NO. 15-35743

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN KERR EUGSTER,

Plaintiff-Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

No. 15-00375 JLR
The Honorable James L. Robart
United States District Court Judge

APPELLEES' JOINT ANSWERING BRIEF

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I. INTRODUCTION

This appeal presents only two legal questions for this Court, both of which are settled under United States Supreme Court precedent. First, Plaintiff-Appellant Stephen Kerr Eugster, an attorney, asks this Court to overrule a longstanding Supreme Court case upholding mandatory bar membership and fees as valid state requirements for the practice of law. *See Lathrop v. Donohue*, 367 U.S. 820 (1961). Mr. Eugster fails to provide this Court with any authority that would permit it to overturn United States Supreme Court precedent. In any event, *Lathrop* should not be overruled because its holding is consistent with the Supreme Court's historical and contemporary First Amendment jurisprudence.

Second, Mr. Eugster challenges the collection and use of licensing fees to fund the activities of Defendant-Appellee the Washington State Bar Association (WSBA). Mr. Eugster again ignores that his licensing fees may be collected and used in accordance with established Supreme Court precedent. Before the District Court, Mr. Eugster presented no factual allegations that the WSBA improperly collected or used his fees and he provides no basis for this Court to reverse the District Court's decision regarding the collection and use of licensing fees.

For these reasons, this Court should affirm the District Court's dismissal of Mr. Eugster's claims with prejudice.

II. STATEMENT OF JURISDICTION

Defendants-Appellees the WSBA, its named officials, and the Justices of the Washington Supreme Court are generally satisfied with Mr. Eugster's statement of jurisdiction, except that because the District Court's dismissal of Mr. Eugster's claims was final rather than interlocutory, the source for this Court's jurisdiction is 28 U.S.C. § 1291 rather than 28 U.S.C. § 1292(a)(1).

III. STATEMENT OF THE ISSUES

Mr. Eugster identifies only two issues for this Court's review. *See* Opening Brief of Appellant (Op. Br.) at 3.

First, whether this Court should "overrule[]" *Lathrop v. Donohue*, 367 U.S. 820 (1961), and hold for the first time that mandatory bar membership violates an attorney's First and Fourteenth Amendment rights under the United States Constitution.

Second, whether the WSBA's collection and use of licensing fees consistent with *Keller v. State Bar of California*, 496 U.S. 1 (1990), violates Mr. Eugster's First and Fourteenth Amendment rights under the United States Constitution.

IV. STATEMENT OF THE CASE

A. Background

Washington State has an "integrated" bar system, which means that persons wishing to practice law in the State of Washington generally must be members of and pay annual licensing fees to the WSBA. Plaintiff-Appellant's Excerpts of Record (ER) 30-31, 33 at ¶¶ 11, 17; Washington Admission and Practice Rules 1(b), 5(b)(3)-(4); Wash. Rev. Code § 2.48.130, .140 (2016).

The WSBA exists in part to promote "an effective legal system" and "understanding of and respect for our legal system and the law" and to administer "admissions to the bar and discipline of its members in a manner that protects the public and respects the rights of the applicant or member." Washington General Rule (GR) 12.1. Pursuant to authority delegated by the Washington Supreme Court, the WSBA sets the amount of and collects all licensing fees, subject to the Supreme Court's review. *Id*.

While mandatory attorney licensing fees may be used for purposes germane to the regulation or improvement of the legal profession, they may not be used for political or ideological expression unrelated to the regulation or improvement of the legal profession. *Keller*, 496 U.S. at 14. Consistent with the process approved by the United States Supreme Court in *Keller*, the WSBA

provides its members with an explanation of any expenditures that are arguably non-chargeable, and members may elect to take a deduction from their licensing fees for their proportionate share of such amounts. ER 41-42 at ¶¶ 52-54; Appellees' Supplemental Excerpts for Record (SER) 1-3 (Keller Compliance Option for the Year 2015).[1] *See also Keller*, 496 U.S. at 16-17 (expressly approving this method of protecting objecting bar members' First Amendment rights). WSBA members may challenge the amount of the WSBA's *Keller* deduction by invoking binding arbitration before an impartial decision-maker appointed by the Chief Justice of the Washington Supreme Court. SER 2-3. While the arbitration is pending, the disputing bar member need not pay the challenged portion of his or her fees. SER 2-3.

