allow broad participation and "engage the membership and the public," and that the BOG was "only one of several oversight boards" created by the Supreme Court and governing "aspects of the legal profession in Washington." (CP 29-30) Two dissenting Governors e-mailed the entire Bar membership on March 15, 2019, objecting to Ms. Littlewood's termination. (CP 120-22)

⁷ Available at: https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-minutes-2018-2019/mar72019publicsessionminutesad8368f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=815a0df1_7 (last accessed February 10, 2020).

A “referendum petition” was circulated to “reverse” Ms. Littlewood’s termination,⁸ but with 346 electronic signatures did not generate sufficient support to be presented to the membership. (CP 290) Ms. Littlewood did not formally request a review of her termination by this Court under the WSBA Bylaws (CP 82), and this Court by a 6-3 vote decided “not to intervene and to allow the decision of the BOG to stand.” (CP 449)

D. Procedural history.

On March 21, 2019, respondent Lincoln Beauregard, a Washington lawyer and WSBA member, sued the WSBA in King County Superior Court alleging the BOG had violated the Open Public Meetings Act (OPMA), RCW ch. 42.30, and the WSBA Bylaws when it terminated Ms. Littlewood. (CP 1-12) Mr. Beauregard’s complaint “demand[ed] that Ms. Littlewood be reinstated.” (CP 11) Four days after filing his complaint, on March 25, 2019, Mr. Beauregard moved for a preliminary injunction reinstating Ms. Littlewood. (CP 15-25)

⁸ <https://www.gopetition.com/signatures/wsba-referendum-re-executive-director-termination.html> (last accessed February 10, 2020). A petition must be signed by at least 5% of active WSBA members (roughly 2,000 individuals) before the BOG can present the referendum to all active members for a vote. (CP 101)

King County Superior Court Judge Roger Rogoff (“the trial court”) heard oral argument on Mr. Beauregard’s motion less than two weeks later, on April 9, 2019. (RP 1) The trial court held that it lacked the authority to reinstate Ms. Littlewood, but concluded the WSBA was subject to the OPMA. (CP 482) The trial court issued a preliminary injunction ordering the WSBA to “comply with the OPMA on all BOG decisions moving forward,” including “efforts to hire a new [Executive Director],” and to “comply with the OPMA as it relates to any correspondence among BOG members about the firing of Ms. Littlewood.” (CP 482)

The WSBA moved for reconsideration, pointing out that the OPMA was not a basis for the specific relief the trial court granted because it does not require the disclosure of communications regarding personnel decisions made in executive session. (CP 357-62) Without conceding that the WSBA is subject to the OPMA, the WSBA agreed to comply with the OPMA’s procedural requirements pending further court order. (CP 358) The BOG underwent open

meetings training with an Attorney General training team on May 16-17, 2019. 5/16-17/19 WSBA BOG Meeting Minutes.⁹

On reconsideration, the trial court clarified that it “intended for [the WSBA] to retroactively comply with the OPMA in terms of any private meetings that, under the OPMA should have been open. If private correspondence exists which, under the OPMA, should have been public (i.e., email votes, notes or minutes or private meetings, video of private meetings, etc.) with regard to Ms. Littlewood’s firing. It should be made public now.” (CP 465)

This Court accepted direct discretionary review of the trial court’s preliminary injunction order on August 27, 2019.

II. ISSUES PRESENTED FOR REVIEW

1. Whether Mr. Beauregard had a well-grounded fear of immediate invasion of a clear equitable right that would cause actual, substantial harm to him that could justify the trial court’s preliminary injunction order in an action that demanded reinstatement not of Mr. Beauregard, but of an employee terminable at will by the defendant?

⁹ Available at: https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-minutes-2018-2019/board-of-governors-meeting-minutes-may-16-17-2019.pdf?sfvrsn=3a4a0df1_8 (last accessed February 10, 2020).

