No. 16-35542

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

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

APPELLEES' BRIEF

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I. INTRODUCTION

In response to being disciplined for professional misconduct as an attorney in 2009 and multiple investigations into subsequent misconduct in the years since, Plaintiff-Appellant Stephen Kerr Eugster ("Eugster") has filed one lawsuit after another attempting to upend Washington's entire lawyer discipline system. Eugster's prior lawsuits against the Washington State Bar Association ("WSBA") and its officials have all been found to be baseless; this case is no different.

This Court should affirm the district court's dismissal of this lawsuit with prejudice, for multiple independent reasons. First, Eugster had multiple opportunities to make the same arguments in prior litigation but opted not to do so. Eugster's serial litigation is barred by the doctrine of res judicata. Second, there is an ongoing state bar disciplinary proceeding against Eugster that warrants abstention under the *Younger* abstention doctrine. Eugster can assert and has asserted his objections within that proceeding, which is subject to judicial review by the Washington Supreme Court. Third, Eugster's allegations about due process ignore Washington's rules governing lawyer discipline proceedings and are legally insufficient to state a valid claim for relief. Finally, Eugster's claim is unripe, because he has not identified a particular deprivation of due process that he has suffered or is likely to suffer. For any and all of these reasons, this Court should affirm the district court.

II. STATEMENT OF JURISDICTION

Appellees agree with Eugster's statement of jurisdiction.

III. ISSUE STATEMENT

Whether one or more of the following grounds supports the district court's decision to dismiss this lawsuit with prejudice:

(1) prior litigation between Eugster and WSBA officials requiring dismissal under the res judicata doctrine;

(2) an ongoing state discipline proceeding against Eugster requiring abstention under the *Younger* doctrine;

(3) failure to state a valid claim for relief; and

(4) lack of ripeness.

IV. STATEMENT OF THE CASE

A. Eugster's History of Prior Litigation Against the WSBA.

This case is the latest in a number of proceedings between Eugster and the WSBA. The prior disputes provide context for Eugster's arguments here. This Court may take judicial notice of these prior cases. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings.").

In 2005, the WSBA charged Eugster with numerous counts of attorney misconduct. *See In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 307, 209 P.3d 435 (2009) ("*Eugster* I"). Among other issues, Eugster had filed a

"baseless" petition, ignored his client's direction, and refused to acknowledge that his client had discharged him. *Id.* at 317-18. A hearing officer found Eugster had violated numerous rules of professional conduct. *Id.* at 307. The WSBA Disciplinary Board then recommended that Eugster be disbarred. *Id.* at 311. In 2009, five justices of the Washington Supreme Court decided instead to suspend Eugster for 18 months, while the remaining four justices agreed with the Disciplinary Board's conclusion that he should be disbarred. *Id.* at 327-28.

In the meantime, the WSBA was investigating another complaint it had received against Eugster based on other conduct. *See Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237, at *1 (E.D. Wash. July 23, 2010) ("*Eugster* II"). This investigation culminated in a letter from the WSBA to Eugster in December of 2009 warning Eugster "to more carefully analyze the law before filing lawsuits" but otherwise dismissing the matter. *Id.*

In January 2010, Eugster filed a complaint in the Eastern District of Washington against the WSBA and its officials, alleging that Washington's attorney discipline system violated his due process rights. *See id.* at *2. The district court dismissed the case. *Id.* at *11. Specifically, the court determined that Eugster lacked standing to assert his claims and that his claims were "unripe" because he did "not present concrete legal issues . . . but rather, abstractions." *Id.* at *8 (internal quotations omitted) . This Court affirmed, noting that Eugster's

objections were "contingent" and he had not explained "what he will do in the future that might subject him to the allegedly unconstitutional attorney disciplinary process . . . ." 474 Fed. App'x 624, 625 (9th Cir. 2012).

