

No. 16-35542

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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STEPHEN KERR EUGSTER,  
Plaintiff - Appellant,

v.

PAULA LITTLEWOOD, Executive Director, WSBA, in her official capacity;  
DOUGLAS J. ENDE, Director of the WSBA of Disciplinary Counsel, in his  
official capacity; FRANCESCA D'ANGELO, Disciplinary Counsel, WSBA Office  
of Disciplinary Counsel, in her official capacity,  
Defendant - Appellees.

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**APPEAL FROM THE U.S. District Court for Eastern Washington, Spokane,  
No. 2:15-cv-00352-TOR  
HONORABLE Thomas O. Rice**

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**DEFENDANTS-APPELLEES' RESPONSE TO  
MOTION TO TAKE JUDICIAL NOTICE**

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## **I. INTRODUCTION**

In his Motion to Take Judicial Notice, Plaintiff-Appellant Stephen Kerr Eugster (“Eugster”) asks this Court to take judicial notice of 18 separate filings from the ongoing state bar disciplinary proceeding against him. Defendants-Appellees (the “WSBA Officials”) do not object to this Court taking judicial notice of the documents. The WSBA Officials do object, however, to Eugster’s description of the documents and his assertions regarding their relevance to this appeal. Eugster argues the documents show that he is unable to raise his constitutional challenge within the disciplinary proceeding. A review of his submitted documents, however, reveals that Eugster has been afforded the opportunity to pursue his constitutional challenge. Regardless, Eugster’s submitted documents are irrelevant to the outcome of this appeal because there are multiple independent grounds on which this Court may affirm the district court’s dismissal of this case.

## **II. PROCEDURAL HISTORY**

In this appeal, Eugster alleges that Washington’s lawyer discipline system violates procedural due process requirements due to a lack of impartiality. *See* ECF No. 2 at 15-22; ECF No. 9 at 11-13. Eugster filed his opening brief arguing this claim on October 10, 2016. *See* ECF No. 2.

The WSBA Officials filed their answering brief on December 8, 2016, arguing that this Court should affirm dismissal of this lawsuit on any of four independent grounds: *res judicata*, *Younger* abstention, failure to state a claim, and lack of ripeness. *See* ECF No. 9 at 13-24. Regarding *Younger* abstention, the WSBA Officials explained that there is an ongoing state bar disciplinary proceeding against Eugster that requires federal abstention. *See id.* at 17-20. In furtherance of this argument, the WSBA Officials submitted into the record the Formal Complaint and Motion to Dismiss from the disciplinary proceeding against Eugster, *see* ECF Nos. 11-2 and 11-3, and moved this Court to take judicial notice of these filings, *see* ECF No. 11-1.

Eugster then filed his reply brief on December 22, 2016. *See* ECF No. 15. At the same time, Eugster filed the present Motion to Take Judicial Notice (the “Motion”). *See* ECF No. 16-1. The Motion requests judicial notice of 18 filings from Eugster’s disciplinary proceeding, including the Formal Complaint and Motion to Dismiss. *See id.* at 1-2. Eugster asserts these documents are relevant to this appeal, but bases that assertion on an order issued by the Washington State Superior Court for the County of Spokane in another lawsuit filed by Eugster, not the district court’s order of dismissal in this case. *See id.* at 3-4.<sup>1</sup> The essential

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<sup>1</sup> Contrary to Eugster’s assertions, the district court below did not dismiss Eugster’s claims because the Washington Supreme Court has exclusive

claim made in the Motion, however, is that the documents “establish that in no way is [Eugster] going to be able to advance his constitutional concerns in the discipline proceedings against him.” *Id.* at 5. As set forth below, Eugster’s claim regarding the documents is both inaccurate and irrelevant to the outcome of this appeal.

### III. ARGUMENT

The WSBA Officials do not object to this Court taking judicial notice of filings from Eugster’s ongoing disciplinary proceeding. *See* ECF No. 11-1. The WSBA Officials do object, however, to Eugster’s claim that his submitted documents show he is unable “to advance his constitutional concerns in the discipline proceedings against him.” ECF No. 16-1 at 5. As explained below, a review of the documents reveals that the opposite is true. Regardless, there are multiple independent grounds for affirming dismissal of this lawsuit, which remains meritless.