2. Is disclosure of private “correspondence” concerning the employment of an employee subject to termination at will an appropriate remedy available under the Open Public Meetings Act (OPMA)?

3. Is the Washington State Bar Association (WSBA), an extension of the judiciary under the plenary authority and supervision of this Court, a “public agency” subject to the OPMA?

4. Would subjecting the WSBA to the OPMA violate separation of powers principles and this Court’s inherent judicial power, which it has delegated to the WSBA?

III. ARGUMENT

A. The preliminary injunction order exceeded the scope of the relief requested, and was not necessary to prevent any harm to Mr. Beauregard.

“The purpose of a preliminary injunction is to preserve the status quo of the subject matter of a suit until a trial can be had on the merits.” *McLean v. Smith*, 4 Wn. App. 394, 399, 482 P.2d 798 (1971); *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 528-29, 98 P.2d 680, 683 (1940). A preliminary injunction looks forward, and is intended to forbid “the performance of *threatened* acts until the rights of the parties have been finally determined by the courts.” *McLean*, 4 Wn. App. at 399 (emphasis added). The trial

court's order here did not "preserve the status quo," and exceeded the scope of relief requested in both Mr. Beauregard's complaint and his motion for a preliminary injunction.

The complaint governs the scope of a preliminary injunction. RCW 7.40.020. Mr. Beauregard's complaint, brought under the OPMA, sought "all relief available under the law," and specifically demanded that "Ms. Littlewood be reinstated and other likely impending violations be curtailed" and that "each member of the BOG . . . be subject to proper training on governance and transparency principles." (CP 11)

In his motion for a preliminary injunction, Mr. Beauregard sought only Ms. Littlewood's reinstatement, and that if "the BOG wants to revisit the possible termination of Ms. Littlewood, it should be done after adherence to 'transparent process that includes members of the professions, members of the public, and a knowledgeable executive director.'" (CP 11) Mr. Beauregard reiterated the relief he sought at the hearing on his motion for a preliminary injunction: "we're asking that the Court reinstate Paula Littlewood. That's the relief that's available under either the bylaws or the Open Public Meetings Act, which we'll litigate the merits of as we move forward." (RP 5)

The order the trial court entered on Mr. Beauregard's motion was far different from and did not address the relief requested in his complaint or his motion. By the time it was entered this Court had declined to order Ms. Littlewood's reinstatement, and Mr. Beauregard himself admitted that the relief he requested would be moot if the trial court did not issue an order reinstating Ms. Littlewood, as "the ship [will have] left the station." (RP 31)

Ordering the disclosure of private correspondence among BOG members also did not remedy the specific harm articulated by Mr. Beauregard, which was the termination of Ms. Littlewood as Executive Director. "Injunctions must be tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law." *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986). "The trial court must be careful not to issue a more comprehensive injunction than is necessary to remedy proven abuses, and if appropriate the court should consider less drastic remedies." *Whatcom County v. Kane*, 31 Wn. App. 250, 253, 640 P.2d 1075 (1981) (injunction preventing defendant from filing any legal proceeding in Whatcom County against any citizen was too broad).

In entering its preliminary injunction order the trial court found that Mr. Beauregard had an “equitable right to understand and meaningfully participate in the hiring/firing decisions” and that the harm from which Mr. Beauregard needed to be protected was the “inability to know why the person running the organization was fired.” (CP 480-81) The trial court erred because there is no authority (and none cited) for this purported “equitable right” to participate in personnel decisions of the WSBA through discovery of correspondence among BOG members.

Even if the OPMA applies to the WSBA, review of the performance of a public employee is an exception to the requirement of the OPMA that all meetings be open and public. RCW 42.30.110(1)(g). By allowing those discussions in executive session, the Legislature made clear “a policy decision that the public interest could be better served by discussion of these limited topics in private, rather than public,” reflecting “a legislative effort to balance the public interest in openness against the public interest in conducting

a limited set of governmental affairs outside public view.” 2017 Att’y Gen. Op. No. 5,¹⁰ at 5.