In September 2014, another grievance was filed against Eugster, within two weeks of his being retained on a matter. Pl.-Appellant's Excerpts of Record ("ER") at 46. The WSBA immediately sent an acknowledgement of the grievance to Eugster. *See id.* In November 2014, the WSBA notified Eugster that it was conducting an investigation of the grievance. *See* ER at 47. Eugster was informed that the investigation had been assigned to Managing Disciplinary Counsel, who began corresponding with Eugster regarding the investigation. *See id.*

On March 12, 2015, Eugster filed another lawsuit in federal court against the WSBA and its officials, this time in the Western District of Washington. *See Eugster v. Wash. State Bar Ass'n*, No. C15-0375-JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("*Eugster* III"). In that lawsuit, Eugster complained that his constitutional rights of association and speech were violated by the requirement of membership in the state bar and payment of license fees in order to practice law. *Id.* at 8-16. In support of these claims, Eugster explained that he did "not wish to associate with the WSBA" because of what he believed to be "significant problems" with the lawyer discipline system, including a failure to provide "due

process of law." Supp. Excerpts of Record ("SER") at 9-10.[1] Eugster did not assert this alleged failure to provide due process as a separate claim, as he does here. *See id*.

In September 2015, the district court in *Eugster* III dismissed Eugster's complaint. 2015 WL 5175722, at *1. Specifically, the court determined Eugster had "grossly misstate[d]" and "misconstrued" governing precedent, which authorized mandatory bar membership and fees. *Id*. at *5. Eugster appealed to this Court, and that appeal remains pending. *Eugster* III, No. 15-35743 (9th Cir. 2015).

In the meantime, the bar disciplinary process had moved forward and the latest grievance against Eugster continued to be investigated. In April 2015, Eugster received notice that the ongoing investigation had been assigned to an investigator, who met with Eugster to discuss the matter. ER at 48. Eugster then received notice the investigation had been assigned to Disciplinary Counsel, with whom Eugster corresponded. *See id.* In late September 2015, Eugster received a request for more information, to which he responded. *See id.* On November 5, 2015, Eugster was notified that Disciplinary Counsel would be recommending a

[1] Court filings from Eugster's other lawsuits were submitted to the district court for its convenience and are included in Appellees' Supplemental Excerpts of Record. This Court may take judicial notice of these filings because they are referenced in Eugster's Complaint and are matters of public record. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *MGIC*, 803 F.2d at 504.

formal hearing on the pending grievance against him. *See id.* at 49. A formal hearing was subsequently ordered. *See id.* at 49-50.

On November 9, 2015—four days after Eugster received notice of the hearing recommendation—Eugster filed another lawsuit against the WSBA and its officials, this time in Spokane County Superior Court. *Eugster v. Wash. State Bar Ass'n*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015) ("*Eugster* IV"). Eugster's complaint was largely identical to his complaint here, sounding in due process, but also including damages claims. *See* SER at 44-63. On April 1, 2016, the superior court dismissed the complaint with prejudice, concluding that the Washington Supreme Court has exclusive jurisdiction over lawyer discipline in Washington, that Eugster already had been afforded an opportunity to raise his objections within his prior disciplinary proceedings, and that the WSBA's officials were immune from Eugster's damages claims. *See* ER at 20-22 (*Eugster* IV order). Eugster appealed that decision to Division III of the Washington Court of Appeals, and that appeal remains pending.

B. Eugster Files the Current Case Against the WSBA Officials.

On December 22, 2015, soon after Eugster filed his lawsuit in Spokane County Superior Court, he filed the present lawsuit in the Eastern District of Washington. The allegations in the two lawsuits are nearly identical. *Compare* ER at 24-58, *with* SER at 19-64.

On March 9, 2016, prior to effecting service in this case, Eugster filed a slightly altered Amended and Restated Complaint ("Amended Complaint"). *See* ER at 24-58. The Amended Complaint makes various allegations concerning the rules and structure of Washington's lawyer discipline system and asserts that the system "violates Procedural Due Process." ER at 55. The Amended Complaint also asserts that the discipline system violates Eugster's First Amendment rights, and in particular his "Associational Freedoms." ER at 26, 54. Eugster served the Amended Complaint on the WSBA officials as defendants in March of 2016.