Mr. Eugster is an attorney licensed to practice law in Washington since 1970. ER 30-31 at ¶¶ 11-12. He is an active member of the WSBA and has consistently paid his annual licensing fees. ER 31 at ¶ 13. Mr. Eugster objects

[1] Mr. Eugster quoted extensively from the WSBA's Keller Compliance Website in his Complaint for Declaratory Relief (Complaint) and in his Amended and Restated Complaint for Declaratory Relief (Amended Complaint), so the Judicial Defendants attached a copy of the webpage in whole to their Motion to Dismiss. ER 41 at ¶ 52 (Amended Complaint); SER 4-21 (Complaint); SER 1-3 (Appendix A to Judicial Defendants' Motion for Judgment on the Pleadings). This Court may treat the website as incorporated into the Amended Complaint by reference. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

to the WSBA's use of revenue from licensing fees for purposes such as the lawyer discipline system, continuing legal education, and conventions. ER 38-40 at ¶¶ 43-45, 45-46 at ¶¶ 69(a)-(b). He has never challenged the *Keller* deduction amount through the arbitration process described above. *See id*.

B. Procedural History

Pursuant to 42 U.S.C. § 1983, Mr. Eugster brought an action in the United States District Court for the Western District of Washington seeking declaratory and injunctive relief against the WSBA, certain WSBA officials, and the Justices of the Washington Supreme Court. ER 28-29. He alleged two claims under the First and Fourteenth Amendments to the United States Constitution: (1) that he cannot be compelled to join and pay licensing fees to the WSBA at all, and (2) if he can be required to pay fees, that his mandatory fees are being spent on non-chargeable activities. ER 37-47.

The WSBA and the Judicial Defendants filed motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12. ER 6.[2]

[2] The Judicial Defendants, the Washington Supreme Court and its justices, mistakenly identified their motion as one seeking a Rule 12(c) judgment on the pleadings, but the District Court appropriately considered the motion as seeking dismissal under Rule 12(b)(6), and Mr. Eugster does not challenge that aspect of the District Court's decision. ER 11-13.

Regarding Mr. Eugster's challenge to mandatory bar membership and payment of licensing fees, in light of controlling precedent and the futility of amendment, the District Court granted the motions and dismissed Mr. Eugster's first claim with prejudice. ER 23. As to Mr. Eugster's second claim—regarding whether the WSBA was appropriately spending mandatory licensing fees—the District Court concluded that the Amended Complaint failed to state a claim but could conceivably be amended to include more detail or explanation regarding the expenses Mr. Eugster claimed were non-chargeable. ER 23-24. Mr. Eugster was thus afforded leave to amend his Amended Complaint, but failed to do so. ER 4-5. Accordingly, the District Court subsequently dismissed Mr. Eugster's second claim with prejudice. ER 5. Mr. Eugster then timely appealed both of the District Court's orders to this Court. ER 1-2.

V. SUMMARY OF ARGUMENT

In this appeal, Mr. Eugster objects to being required to maintain bar membership and pay annual licensing fees to the WSBA in order to practice law in the State of Washington. To avoid these requirements, he first asks this Court to overrule a United States Supreme Court decision (*Lathrop*). *Lathrop* and its progeny confirm that mandatory bar membership and fees impose

minimal burdens on speech and associational freedoms, while serving strong government interests in regulating and improving the practice of law. Because Mr. Eugster fails to articulate any legal basis upon which this Court could overrule *Lathrop* and subsequent decisions, and because, regardless, the *Lathrop* line of cases is consistent with the Supreme Court's and this Court's First Amendment jurisprudence, this Court should affirm the dismissal of Mr. Eugster's first claim.

As a fallback, Mr. Eugster then asks this Court to determine that his annual licensing fees cannot be used to fund the activities of the WSBA without his consent. Again, a United States Supreme Court decision (*Keller*) controls his claim. In *Keller*, the Supreme Court reaffirmed that mandatory bar fees may be collected and used for activities germane to regulating or improving the legal profession. The Supreme Court then held that bar associations also may fund non-chargeable activities with bar fees so long as members are provided an opportunity to abstain from funding those activities. The Supreme Court approved a specific method by which bar members may be allowed to retain the portion of annual fees used for any non-chargeable activities each year. The WSBA follows the method approved in *Keller*. Mr. Eugster does not allege otherwise, which requires dismissal of his

second claim.