“Where an individual's case is concerned, of course, respect for personal privacy is an important factor.” *Port Townsend Pub. Co., Inc. v. Brown*, 18 Wn. App. 80, 84, 567 P.2d 664 (1977) (quoted source omitted). But the main motivation behind these exceptions is the policy to promote frank discussion of personnel matters, so that government will operate efficiently and effectively. “It is unrealistic to expect officials to be candid about prospective personnel in public because any criticism can take on an unintended personal tone. The interested citizen's ‘need to know’ here is not so critical.” *Port Townsend*, 18 Wn. App. at 84 (quoted source omitted).

Mr. Beauregard’s assertion that he had a right to know why Ms. Littlewood was terminated was not a basis for preliminary injunctive relief. The trial court’s order itself recognizes that the “substantial harm” to be addressed by entry of an injunction under CR 65 “is not well-defined or well-presented by Plaintiff.” (CP 481) The actual harm articulated by Mr. Beauregard was the claimed past

¹⁰ Available at: <https://www.atg.wa.gov/ago-opinions/whether-information-learned-executive-session-confidential> (last accessed February 10, 2020).

harm of Ms. Littlewood's "secret" termination and the possible future harm of hiring any new Executive Director in "secret." The order was overly broad and not necessary to remedy any legitimate fear of immediate invasion of Mr. Beauregard's legal or equitable rights.

The trial court also ordered that the "WSBA BOG shall comply with the OPMA as it relates to any correspondence among BOG members about the firing of Ms. Littlewood." (CP 482) But the OPMA itself does not require the production of correspondence regarding decisions by a public agency, particularly as it relates to any discussions in executive session. To the extent Mr. Beauregard claimed that BOG members had a "meeting" regarding Ms. Littlewood's termination through correspondence, "[n]o meeting takes place, and the OPMA does not apply, if the public agency lacks a quorum." *Eugster v. City of Spokane*, 128 Wn. App. 1, 8, § 22, 114 P.3d 1200 (2005), *rev. denied*, 156 Wn.2d 1014 (2006).

In this case, on this record, and despite Mr. Beauregard's baseless attacks on a supposed BOG "gang of eight" (CP 10), there is no evidence that a quorum of the BOG met privately, through correspondence or otherwise, to conduct WSBA business. The trial court erred in granting a preliminary injunction absent any evidence that Ms. Littlewood's termination violated Mr. Beauregard's legal or

equitable rights, or that he would be protected from any threatened violation of his rights by imposition of the extraordinary relief granted.

B. The Open Public Meetings Act (OPMA) does not provide for production to a plaintiff under the Act of “correspondence” regarding a personnel (or any) decision.

The OPMA does not address the production of correspondence among members of the governing body of a public agency. There is no provision for production of correspondence under the OPMA; the OPMA provides standing only to seek compliance with the OPMA by injunction or mandamus. RCW 42.30.130. Even that standing was limited to an individual directly affected by the alleged violation in *Kirk v. Pierce County Fire Protection Dist. No. 21*, 95 Wn.2d 769, 773, 630 P.2d 930 (1981).¹¹ Even if the WSBA was a “public agency” governed by the OPMA, the BOG can in executive session “evaluate the qualifications of an application for public employment or to review the performance of a public employee,” so long as any “discussion by a governing body of salaries, wages and other conditions of employment” and any “final

¹¹ *But see West v. Pierce County Council*, 197 Wn. App. 895, 899, ¶ 10, 391 P.3d 592 (2017).

action hiring, setting the salary of an individual employee . . . or discharging or disciplining an employee” is in a meeting open to the public. RCW 42.30.110(1)(g); *see also Port Townsend*, 18 Wn. App. at 84 (holding no violation of the OPMA because “the possible promotion and dismissal” of current employees was properly discussed by Jefferson County Commissioners in executive session).¹²