The WSBA officials moved to dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The motion to dismiss explained that Eugster's claims were barred by the res judicata doctrine, legally insufficient to state a valid claim for relief, and unripe. The motion further explained that an ongoing bar disciplinary proceeding against Eugster had been ordered to hearing, with a formal complaint ("Formal Complaint") forthcoming, and that abstention was thus warranted under the *Younger* doctrine to avoid interference with those ongoing state proceedings.

On June 16, 2016, shortly before the district court ruled on the pending motion to dismiss, the Formal Complaint against Eugster in his disciplinary proceeding was filed. *See* ECF No. 11-2 at 1-8. The Formal Complaint charges Eugster with numerous violations of Washington's Rules of Professional Conduct,

based on his dealings with a vulnerable senior citizen. *See id.* The violations identified include legal representation that was directly adverse to Eugster's other clients (who benefitted), improper execution of a power of attorney (for Eugster's benefit), and charging unreasonable attorney fees (including for house chores). *See id.* In response, Eugster has argued within the discipline proceeding that the entire proceeding violates his "fundamental constitutional procedural due process right to a fair and impartial hearing." ECF No. 11-3 at 2.[2]

On June 29, 2016, the district court dismissed this lawsuit with prejudice. ER at 18. The court focused its analysis on whether the res judicata doctrine bars Eugster's claims. Rather than relying on *Eugster* I or *Eugster* III as the basis for applying the res judicata doctrine (as the WSBA officials argued), the district court relied on *Eugster* IV, the Spokane County case. ER at 12-13. The district court noted that the complaints in the two cases "are nearly identical." ER at 17. The court further observed that Eugster's claims "were already adjudicated" in *Eugster* IV. *Id.* Specifically, the *Eugster* IV court dismissed Eugster's claims because the Washington Supreme Court has "exclusive jurisdiction over matters of lawyer discipline" in Washington (through its lawyer discipline system as administered by

[2] For the Court's convenience, copies of relevant filings from Eugster's ongoing disciplinary proceeding have been submitted for judicial notice. *See* ECF No. 11. The Court can take judicial notice of these filings as public documents. *See Daniels-Hall*, 629 F.3d at 998; *MGIC*, 803 F.2d at 504.

its agent the WSBA) and Eugster "already had been afforded an opportunity to raise his constitutional concerns with the Washington Supreme Court in his prior disciplinary proceedings," namely in *Eugster* I. ER at 9-10. Because Eugster's identical claims were dismissed in *Eugster* IV, the district court in this case dismissed the Amended Complaint with prejudice. The court acknowledged that the WSBA officials had presented "multiple arguments" for dismissal, but did "not address" those "remaining arguments" because res judicata was a total bar to this lawsuit. ER at 12, 17.

V. SUMMARY OF ARGUMENT

On appeal, Eugster continues to pursue his systemic due process challenge to Washington's lawyer discipline system, arguing that the system lacks impartiality. He argues that res judicata does not apply to his due process claim because *Eugster* IV, his nearly identical lawsuit in state court, was dismissed for want of jurisdiction rather than on the merits. This technical argument overlooks the context and substance of the *Eugster* IV decision. It also ignores that this Court's review is *de novo* and that the district court's order of dismissal can be affirmed on any legitimate ground supported in the record.

There are multiple independent grounds for affirming the district court's order of dismissal here. First, Eugster's claim is barred by res judicata, because he already had the opportunity to raise the same claim in *Eugster* I and then again in

Eugster III, but he opted not to do so. Second, Eugster's state bar proceedings are ongoing and he has the opportunity to raise his constitutional objections in those proceedings. Under the *Younger* doctrine, a federal court should abstain in such circumstances to avoid unduly interfering with the state proceedings. Third, Eugster's allegations are legally insufficient to state a claim for relief. The nature and structure of the WSBA's discipline system includes adequate procedures as a matter of law. Finally, Eugster's claim is unripe. He has failed to identify any particular deprivation of due process that he has suffered or is likely to suffer. Any one of these grounds is sufficient to affirm the district court's order of dismissal with prejudice.