In sum, Mr. Eugster has failed to state a valid claim for relief before the District Court. Thus, this Court should affirm the dismissal of Mr. Eugster's claims with prejudice.

VI. ARGUMENT

A. Standard of Review

This Court reviews a district court's grant of a Rule 12(b)(6) motion to dismiss de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). A complaint must be dismissed under Rule 12(b)(6) if it "lacks a cognizable legal theory" or "fails to allege sufficient facts to support a cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). A complaint alleges sufficient facts only if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is *plausible* on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (emphasis added). If "the well-pleaded facts do not permit the court to infer more than the mere *possibility*" of a violation of the law, the complaint fails to show entitlement to relief. *Id*. (emphasis added). A plaintiff is not entitled to rely on mere conclusory allegations. *Id*.

B. Mandatory Bar Membership and Compelled Fees Do Not Violate the First Amendment

Mr. Eugster's primary argument is that the First and Fourteenth Amendments to the United States Constitution prohibit the State of Washington from requiring any person engaged in the practice of law "to be a member of the WSBA and to pay dues levied by the WSBA." ER 37 at ¶¶ 39-40. Initially, Mr. Eugster alleged in his Amended Complaint that "[t]he issue of whether mandatory membership in an integrated bar association violates a lawyer's First and Fourteenth Amendment rights has yet to be determined." ER 37 at ¶ 41. As the District Court observed, however, Mr. Eugster's Amended Complaint "grossly misstates" applicable law, including by manipulating the wording and relevant meaning of a recent Supreme Court opinion that it quotes, *Harris v. Quinn*, 134 S. Ct. 2618 (2014). ER 16 ("[B]y substituting 'has' for 'had,' Mr. Eugster misconstrued the clear meaning of the opinion.").

On appeal, Mr. Eugster now concedes that at least one Supreme Court decision (*Lathrop*) precludes his claim, and instead spends the bulk of his argument articulating why that decision should be overruled. Op. Br. at 3, 9-25. In doing so, Mr. Eugster mischaracterizes the holding of that decision, fails to acknowledge this Court's inability to overrule a Supreme Court

decision, fails to acknowledge other binding cases that dispose of his claim, and ignores the strength of the precedent he is asking this Court to overrule.

1. Mandatory Bar Membership and Compelled Licensing Fees Are Constitutional Under *Lathrop* and *Keller*.

It is well established that mandatory bar membership and licensing fees are constitutional. The Supreme Court first addressed the question through multiple opinions in *Lathrop*, 367 U.S. at 820. There, the lead opinion consisting of four Justices concluded that mandatory bar membership does not, in and of itself, infringe on First Amendment rights because attorneys are not compelled "to associate with anyone" and remain "free to attend or not attend meetings or vote." *Id*. at 827-28, 843. The only constitutionally significant imposition on bar members is "the duty to pay dues," *id*. at 827-28, and in that respect, the Court concluded that a state may "constitutionally require that the costs of improving the profession" be "shared by the subjects and beneficiaries of the regulatory program, the lawyers." *Id*. at 843. The lead opinion declined to consider whether specific bar expenditures were constitutionally infirm in light of the limited record before it. *Id*. at 844-45. Two concurring opinions consisting of three additional Justices agreed that a state may compel lawyers to join and pay dues to an integrated bar association. *Id*. at 849-50, 865. Thus, a seven-justice majority of the Supreme Court agreed that requiring mandatory

bar membership and payment of dues does not violate the Constitution. The only disagreement between the lead and concurring opinions in *Lathrop* was whether and how the Court should decide if certain expenditures used to support the bar association's political and ideological expression complied with the Constitution. *Id*. at 849-50, 865.

Nearly thirty years later, the Supreme Court answered the latter question. In *Keller*, the Court articulated a test for when a state may use mandatory bar dues for any given bar association activities: as long as the "challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of legal service available to the people of the State,' " they are constitutionally permissible. *Keller*, 496 U.S. at 14 (quoting *Lathrop*, 367 U.S. at 843). The *Keller* Court also reaffirmed *Lathrop*'s holding that "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar." *Id*. at 4; *see also id*. at 13 ("Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services.").