Public agencies are permitted to “review the performance of a public employee” in executive session. RCW 42.30.110(1)(g). Mr. Beauregard would not be entitled to the minutes of an executive session, much less any “correspondence” among BOG members related to discussions during executive session, under the OPMA. RCW 42.30.035 provides only that “minutes of all regular and special meetings except executive sessions . . . be open to public inspections.” Far from requiring disclosure of correspondence about personnel matters, the OPMA precludes disclosure of information obtained or

¹² *Port Townsend* was decided under former RCW 4.32.110, which provided that “nothing contained in this chapter shall be construed to prevent a governing body from holding executive sessions . . . to consider matters affecting . . . the appointment, employment, or dismissal of a public officer or employee.” The statute has been amended to provide that any “final action . . . discharging or disciplining an employee . . . shall be taken in a meeting open to the public.” RCW 42.30.110(1)(g).

discussed in executive session. To the contrary, the Attorney General has issued a formal opinion that the OPMA *prohibits* members of the governing body of a public agency from disclosing information shared during executive sessions properly called under the OPMA. 2017 Att’y Gen. Op. No. 5.

“[P]articipants in an executive session have a duty under the OPMA to hold in confidence information that they obtain in the course of a properly convened executive session, but only if the information at issue is within the scope of the statutorily authorized purpose for which the executive session was called.” 2017 Att’y Gen. Op. No. 5, at 2. Considering the specific example of “a member of a city council who might discuss in executive session the performance evaluation of a city employee,” the Attorney General concluded that because the topic would be discussed in executive session, this “might create at a minimum an expectation that the discussion would not be divulged outside executive session without the approval of the governing board as a whole.” 2017 Att’y Gen. Op. No. 5, at 4-5.

Executive sessions “to review the performance of a public employee” thus are confidential, and neither Mr. Beauregard nor any member of the public would be entitled under the OPMA to “any correspondence among BOG members about the firing of Ms.

Littlewood” were she a public employee. Nor does Mr. Beauregard’s claim that a supposed “secret” vote to dismiss Ms. Littlewood made her termination as an at-will employee void provide a basis for access to any correspondence before her termination in a public BOG meeting in March 2019. Even if previous private communications between BOG members could have been considered to violate the OPMA, the action taken would not be invalidated because the final vote in March 2019 occurred in a proper open public meeting. *Organization to Preserve Agricultural Lands [OPAL] v. Adams County*, 128 Wn.2d 869, 913 P.2d 793 (1996).

This Court rejected plaintiffs’ argument that a landfill use permit should be invalidated because two of three Adams County Commissioners had violated the OPMA by “discussing [the] proposal over the phone and agreeing how they would vote before the public meeting” in *OPAL*, 128 Wn.2d at 881. Although this Court recognized that “[a]ny ‘action’ taken during the phone call would thus be invalidated,” it held “that the [OPMA] does not, however, require that subsequent actions taken in compliance with the Act are also invalidated.” *OPAL*, 128 Wn.2d at 883 (footnote omitted).

In reaching its decision in *OPAL*, this Court relied on an Attorney General opinion that concluded “if the final action taken by

the public agency is in accordance with our [OPMA] requirements, then it would appear to us that this action would be defensible even though there may have been a failure to comply with the act earlier during the governing body's preliminary consideration of the subject. For example, if the members of the governing body had held an earlier meeting to discuss a certain proposal without complying with the act, but did comply in connection with the meeting at which the actual adoption of the proposal took place, the final action thus taken would be defensible.” *OPAL*, 128 Wn.2d at 883, *quoting* 1971 Att’y Gen. Op. No. 33,¹³ at 40 (underline in original).

After *OPAL*, all that matters under the OPMA is that the final 9 to 4 vote terminating Ms. Littlewood’s employment occurred during open session at the BOG’s March 2019 public meeting. The OPMA does not support the trial court’s order requiring production of any “correspondence” among BOG members before that.