Eugster’s submitted documents reveal that he has been permitted to pursue his constitutional challenge in the ongoing disciplinary proceeding against him. In response to Eugster’s Answer, the Office of Disciplinary Counsel (“ODC”) expressly acknowledged that Eugster “is entitled to present defenses that raise constitutional . . . issues . . . as they apply to him . . . .” ECF No. 16-1 App. at 28. ODC merely objected that Eugster cannot assert “counterclaims” or “third-party

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jurisdiction. *See* ECF No. 16-1 at 3-4. Rather, the district court dismissed Eugster’s claims on *res judicata* grounds. ECF No. 3-1 at 7-21.

claims” nor request “affirmative relief” in the proceeding. *Id.*; *cf. id.* at 25 (Eugster’s request for damages). ODC moved to strike these extraneous portions of Eugster’s Answer, as opposed to his “affirmative defenses, including those that assert constitutional challenges to the disciplinary system.” *Id.* at 31. The hearing officer granted this limited request. *See id.* at 150.<sup>2</sup>

Eugster also has not been unduly limited in his ability to seek discovery. Eugster sought leave to make numerous broad requests, including for individualized, detailed information about every lawyer grievance filed in Washington over a five-year period. *See id.* at 202. In response, ODC explained that “much of” what Eugster requested was “confidential . . . unduly burdensome, or of minimal relevance . . . .” *Id.* at 210. The hearing officer agreed, finding all but one of Eugster’s requests “not relevant to [his] affirmative defenses” and not likely “to lead to information that is relevant and admissible.” *Id.* at 255. The hearing officer thus denied all of Eugster’s requests but one, without prejudice to “conducting additional discovery, at a later time, both formal and informal.” *Id.* at 256. Thus, Eugster has been allowed to conduct discovery in his disciplinary proceeding to the extent relevant and proper.

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<sup>2</sup> Likewise, the fact that Eugster’s motion to dismiss the disciplinary proceeding and to disqualify disciplinary counsel were denied reflects the lack of merit in those motions, not a lack of opportunity raise his constitutional challenge. *See* ECF No. 16-1 App. at 148, 195.

To whatever extent Eugster has objections to the particular decisions that have been made in his disciplinary proceeding, he must raise those on appeal to the Washington Supreme Court, not in a collateral attack in federal district court. *See* ECF No. 9 at 17-20. The *Younger* doctrine precludes federal courts from interfering in precisely these circumstances, when important state proceedings are ongoing and the plaintiff's claim may be litigated in those proceedings (and ultimately appealed to the state's highest court and then to the United States Supreme Court). *See id.* It is sufficient that, as is the case here, "constitutional rights may be asserted" in the state bar proceedings as a matter of law. *Canatella v. California*, 404 F.3d 1106, 1111 (9th Cir. 2005). Accordingly, Eugster cannot obtain federal court review of the hearing officer's discrete rulings, and he must pursue his constitutional challenge within the state proceeding.

Finally, Eugster's request for judicial notice does not affect the outcome of this appeal. There are multiple independent grounds for affirming dismissal of this lawsuit—including *res judicata*, failure to state a claim, and lack of ripeness—in addition to *Younger* abstention. *See* ECF No. 9 at 13-17, 20-24. The filings from Eugster's disciplinary proceeding are not relevant to any of these grounds for dismissal, each of which is independently sufficient to affirm the district court.

#### IV. CONCLUSION

The WSBA Officials do not object to this Court taking judicial notice of filings from the ongoing state disciplinary proceeding against Eugster. But those filings demonstrate only that Eugster is being allowed to raise his constitutional challenge within that proceeding, consistent with Washington law governing such proceedings. Regardless, this lawsuit remains subject to dismissal on multiple independent grounds and the district court should be affirmed.

Respectfully submitted this 3<sup>rd</sup> day of January, 2017.

By s/ Paul J. Lawrence

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9th Circuit Case Number(s)

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