VI. STANDARD OF REVIEW

This Court will "review the district court's decision to grant a motion to dismiss *de novo*." *Whittaker Corp. v. United States*, 825 F.3d 1002, 1005 (9th Cir. 2016). Facts alleged in the complaint are taken as true. *Id.* at 1006. The Court may also "take judicial notice of matters of public record outside the pleadings." *MGIC*, 803 F.2d at 504. Additionally, as Eugster concedes, *see* ECF No. 2 at 9, the Court "may affirm on any ground supported by the record." *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 554 (9th Cir. 2016) (citations omitted); *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000).

Dismissal is proper "when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory." *Whittaker*, 825 F.3d at 1006 (internal quotes omitted). A complaint "that offers labels and conclusions, a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement will not suffice." *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 641 (9th Cir. 2014) (internal marks omitted). Instead, the complaint must allege "specific facts" establishing the plausibility of a valid claim. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 999 (9th Cir. 2014).

VII. SCOPE OF REVIEW

Eugster has abandoned all but one potential claim in this case: that Washington's lawyer discipline system lacks impartial decision-making as a component of due process. Eugster's opening brief does not seek review of the district court's dismissal of any other potential claim, whether sounding under the First Amendment or otherwise. *See* ECF No. 2 at 15-22. Thus, any other claim Eugster might have raised before the district court has been abandoned. *See Williamson*, 208 F.3d at 1149 ("It is well established in this Circuit that claims which are not addressed in the appellant's brief are deemed abandoned." (internal quotations omitted)); *see also AE ex rel. Hernandez v. County of Tulare*, 666 F.3d

631, 638 (9th Cir. 2012) (noting each claim must be "specifically and distinctly" argued in opening brief to be raised on appeal).

In *Williamson*, the plaintiffs had pleaded "two basic claims" sounding in fraud, one based on the defendant's allegedly fraudulent statements concerning overtime wages, and another based on statements concerning job security. 208 F.3d at 1148-49. The district court dismissed both claims on the same grounds: vagueness, the limitations period, and preemption. *Id.* at 1149. Arguing against these grounds for dismissal, the plaintiffs' opening brief on appeal discussed only the statements about job security, not the statements about wages. As a result, this Court held that the plaintiffs had "abandoned" their claim related to the wage statements. *Id.* The Court limited the scope of its review to whether or not the job security claim had been properly dismissed. *See id.*

The same principle applies here. Eugster's opening brief does not identify any basis for his challenge to the lawyer discipline system to proceed, other than an alleged due process violation based on a lack of impartiality. *See* ECF No. 2 at 15-22. The opening brief does not address the First Amendment, associational rights, or any other potential claim Eugster may have argued before the district court. *See id.* Accordingly, this Court should limit its review to whether the district court properly dismissed Eugster's due process claim asserting that the lawyer discipline

system as a whole is not impartial. As explained below, the district court property dismissed this claim.[3]

VIII. ARGUMENT

A. Eugster's Claim Should Have Been Asserted in Prior Proceedings and Is Now Barred Under the Res Judicata Doctrine.

The first reason that this Court should affirm dismissal of this lawsuit is that Eugster already had the opportunity to litigate his claim in prior proceedings, and his serial litigation is now barred under the res judicata doctrine. Res judicata is intended to "avoid[] repetitive litigation, conserve[e] judicial resources, and prevent[] the moral force of court judgments from being undermined." *Int'l Union of Operating Eng'rs-Emp'rs Constr. Indus. Pension v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993) (internal quotations omitted). The doctrine "bars litigation in a subsequent action of any claims that were raised or could have been raised in [a] prior action." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). It applies whenever there is a prior "final judgment" between the same or related parties and "the two suits arise out of the same transactional nucleus of facts." *Id.* at 713-14 (internal quotes omitted). Here, there are two relevant prior

[3] Even if Eugster had properly raised other claims in this appeal, dismissal would still be appropriate for the same reasons explained below: res judicata, *Younger* abstention, failure to state a claim, and lack of ripeness.