As was the case in *Lathrop* and *Keller*, the only compelled act Mr. Eugster alleges is the payment of licensing fees. Mr. Eugster is "free to

attend or not attend [the WSBA's] meetings or vote in its elections as he chooses. The only compulsion to which he has been made subjected by the integration of the bar is the payment of the annual dues." *Lathrop*, 367 U.S. at 827-29, 843. The requirement of annual lawyer licensing fees, to be used for the purpose of regulating the legal profession and improving the quality of legal services available to the people of the State of Washington, complies with the First Amendment as set forth in *Lathrop* and *Keller*.

2. *Lathrop* and *Keller* Control the Outcome of This Case.

Mr. Eugster does not attempt to distinguish his challenge to mandatory bar membership and dues from the challenges at issue in either *Lathrop* or *Keller*, and appears to concede that those cases govern his claim. Op. Br. at 3, 9-25. Instead, Mr. Eugster asks this Court to overrule *Lathrop*. *Id*. Mr. Eugster's arguments are without merit.

"A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). As set forth above, seven Justices in *Lathrop* agreed that mandatory bar membership, including the payment of dues, is a minimal burden that complies with the Constitution. *Lathrop*, 367 U.S. at 843, 849-50, 865. Even if this Court disagrees with the

Supreme Court's holding in *Lathrop*, it is without the authority to overrule it. *Hart*, 266 F.3d at 1171; *see also United States v. McCalla*, 545 F.3d 750, 753 (9th Cir. 2008) (rejecting request to overrule Supreme Court precedent).

In addition to improperly asking this Court to overrule *Lathrop*, Mr. Eugster also fails to address why *Keller* and multiple Ninth Circuit decisions would not dispose of his claim even absent *Lathrop*. *See Keller*, 496 U.S. at 13-14; *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042-43 (9th. Cir. 2002) (recognizing "it is not unconstitutional for the state bar to spend its income from its members' dues for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State" (citing *Keller*, 496 U.S. at 14, and *Lathrop*, 367 U.S. at 843) (internal quotations omitted)); *Morrow v. State Bar of California*, 188 F.3d 1174, 1176-77 (9th Cir. 1999) (noting "*Keller* reaffirmed *Lathrop*'s holding that 'lawyers admitted to practice in the State may be required to join and pay dues to the State Bar' " (quoting *Keller*, 496 U.S. at 4)). Thus, even if *Lathrop* did not control the outcome here, which it does, this Court still must follow *Keller* and Ninth Circuit decisions interpreting and applying *Lathrop* and *Keller*.

Mr. Eugster also incorrectly argues that another Supreme Court case calls into question the vitality of the *Lathrop* decision. *See* Op. Br. at 6 (citing *Harris*, 134 S. Ct. 2618). In *Harris*, the Supreme Court specifically recognized the continuing validity of its previous holdings in *Lathrop* and *Keller* that mandatory bar membership serves important state interests and is constitutional. 134 S. Ct. at 2629, 2643-2644 ("States [] have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.").

No Supreme Court decision has concluded that mandatory bar membership and dues violate the First Amendment. This Court is bound to follow *Lathrop* and *Keller* unless and until these decisions are "*explicitly* overruled" by the Supreme Court. *Nunez-Reyes v. Holder*, 646 F.3d 684, 692 (9th Cir. 2011) (emphasis added) ("[E]ven if recent Supreme Court jurisprudence has perhaps called into question the continuing validity of its precedent, we are bound to follow a controlling . . . precedent until it is explicitly overruled by that Court." (internal marks omitted)); *United States v. Wilkes*, 744 F.3d 1101, 1109 (9th Cir. 2014) (rejecting argument that Supreme Court precedent had been overruled by implication). *In Wilkes*, this Court

heeded the Supreme Court's warning "against concluding that 'recent cases have, by implication, overruled an earlier precedent.' " 744 F.3d at 1109 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)). As a result, this Court should reject any argument from Mr. Eugster that later Supreme Court decisions implicitly overrule *Lathrop* or *Keller*.

In sum, Supreme Court and Ninth Circuit precedents conclusively establish that states may require attorneys to join and pay licensing fees to an integrated bar association. Thus, the District Court properly dismissed Mr. Eugster's challenge to Washington's integrated bar and collection of licensing fees under this authority.