C. Because the WSBA is part of the judicial branch, the OPMA does not apply.

The preceding analysis presumes the OPMA applies to the WSBA and the BOG. But the OPMA applies only to “public agencies”:

¹³ Available at: <https://www.atg.wa.gov/ago-opinions/meetings-public-applicability-open-public-meetings-act-state-and-local-governmental> (last accessed February 10, 2020).

“[a]ny state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature.” RCW 42.30.020(1)(a). And the issue here is not simply whether the WSBA satisfies the definition of a “public agency” under the OPMA—it is whether applying the OPMA impermissibly invades the inherent judicial power the WSBA administers under this Court’s plenary authority and supervision.

Although the WSBA as currently constituted was created by statute, RCW ch. 2.48, it operates solely under the delegated authority of this Court:

In the exercise of its inherent and plenary authority to regulate the practice of law in Washington, the Supreme Court authorizes and supervises the Washington State Bar Association’s activities. The Washington State Bar Association carries out the administrative responsibilities and functions expressly delegated to it by this rule and other Supreme Court rules and orders enacted or adopted to regulate the practice of law.

GR 12.2. In essence, the WSBA is an extension of—and thus inextricable from—the Court’s constitutional power. “[T]his court does not share the power of discipline, disbarment, suspension or reinstatement with either the legislature or the state bar association . . . In short, membership in the state bar association and

authorization to continue in the practice of law coexist under the aegis of one authority, the Supreme Court.” *State ex. rel. Schwab v. Wash. State Bar Ass’n*, 80 Wn.2d 266, 269, 493 P.2d 1237 (1972).

“The Court’s control over the WSBA is not limited to admissions and discipline of lawyers. It extends to ancillary administrative functions as well.” *Wash. State Bar Ass’n [WSBA] v. State*, 125 Wn.2d 901, 907-08, 890 P.2d 1047 (1995). Although it is “possible to have an overlap of responsibility in governing the administrative aspects of court-related functions . . . a legislative enactment may not impair this court’s functioning or encroach upon the power of the judiciary to administer its own affairs.” *WSBA*, 125 Wn.2d at 908-09. The legislature may not invade the judicial power by infringing on the WSBA’s activities, including its employment decisions. *WSBA*, 125 Wn.2d at 908.

This Court held that the Legislature could not force the WSBA to comply with the Public Employees’ Collective Bargaining Act by requiring the BOG to collectively bargain with WSBA employees in *WSBA*, 125 Wn.2d at 907-09. After WSBA employees attempted to unionize, the Legislature amended the Bargaining Act, “strongly encourag[ing]” the Court to “adopt collective bargaining” for WSBA employees and providing that the Court “may provide by rule that

the [WSBA] shall be considered a public employer.” *WSBA*, 125 Wn.2d at 903; Laws of 1993, ch. 76 §§ 1-2.

Rather than taking the Legislature’s invitation and enacting a rule requiring compliance with the Bargaining Act, this Court amended GR 12 to give the BOG the discretion to determine whether to collectively bargain with WSBA employees. *WSBA*, 125 Wn.2d at 903-04. The Legislature responded by amending the Bargaining Act again, this time purporting to eliminate this Court’s discretion by expressly defining the WSBA as a public employer subject to the Act. *WSBA*, 125 Wn.2d at 905; Laws of 1994, ch. 297 § 1 (“The [WSBA] shall be considered a public employer of its employees.”).

This Court invalidated the amendment, holding that “[l]egislation which directly and unavoidably conflicts with a rule of court governing Bar Association powers and responsibilities is unconstitutional as it violates the separation of powers doctrine.” *WSBA*, 125 Wn.2d at 906. This Court held that the “ultimate power to regulate court-related functions, including the administration of the [WSBA], belongs exclusively to this Court,” and that, by forcing the WSBA to comply with the Act, the legislature impermissibly “nullifie[d]” the rules governing the WSBA. *WSBA*, 125 Wn.2d at

909. When those rules conflict with a statute and “cannot be harmonized, the court rule will prevail.” *WSBA*, 125 Wn.2d at 909.