judgments, *Eugster* III and *Eugster* I, either one of which precludes Eugster's claim.[4]

First, Eugster should have raised his claim in *Eugster* III, his federal lawsuit from last year challenging mandatory bar membership, which was dismissed with prejudice. Such a dismissal qualifies as a final judgment for res judicata purposes. *See Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). The *Eugster* III lawsuit arose out of the same nucleus of facts, namely, Eugster's involvement with, and abstract objections to, Washington's lawyer discipline system. *See* SER at 9-11. Eugster even alleged a deprivation of due process at the time—he simply chose not to assert it as a separate claim, as he has done here. *See* SER at 10.

Eugster responds that he could not have raised his due process claim in *Eugster* III because at the time he "did not have standing" (as was the case in *Eugster* II) and the claim "was not ripe." ECF No. 2 at 15. But in *Eugster* II, this Court found that Eugster lacked standing because he could not identify how he

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[4] As they did before the district court, the WSBA officials rely on *Eugster* III and *Eugster* I as the basis for res judicata in this appeal. *See* ER at 12-13. Eugster has assigned error to the district court's reliance on *Eugster* IV as the basis for res judicata, because the *Eugster* IV court dismissed Eugster's case for lack of jurisdiction. *See* ECF No. 2 at 12-15. But in *Eugster* IV, the superior court also determined that Eugster had the opportunity but failed to raise his due process claim in *Eugster* I. *See* ER at 21-22. This Court need not determine whether the district court properly relied on *Eugster* IV as the basis for res judicata, however, as *Eugster* III and *Eugster* I both provide independent grounds to apply the res judicata doctrine, as explained below.

would likely become subject to the attorney disciplinary process again in the future. 474 Fed. App'x at 625. In contrast, by the time he filed *Eugster* III, a new grievance had been filed against Eugster and an investigation had commenced. SER at 59-60. As to ripeness, in light of the vague and inherently abstract nature of the allegations in the Amended Complaint, Eugster's due process claim is no more ripe today than it was at the time of *Eugster* III. Lack of ripeness is simply an additional reason to affirm the dismissal of this lawsuit. *See infra*, § VIII(D).

Second, Eugster should have raised his due process claim even earlier, in *Eugster* I, his prior disciplinary proceedings.[5] As the *Eugster* IV court observed, the lawyer discipline system in Washington provides an adequate forum for adjudicating any given due process objections. *See* ER at 21; *see also, e.g.*, *In re Disciplinary Proceeding Against Blanchard*, 158 Wn.2d 317, 330-31, 144 P.3d 285 (2006). Accordingly, Eugster already "had the opportunity to raise his constitutional concerns with the Washington Supreme Court in his prior discipline case." ER at 21. His claim is now barred.

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[5] Federal courts give state court judgments the same preclusive effect as they would receive in the courts of the originating state. *See, e.g., Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Washington law on the application of res judicata is the same as federal law in all material respects. *See, e.g., Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997) (noting that res judicata bars a matter from being "relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in [a] prior proceeding").

Eugster responds that he was not "aware that the WSBA violated his civil rights" until he "had gone through the entire discipline action . . . ." ECF No. 2 at 16. But Eugster's due process claim in this case is abstract and based solely on the rules and structure of the disciplinary system, not specific allegations of how the system was applied to him. *See id.* at 16-23. Moreover, to the extent he is now complaining about specific past due process violations in a prior disciplinary action, those claims are barred not only by res judicata, but also by the *Rooker-Feldman* doctrine, which precludes direct review in lower federal courts of state court judgments. *See Eugster* II, 2010 WL 2926237, at *3-4 (discussing *Rooker-Feldman* doctrine and citing cases).