3. The Supreme Court's Reasoning in *Lathrop* Remains Valid.

As explained above, this Court does not have authority to overrule the Supreme Court's decision in *Lathrop*. Even if this Court had such authority, however, overruling *Lathrop* would be a mistake. Contrary to Mr. Eugster's assertions, each consideration that might properly inform that determination—initial clarity, subsequent history, workability, reliance, and the underlying merits—all weigh heavily in support of maintaining *Lathrop* as precedent.

Initially, the central ruling of *Lathrop*—that a state may require bar membership and fees from persons engaged in the practice of law—was

coherent and unqualified. In particular, seven Justices agreed that requiring bar membership and fees is a minimal burden, serves important state interests, and is thus constitutional. *See Lathrop*, 367 U.S. at 827-28, 843 (Brennan, J., lead opinion) (noting that "compulsory enrollment imposes only the duty to pay dues" and serves "a legitimate end of state policy"); *id.* at 849-50, 861-64 (Harlan, J., concurring) (noting the "conjunction of a highly significant state need and the chimerical nature of the . . . abridgment of individual freedom" as "recognized by the plurality opinion"); *id.* at 865 (Whittaker, J., concurring) (noting that fee payment for "the special privilege . . . of practicing law . . . is really all that is involved"). Thus, Mr. Eugster is incorrect to suggest that the *Lathrop* Court was not "fully committed" or that the holding should be limited because it was a plurality decision. *See* Op. Br. at 10.

As discussed in Section VI(B)(1), *supra*, the disagreement in *Lathrop* was limited to whether mandatory fees could be "used to support the *political activities* of the State Bar." *Lathrop*, 367 U.S. at 844 (emphasis added). As to that distinct issue, the plurality in *Lathrop* found that the question had not been properly presented, whereas the concurring and dissenting Justices would have reached the issue and decided it. *See id.* at 844-48, 848-50, 865-66, 878. It was in reference to this discrete issue that Justice Black complained that a

decision had not been made. *See id.* at 865 (Black, J., dissenting). Mr. Eugster's quotation of that dissenting opinion is simply taken out of context. *See* Op. Br. at 10. Regardless, the Supreme Court resolved in *Keller* the "very claim" left undecided in *Lathrop*. *Keller*, 496 U.S. at 9.

Beyond the initial strength of the Court's central holding in *Lathrop*, that holding also has been consistently reaffirmed and followed for more than sixty-five years. *See, e.g.*, *Keller*, 496 U.S. at 4, 13; *Gardner*, 284 F.3d at 1042-43; *Morrow*, 188 F.3d at 1176-77. Likewise, Mr. Eugster acknowledges that over thirty jurisdictions in the United States now operate integrated bar systems consistent with *Lathrop*. *See* Op. Br. at 4. These systems, which all have been operated, administered, and developed in reliance on *Lathrop*, have proved workable for many decades. In Washington, for example, the integrated bar includes organizational structures, meaningful and adaptive programming, and detailed regulations. *See, e.g.*, Wash. GR 12.1(b). Mr. Eugster is asking to upend these systems, while incorrectly insisting that "[n]o reliance interests are at stake." Op. Br. at 17.

Finally, when considering the Supreme Court's more recent constitutional jurisprudence, *Lathrop* still was decided correctly on the merits. Mr. Eugster makes much of the development of the "strict scrutiny" doctrine.

Op. Br. at 15. The doctrine of strict scrutiny is irrelevant to the issues in this case, however, because it applies "only if the burden" on protected speech and associational freedoms "is severe." *Clingman v. Beaver*, 544 U.S. 581, 591-92 (2005); *see also Lincoln Club of Orange Cty. v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). As the Court in *Lathrop* recognized, mandatory bar membership and fees impose minimal burdens on persons seeking to practice law. 367 U.S. at 827-28, 843. Strict scrutiny is, thus, not warranted in this context. Mr. Eugster also ignores that the doctrine of strict scrutiny was well established when the Supreme Court decided *Keller*, which reaffirmed *Lathrop*. *See Keller*, 496 U.S. at 4, 13.

In support of applying strict scrutiny, Mr. Eugster quotes at length from *Knox v. Service Employees International Union*, 132 S. Ct. 2277 (2012). *See* Op. Br. at 17-18. But *Knox* discussed "compulsory subsidies for private speech" in the context of commercial enterprises and unions, rather than compelled payment of licensing fees to an integrated bar association. *Knox*, 132 S. Ct. at 2289; *see also Rosenthal v. Justices of the Supreme Ct. of Cal.*, 910 F.2d 561, 566 (9th Cir. 1990) (noting that the " 'substantial analogy' " between unions and bar associations "does not establish that [a] bar association *is* a labor union" and "substantial differences remain" (quoting *Keller*)).