The separation of powers problem here is no different. Under its inherent judicial power, this Court—and, by extension, the BOG, subject to this Court’s supervision—has the discretion to determine the level of transparency necessary to administer the WSBA’s duties. Exercising that discretion, the BOG held meetings under its own Bylaws, and the rules of this Court. Like the amendment at issue in *WSBA*, the trial court’s decision forcing the BOG to comply with the OPMA nullifies those Bylaws and rules and, by extension, the Court’s authority to govern the WSBA. In other words, it erases the discretion that necessarily flows from the Court’s inherent judicial power to regulate both the substantive aspects of the legal profession and the WSBA’s “ancillary administrative functions.” *WSBA*, 125 Wn.2d at 908.

This Court has already held that the WSBA is exempt from general legislative pronouncements governing non-judicial public agencies. *Graham v. Wash. State Bar Ass’n*, 86 Wn.2d 624, 548 P.2d 310 (1976). In *Graham*, this Court quashed a performance audit subpoena from the state Auditor because the WSBA “is responsible to the Supreme Court, not the legislature,” and it is therefore “the

Board of Governors, elected by the bar association members, not the legislature, that determines what activities [the WSBA] will engage in.” *Graham*, 86 Wn.2d at 628.

As here, the issue in *Graham* was whether the WSBA is a “state department” or “agency” within the meaning of the statute governing the state Auditor’s rights and duties. *Graham*, 86 Wn.2d at 626. The Auditor, Robert Graham, argued that the language in the 1933 Bar Act describing the WSBA as “an agency of the state,” RCW 2.48.010, was dispositive. *Graham*, 86 Wn.2d at 626. This Court rejected this simplistic approach for two reasons:

First, this Court explained that when the Legislature used the “agency of the state” description for the WSBA in the 1933 Bar Act, it could not have intended that this language would mean that the WSBA would be required to comply with every subsequent statute governing public agencies:

Petitioner treats as determinative the characterization of the Washington State Bar Association as ‘an agency of the state’ in the State Bar Act of 1933, RCW 2.48.010, et seq. However, it is inconceivable that the legislature in 1933 intended this reference, in itself, to sanction an audit of that organization since the auditing statutes were adopted only in 1941 and succeeding years.

Graham, 86 Wn.2d at 626. Similarly, here the 1933 Legislature could not have intended to subject the WSBA to a general government transparency requirement adopted in 1971.

Second, the legal consequences applying to an “agency” vary depending on the context. This Court recognized in *Graham* that an entity may be an “agency” for one purpose but not for another:

Moreover, the legislature has given the term “agency” a variety of meanings. See, e.g., RCW 42.17.020, 42.18.030, 42.30.020, 43.17.120-200. In *State ex rel. Tattersall v. Yelle*, 52 Wn.2d 856, 863, 329 P.2d 841 (1958), this court noted that the term “state officer” is used in several different ways in the constitution and hence its meaning “may vary according to the context in which it is used.” Similarly, the meaning of the term “agency” depends on its context. Thus, the reference to the bar association as “an agency of the state” in the State Bar Act of 1933 does not control the applicability of the auditing statutes to that organization.

Graham, 86 Wn.2d at 626.

In particular, this Court recognized that the Legislature described the WSBA as an “agency of the state” in the 1933 Bar Act “for limited purposes”—namely, to avoid the constitutional prohibition against the creation of private corporations by special act. *Graham*, 86 Wn.2d at 627; Wash. Const. art. 12, § 1; art. 2, § 28. A 1975 Attorney General letter opinion explains that the Legislature included the “agency of the state” language only because the 1923

Idaho Bar Act had been successfully challenged for the same reason.¹⁴ 1975 Att’y Gen. Letter Op. No. 20, at 3 (explaining that the 1923 Idaho Bar Act was invalidated under the Idaho state constitution because it created a private corporation and noting that “this experience by our neighbor state . . . was expressly brought to the attention of our own state bar at its annual convention in 1930, and undoubtedly played a part in the drafting of the Washington state bar act for presentation to our own legislature in 1933.”); *see also Address*, 5 Wash. L. Rev. at 162 (“Had [the Idaho] Supreme Court regarded our organization as a corporation, the law would have been held unconstitutional.”).