Eugster also insists that the final judgment in *Eugster* I is "void" because of an alleged lack of impartiality. ECF No. 2 at 17-22. But this attempt at a "collateral attack" against *Eugster* I "cannot be squared with res judicata and the practical necessity served by that rule." *Travelers Indem. Co. v. Bailey*, 557 U.S 137, 154 (2009). The cases Eugster cites involve due process challenges within the same proceedings—not collateral attacks on prior judgments. *See* ECF No. 2 at 19 (citing cases). In his prior discipline action, Eugster was "given a fair chance" to raise any objections before the Washington Supreme Court, and he also had the opportunity to seek review before the U.S. Supreme Court. *Travelers*, 557 U.S. at 153. The time for challenging the *Eugster* I judgment has long since passed.

In sum, Eugster already had multiple opportunities to raise his due process claim but opted not to do so. He should not be allowed to continue engaging in serial litigation against the WSBA and its officials. Under the doctrine of res judicata, this Court should affirm the dismissal of this lawsuit.

B. The Ongoing State Bar Proceedings Against Eugster Warrant Abstention Under the *Younger* Doctrine.

The second reason that this Court should affirm dismissal of this lawsuit is that the state bar proceedings against Eugster are ongoing and require abstention under the *Younger* doctrine. The purpose of the *Younger* abstention doctrine is to ensure federal courts do not "unduly interfere with the legitimate activities of the States." *M&A Gabaee v. Cmty. Redev. Agency*, 419 F.3d 1036, 1040 (9th Cir. 2005). To that end, a federal court "must abstain" when (1) there are "ongoing state proceedings" that (2) "implicate important state interests" and (3) the federal plaintiff's claims may be litigated "in the state proceedings." *M&A*, 419 F.3d at 1039. Each of these elements is satisfied here.

First, there are ongoing state proceedings, specifically the lawyer disciplinary action against Eugster. *See* ECF No. 11-2 at 1-8. As this Court has clarified, "*Younger* abstention applies . . . as long as [the state action is initiated] before proceedings of substance on the merits occur in federal court." *M&A*, 419 F.3d at 1041 (citing *Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987)). Here, the state disciplinary action against Eugster began in late 2014, when an

official investigation governed by detailed rules was commenced. *See* ER at 47; Wash. Rules for the Enforcement of Lawyer Conduct ("ELC") Title 5; *cf. In re Scannell*, 169 Wn.2d 723, 740, 239 P.3d 332 (2010) (holding lawsuit filed during initial bar investigation "was not preexisting" and did not warrant disqualification of hearing officers named as defendants in lawsuit). A formal hearing was then ordered, *see* ER at 49-50, which rendered a bar complaint and hearing inevitable under Washington's rules, *see* ELC 10.3(a)(1). Finally, the Formal Complaint was filed on June 16, 2016, *see* ECF No. 11-2 at 1, which was before the district court's June 29, 2016, order dismissing this case. The disciplinary action against Eugster was thus already well underway. *See Polykoff*, 816 F.2d at 1332 (holding that state proceeding initiated after motion to dismiss was filed in federal court and two days before the federal court held a preliminary injunction hearing was an ongoing state proceeding and required abstention under *Younger*). Moreover, no proceedings of substance on the merits ever took place in this case. *See id.* (noting "extensive hearings" or a preliminary injunction qualify as proceedings of substance). In sum, the disciplinary action against Eugster qualifies as an ongoing state proceeding.

Second, the U.S. Supreme Court has determined that lawyer disciplinary proceedings qualify as proceedings that implicate important state interests. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434-35 (1982). As the *Middlesex* Court explained, "each state has an extremely important

interest in maintaining and assuring the professional conduct of the attorneys it licenses." *Id.* at 434.