Moreover, the Court in *Knox* indicated that only "exacting" scrutiny, rather than strict scrutiny, would generally apply to such compelled subsidies. *Knox*, 132 S. Ct. at 2289; *cf. Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 535-38 (9th Cir. 2015) (discussing exacting scrutiny as a more lenient form of scrutiny). In any case, the Supreme Court in *Harris* subsequently and specifically confirmed that integrated bars serve strong state interests and would withstand modern constitutional scrutiny. *Harris*, 134 S. Ct. at 2644.

Finally, Mr. Eugster asserts certain objections to the bar discipline system in Washington, all of which are irrelevant to the determination of whether a mandatory bar system is constitutional. *See* Op. Br. at 20-23 (arguing, *e.g.*, that the bar discipline system disproportionately impacts certain types of lawyers). In this appeal, Mr. Eugster is asking to overrule *Lathrop*, rather than to distinguish it based on certain characteristics of the Washington system. *See id*. at 3. Moreover, Mr. Eugster's objections to the lawyer discipline system in Washington appear to concern enforcement policy, not its requirement for mandatory membership. *See id*. at 20-23 (objecting to predominantly grievance-based enforcement).

Notwithstanding Mr. Eugster's various objections, Washington's integrated bar system imposes minimal burdens on speech and association, serves strong government interests, and remains constitutional. *Lathrop* and its progeny remain good law and the District Court properly dismissed Mr. Eugster's claims based on that precedent.

C. Mr. Eugster Failed to State a Claim That the WSBA Improperly Compels the Payment of Fees for Non-Chargeable Activities.

Mr. Eugster's secondary argument is that, if he can be required to maintain WSBA membership and pay annual licensing fees in order to practice law in Washington, his licensing fees cannot be used for the WSBA's "speech and related activities" without his consent. Op. Br. at 3, 26-28. Once again, governing United States Supreme Court precedent disposes of Mr. Eugster's claim.

In *Keller*, the Supreme Court expressly held that integrated bar associations may use mandatory fees to fund activities germane to "the State's interest in regulating the legal profession and improving the quality of legal services . . . ." 496 U.S. at 13-14. The Court also held that such associations may engage in ideological activities unrelated to these purposes, if objecting members are allowed to abstain from funding those particular activities. *See id.* at 9, 14, 16-17. The Court further specified procedures that could be used

to deduct expenses associated with these non-chargeable activities, drawing on examples from the labor union context. *See id.* at 16-17 (discussing *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)).

The deduction for non-chargeable activities used by the WSBA follows the method approved by the Supreme Court in *Keller*. *See* ER 41-47; SER 1-3. The WSBA's process allocates and explains the proportion of fees that members may deduct based on "an extremely 'conservative' test" for determining which activities are non-chargeable. SER 3. The WSBA then allows members to challenge that allocation by requesting arbitration and without paying contested fees until the arbitration is resolved. *See* SER 2-3. Mr. Eugster does not dispute that this process is consistent with the requirements the Supreme Court identified in *Keller*. *See Keller*, 496 U.S. at 16.

Mr. Eugster instead objects that when the WSBA uses mandatory fees to improve the legal profession, the activities it funds "must be germane" to that purpose. Op. Br. at 27. Yet Mr. Eugster has not identified any use of mandatory fees by the WSBA that is *not* germane to improving the legal profession in Washington. The only activities he identified before the District

Court—such as the discipline system, continuing legal education, and conventions—are all germane. *See* ER 46-47; *cf. Gardner v. State Bar of Nev.*, 284 F.3d 1040 (9th Cir. 2002) (upholding integrated bar association's public relations campaign as germane activity).[3]

In an attempt to circumvent the requirement that he identify a misuse of his licensing fees, Mr. Eugster asserts that "[a] way must be found to test each expenditure," while at the same time conceding that such "testing is not practical." Op. Br. at 27. Mr. Eugster ignores that a workable method of testing already has been determined by the Supreme Court in *Keller* and that method is followed by the WSBA. *See supra*, at 3-4; SER 2-3. The *Keller* Court specifically rejected the suggestion that such testing is impractical or unworkable and the method approved by the Court has been followed for decades. *See Keller*, 496 U.S. at 16-17.