The language of the statute itself reflects this limitation, reciting that the WSBA “is hereby created as an agency of the state, *for the purposes and with the powers hereinafter set forth*” in the 1933 Bar Act. RCW 2.48.010 (emphasis added). The “agency of the

¹⁴ The case referenced in the Attorney General’s 1975 letter opinion is *Jackson v. Gallet*, 39 Idaho 382, 228 P. 1068 (1924). The plaintiff in *Jackson* was a member of Idaho’s Board of Commissioners, the defendant was the state Auditor. The plaintiff sought a writ of mandate requiring the Auditor to certify to the state Board of Commissioners a claim for expenses he had incurred in the performance of his duties as a member of the Board, for payment from state funds. In denying the writ and dismissing plaintiff’s action the Idaho Supreme Court held that the 1923 Idaho Bar Act was unconstitutional because it created a private corporation. *Jackson*, 228 P. at 1070.

state” description in the 1933 Bar Act thus was expressly limited by the language of the statute itself, and was intended to preserve the WSBA from a constitutional challenge. This Court should not, and cannot (given its own plenary authority over the WSBA) rely on it to determine applicability of the OPMA.

In concluding the WSBA is a “public agency” subject to the OPMA, the trial court relied heavily on an informal 1971 Attorney General Letter Opinion. 1971 Att’y Gen. Letter Op. No. 103.¹⁵ (CP 476) But this informal opinion is of little value in light of *Graham*, which this Court decided five years later. First, the 1971 Attorney General Letter Opinion reasoned that because the 1933 Bar Act describes the WSBA as an “agency of the state,” it must be a “public agency” subject to the OPMA. The Court explicitly rejected this analysis in *Graham*, 86 Wn.2d at 626-27. Second, and much worse, the Attorney General’s informal opinion supports its conclusion that the WSBA is subject to the OPMA by relying on an opinion from “the Honorable Robert V. Graham, State Auditor . . . in which we concluded that the [WSBA] was a state agency subject to audit by the

¹⁵ Available at: <https://www.atg.wa.gov/ago-opinions/letter-opinion-1971-no-103> (last accessed February 10, 2020).

state auditor.” 1971 Att’y Gen. Letter Op. No. 103, at 2. In other words, the 1971 Attorney General’s informal letter opinion relies on the analysis of the losing party in *Graham*, in which this Court expressly rejected the Auditor’s argument for his authority over the WSBA. *Graham*, 86 Wn.2d at 633.

Contrary to the Auditor’s opinion of his own authority (and the Attorney General’s informal letter opinion based on it), the legislative history of attorney regulation in Washington also shows that the Legislature ultimately recognized that it must cede all regulatory authority to the Supreme Court and, by extension, the WSBA. As set forth in the Statement of the Case, the Legislature enacted a series of complicated statutory schemes establishing the Board of Examiners, which purported to exercise broad authority to regulate attorneys with little input from the Court, before recognizing its limited authority in this realm in the 1933 Bar Act. Indeed, this Court rejected the petitioner’s argument that the 1933 Bar Act unconstitutionally delegated *legislative* authority to the BOG, holding that the WSBA is “an arm of the court, independent of legislative direction,” in *Schatz*, 80 Wn.2d at 607.