Third, Eugster's objections may be litigated in his disciplinary proceeding, which is subject to judicial review by the Washington Supreme Court. *See* ELC 10.1, 10.8, 12.2-12.4. This Court has held that where, as here, "constitutional rights may be asserted in disciplinary proceedings . . . and on judicial review of such proceedings," the disciplinary proceedings provide "the requisite opportunity to litigate" for purposes of applying the *Younger* doctrine. *Canatella v. California*, 404 F.3d 1106, 1111 (9th Cir. 2005). This is true even if judicial review is "wholly discretionary," so long as some form of appellate review is provided. *Id.*

In sum, all three elements for *Younger* abstention are satisfied in this case. Thus, this Court should affirm the district court's order of dismissal with prejudice. *See id.* at 1111-12 (noting "federal courts must abstain permanently" when claimant is seeking only injunctive relief, as here). Eugster's allegation of bias in the state system does not change the result. He has failed "to offer any actual evidence to overcome the presumption of honesty and integrity in those serving as adjudicators." *Id.* at 1112 (internal quotations omitted). Likewise, this Court has "specifically rejected" the argument that a state supreme court "has an inherent conflict of interest in considering constitutional challenges to state bar disciplinary

proceedings." *Id.* To avoid unduly interfering with the ongoing state disciplinary proceeding against Eugster, this Court should affirm dismissal of this lawsuit.

C. Eugster Has Failed to Identify Any Violation of Due Process.

The third reason that this Court should affirm dismissal of this lawsuit is that Eugster has failed to state a valid claim for relief by not identifying any procedural deficiency within Washington's lawyer discipline system, let alone a deficiency of constitutional magnitude. Eugster ignores governing precedent on this issue and his due process claim is meritless.

This Court has previously reviewed a lawyer discipline system identical to Washington's in all relevant respects, and held that such a system is more than adequate. *See Rosenthal v. Justices of the Supreme Ct. of Cal.*, 910 F.2d 561, 564-65 (9th Cir. 1990). In *Rosenthal*, this Court concluded that California's bar system provided disciplined lawyers "with more than constitutionally sufficient procedural due process." *Id.* at 565. The Court reached this conclusion because disciplined lawyers were afforded (1) the right to a hearing, (2) the ability "to call witnesses and cross-examine," (3) the burden being on the state "to establish culpability by convincing proof," and (4) ultimate, independent review by the state's supreme court. *See id.* at 564-65. Washington's system provides each of these protections. *See* ELC Title 10 (hearings); ELC 10.1, 10.11, 10.12, 10.13 (ability to call and cross-examine witnesses); ELC 10.14(b) (burden on state to prove misconduct "by

a clear preponderance"); ELC Title 12 (supreme court review). Thus, as with the system considered in *Rosenthal*, Washington's lawyer discipline system provides more than adequate process.

Eugster's only response is that these protections "prove[] nothing if the System itself is not neutral." ECF No. 2 at 22. But independent review by the Washington Supreme Court ensures the requisite neutrality. *See Rosenthal*, 910 F.2d at 564-65; *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1435-36 (9th Cir. 1995) ("So long as the judges hearing the [lawyer] misconduct charges are not biased . . . there is no legitimate cause for concern over the composition and partiality of the [initial disciplinary committee]."). Further, this Court has "specifically rejected" the notion that a state supreme court has "an inherent conflict of interest" in reviewing "state bar disciplinary proceedings." *Canatella*, 404 F.3d at 1112.

Eugster's complaints about the various roles of bar officials in the discipline system are equally meritless. *See* ECF No. 2 at 17-19. This Court has rejected the notion that a bar association having "both investigative and adjudicative functions" creates an "unacceptable risk of bias." *Hirsh v. Justices of the Supreme Court of Cal.*, 67 F.3d 708, 714 (9th Cir. 1995). The Court also has acknowledged that "an impartial decisionmaker may come from within the agency against which [a] claim is made." *Kennerly v. United States*, 721 F.2d 1252, 1256 (9th Cir. 1983). To

overcome the "presumption of honesty and integrity in those serving as adjudicators," Eugster would need to present "actual evidence" of bias, specific to a given adjudicator. *Canatella*, 404 F.3d at 1112 (internal quotes omitted); *see also Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995). He has not done so.