As the plaintiff in this case, the burden was on Mr. Eugster to allege an

[3] *See also Thiel v. State Bar of Wis.*, 94 F.3d 399, 405 (7th Cir. 1996) (noting that activities alleged to be non-germane—including legal reporting awards, assistance for alcoholic lawyers, and education materials for pre-college students—were all "geared towards improving the quality of legal services" and thus could be "funded by compulsory dues"), *overruled on other grounds, Kingstad v. State Bar of Wis.*, 622 F.3d 708 (7th Cir. 2010); *Greenberg v. State Bar*, 92 Cal. Rptr. 2d 493, 496-97 (Cal. Ct. App. 2000) (approving continuing legal education classes and a program for the "prevention of substance abuse and emotional illness or stress among lawyers").

improper use of mandatory bar fees. *See, e.g.*, *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 999 (9th Cir. 2014) (failure to allege "specific facts" warrants dismissal); *cf. Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 878 (1998) (noting that a member challenging a union's use of mandatory fees cannot "file a generally phrased complaint, then sit back and require the union to prove the 'germaneness' of its expenditures without a clue as to which of its thousands of expenditures the objectors oppose" (internal quotations omitted)). The District Court even provided Mr. Eugster with the opportunity to amend his complaint a second time to allege with specificity a misuse of mandatory fees. *See* ER 6-26. Mr. Eugster opted not to amend his complaint and instead pursued this appeal. Thus, he failed to state a valid claim for relief before the District Court.

Mr. Eugster also incorrectly implies that if the Supreme Court overrules its decision in *Abood*, the method approved by the Court in *Keller* for determining non-chargeable bar activities will no longer be good law. *See* Op. Br. 27 ("If *Abood* is overruled, the dues for improvement will not have to be paid."). Mr. Eugster is wrong for multiple reasons. Although the *Keller* Court looked to the labor union context, including its prior opinions in *Teachers* and *Abood*, for examples of how non-chargeable activities could be deducted from

annual dues, the Court did not decide the constitutional issues in *Keller* based solely on *Abood*. *See Keller*, 496 U.S. at 16-17; *Rosenthal*, 910 F.2d at 566 (noting "substantial differences remain" between unions and bar associations). In any event, *Abood* remains good law unless and until it is explicitly overruled by the Supreme Court, which has not occurred. *See Nunez-Reyes*, 646 F.3d at 692 (on-point precedent must be explicitly overruled).

Finally, Mr. Eugster relies on a decision by the Nebraska Supreme Court opting to use mandatory bar fees only for regulation and not for improving the legal profession. *See* Op. Br. at 27-28. Mr. Eugster fails to acknowledge, however, that the Nebraska Supreme Court's decision was made as a policy decision in response to a petition for a rule change, not because the change was necessitated for constitutional reasons. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 286 Neb. 1018, 1018-19, 1034, 841 N.W.2d 167 (2013). Thus, the Nebraska Supreme Court's decision does not provide a basis for this Court to reverse the District Court.

The Supreme Court's decision in *Keller* resolves Mr. Eugster's second claim. The Court held that integrated bar associations may charge mandatory fees for activities targeted at improving the legal profession and specified a method by which bar associations may collect such fees. Mr. Eugster does not

dispute that the WSBA follows this approved method. Mr. Eugster failed to identify any misuse of licensing fees under *Keller* before the District Court and his claim properly was dismissed for that reason.

VII. CONCLUSION

Two United States Supreme Court decisions control Mr. Eugster's claims in this appeal. In *Lathrop*, the Court held that a state may require bar membership and fees for the practice of law. In *Keller*, the Court held that a state may use mandatory bar fees to improve the legal profession and also may fund non-chargeable activities if members are allowed to abstain from funding those particular activities. At all times, Washington's integrated bar system has complied with this precedent and Mr. Eugster does not allege otherwise. Accordingly, under *Lathrop* and *Keller*, the District Court properly dismissed Mr. Eugster's claims with prejudice and this Court should affirm that decision.

RESPECTFULLY SUBMITTED this 30th day of March, 2016.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby affirm that there are no known related cases pending before this Court.

DATED this 31st day of March, 2016.

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