Because the WSBA is “responsible to the Supreme Court, not the legislature,” this Court has consistently held that “it is the Board of Governors, [and] not the legislature, that determines what activities it will engage in.” *Graham*, 86 Wn.2d at 628. Similarly, although the 1933 Bar Act described the WSBA as “an agency of the state,” Laws of 1933, ch. 94 § 2, this characterization was included in the Act only to avoid the state constitution’s prohibition against the creation of private corporations by special act. *Graham*, 86 Wn.2d at 627; Wash. Const. art. 12, § 1; art. 2, § 28; *see also* 1975 Att’y Gen. Letter Op. No. 20. Because the WSBA is part of the judicial branch, it is not a “public agency” subject to the OPMA.

D. Public policy does not favor applying the OPMA because this Court can make the WSBA and BOG as transparent as it chooses given the judiciary’s core powers.

The separation of powers doctrine requires that the activity of one branch of government not threaten the integrity of another, or invade its prerogatives. This means that the Legislature cannot interfere with either the judicial branch’s core powers or its ability to self-govern. This is true whether the judicial power manifests in the Supreme Court or in the Court’s regulatory arm, the WSBA. If the WSBA were subject to broad legislative mandates that apply to non-

judicial government agencies, it would substantially interfere with the Court's own authority, which it has delegated to the WSBA subject to this Court's supervision. Because regulation of the legal profession rests with this Court, the WSBA is merely an extension of the Court's authority, and requiring compliance with the OPMA would violate separation of powers principles.

The WSBA is empowered to make its own internal rules, RCW 2.48.050, and has adopted Bylaws that mirror the OPMA. (CP 95-98) Those Bylaws contain remedies for violation of the open meetings policy, including petitioning the BOG to stop violations or prevent threatened violations. (CP 99) Mr. Beauregard never sought any of those remedies, instead rushing to superior court to "demand" reinstatement of Ms. Littlewood that she herself did not pursue.

Both Mr. Beauregard and the trial court heavily relied on the OPMA's mandate that it be construed liberally to effectuate its purpose. (CP 475); *see also* RCW 42.30.010 ("The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.") But to the extent this Court finds public policy concerns for transparency

persuasive, it need not countenance a separation of powers violation to fulfill them. After all, the WSBA is fully subject to this Court's authority and supervision. GR 12.2. The Court can and has enacted its own rules making the operation of the WSBA transparent to the extent it believes it can and should be, consistent with the judiciary's core powers. *See, e.g.*, GR 12.4 (establishing procedures for providing public access to WSBA records, specifically exempting certain records, and limiting access to "those records in the possession of the WSBA and its staff or stored under Bar ownership and control in facilities or servers").

Forcing the WSBA to comply with the OPMA when it already has enacted a similar Bylaw impermissibly "impair[s] the [WSBA's] functioning" and "encroach[es] upon the power of the judiciary to administer its own affairs." *WSBA*, 125 Wn.2d at 909. This Court's rules prevailed over a statute that "[took] discretion away" from the WSBA by mandating collective bargaining for WSBA employees in *WSBA*, 125 Wn.2d at 909. Requiring OPMA compliance would similarly deprive the WSBA (and this Court) of substantial discretion, violate separation of powers principles, and as a matter of public policy is unnecessary and unwise.

IV. CONCLUSION

The Court should vacate the preliminary injunction and dismiss Mr. Beauregard's complaint.

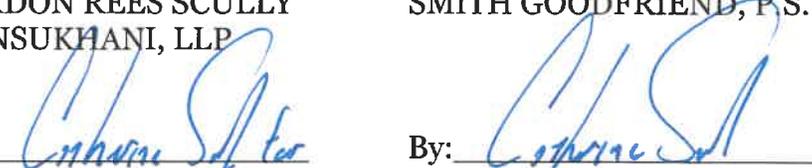
Dated this 10th day of February, 2020.

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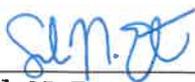
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 10, 2020 I arranged for service of the foregoing Opening Brief of Petitioner, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 10th day of February, 2020.



Sarah N. Eaton

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