Eugster places great reliance on *Girard v. Klopfenstein*, 930 F.2d 738 (9th Cir. 1991), but that case only confirms that Eugster's objection here is meritless. In *Girard*, this Court held that certain commercial "debarment" proceedings met the due process requirement of impartiality. 930 F.2d at 743. The Court reasoned that by regulation, the procedures used had to be "'consistent with principles of fundamental fairness,'" which "includes the right to an impartial decision maker." *Id.* at 742-43 (quoting regulation). Here, Washington's disciplinary rules are even more specific, expressly requiring impartiality on the part of each adjudicator involved. *See* ELC 2.3(h), 2.6(b), (d)(1)(E), (4), 10.2(b).

In sum, Eugster has failed to allege a valid due process claim. As a matter of law, Washington's lawyer discipline system provides adequate procedural protections to meet applicable due process requirements. For this additional reason, the Court should affirm dismissal of this lawsuit.

D. Eugster's Claim Is Unripe.

The fourth reason that this Court should affirm dismissal of this lawsuit is that Eugster's claim is premature and not ripe for adjudication. The ripeness

doctrine requires a claimant to present "concrete legal issues" rather than mere "abstractions." *Mont. Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (internal quotations omitted). Likewise, a claimant must allege injury that "is sufficiently direct and immediate" to warrant judicial review. *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978) (internal quotations omitted). These requirements "sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 738 (internal quotations omitted). Here, Eugster complains about the lawyer discipline system only in the abstract, without alleging any particular deprivation of due process that he has suffered or is likely to suffer. *See* ECF No. 2 at 20. As a result, Eugster has failed to present "concrete legal issues" or any "direct and immediate" injury. *See Pence*, 586 F.2d at 737-38. His claim is thus unripe.

Eugster's vague allegations are especially deficient in the context of a procedural due process challenge. Eugster's claim does not arise from the application of the discipline system to him—instead, his objection is to the system in theory. *See* ECF No. 2 at 20. But as this Court has observed, "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Pence*, 586 F.2d at 737 (internal quotations omitted). In other words, it is generally impossible to evaluate the sufficiency of procedures in a vacuum, without application to a particular case and without

consideration of context and details. As the Court made clear in *Pence*, a procedural due process challenge usually "requires factual development, and should not be decided in the abstract." *Id.* at 736-37 (dismissing as unripe a challenge to regulations that had "not yet been applied to [the] plaintiffs").

Here, Eugster's objection to the discipline system is purely abstract and premature. *See* ER at 50-57; ECF No. 2 at 20. He complains about potential bias, but his complaint is entirely speculative and lacks the specificity and explanatory content required to make out such a claim. *See Hirsh*, 67 F.3d at 714 (noting bar officers are "entitled to a presumption of honesty and integrity"). Because his claim is too abstract to be adjudicated, this Court should once again dismiss Eugster's due process challenge as unripe. *See Eugster* II, 474 Fed. App'x at 625.

E. Eugster's Claim Cannot Be Saved with Further Amendment.

This Court should not only affirm dismissal of this lawsuit, it should also affirm such dismissal with prejudice. Eugster's claim is barred outright by the doctrines of res judicata and *Younger* abstention. Moreover, he already has amended his complaint once, and his allegations remain meritless, deficient, speculative, and unripe. Further amendment "would be futile." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 990 (9th Cir. 2008) (affirming dismissal without leave to amend because plaintiff was unable to propose any amendments that would save complaint).

IX. CONCLUSION

This Court should not entertain this latest meritless attempt by Eugster to undercut Washington's lawyer discipline system. Eugster already has received multiple opportunities to raise his constitutional challenge in prior litigation. The res judicata doctrine prevents Eugster's serial litigation. Moreover, Eugster must raise any objections within the ongoing state discipline action against him. The *Younger* doctrine prevents undue interference with such state disciplinary proceedings. Eugster's claim also lacks any legal merit, and it is too abstract to be adjudicated. For any and all of these reasons, this Court should affirm the district court's dismissal of Eugster's lawsuit.

Respectfully submitted this 7th day of December, 2016.

By */s/ Paul J. Lawrence*
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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, other than the case identified in the Opening Brief of Appellant, *see* ECF No. 2 at 23.

Dated this 7th day of December, 2016.

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9th Circuit Case Number(s) 16-35542

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