Paul J. Lawrence, WSBA #13557
Jessica A. Skelton, WSBA #36748
Taki V. Flevaris, WSBA #42555
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
Telephone: (206) 245.1700
Facsimile: (206) 245.1750
Attorneys for Defendants

Honorable Thomas O. Rice

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

| | |
|---|---|
| STEPHEN KERR EUGSTER,<br><br>Plaintiff,<br><br>v.<br><br>PAULA LITTLEWOOD, Executive Director, Washington State Bar Association (WSBA), in her official capacity; DOUGLAS J. ENDE, Director of the WSBA Office of Disciplinary Counsel, in his official capacity; FRANCESCA D'ANGELO, Disciplinary Counsel, WSBA Office of Disciplinary Counsel, in her official capacity,<br><br>Defendants. | No. 2:15-cv-00352-TOR<br><br>DEFENDANTS' MOTION TO DISMISS<br><br>6/28/2016<br>Without Oral Argument |

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# I. INTRODUCTION

Ever since Plaintiff Stephen Kerr Eugster ("Eugster") was disciplined for attorney misconduct in 2009, he has brought one collateral attack after another against the Washington State Bar Association ("WSBA") and its officials, challenging the lawyer discipline system that the WSBA administers on behalf of the Washington Supreme Court. This is Eugster's fourth such lawsuit, and his second before this Court. Each of his prior lawsuits lacked merit and was dismissed, and this case is no different.

In this case, Eugster brings meritless claims that Washington's lawyer discipline system violates procedural due process requirements and infringes on his First Amendment right of association. *See* ECF No. 8 at 2-3, 27-35. Eugster's due process claim should be dismissed because (1) his procedural objections are all hypothetical and vague, and thus unripe; (2) he has failed to identify any violation of due process; and (3) he could have asserted his claim in an earlier lawsuit, and thus, it is barred by the doctrine of res judicata. *See infra*, at 7-15. Eugster's First Amendment claim also should be dismissed, because (1) he already asserted the same claim in an earlier lawsuit, which was dismissed with prejudice; and (2) as a matter of law, requiring bar membership to practice law does not infringe on First Amendment freedoms. *See infra*, at 15-17.



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 Additionally, this Court should dismiss the entire complaint under the
2 *Younger* abstention doctrine, to avoid interfering with the pending bar
3 proceedings against Eugster. *See infra*, at 17-20. Eugster should present his
4 objections within those proceedings rather than in this collateral attack.
5 For each of these reasons, this Court should dismiss Eugster's claims.
6 Moreover, this Court should dismiss with prejudice because Eugster's claims
7 cannot be rescued by yet another amendment to his Complaint.

8 **II. DISCIPLINARY & LITIGATION HISTORY**

9 This case is the latest in a number of proceedings between Eugster and the
10 WSBA. The prior disputes provide context for Eugster's arguments here. This
11 Court may take judicial notice of these prior cases. *See MGIC Indem. Corp. v.*
12 *Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may
13 take judicial notice of matters of public record outside the pleadings.").
14 In 2005, the WSBA charged Eugster with numerous counts of attorney
15 misconduct. *See In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d
16 293, 307 (2009) ("*Eugster* I"). Among other issues, Eugster had filed a
17 "baseless" petition, ignored his client's direction, and refused to acknowledge
18 that his client had discharged him. *Id.* at 317-18. A hearing officer found
19 Eugster had violated numerous rules of professional conduct. *Id.* at 307. The
20 WSBA Disciplinary Board then recommended that Eugster be disbarred. *Id.* at



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 311. In 2009, five justices of the Washington Supreme Court decided instead to
2 suspend Eugster for 18 months, while the remaining four justices agreed with
3 the Disciplinary Board's conclusion that he should be disbarred. *Id.* at 327-28.
4 In the meantime, the WSBA was investigating another complaint it had
5 received against Eugster based on other conduct. *See Eugster v. Wash. State*
6 *Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237, at *1 (E.D. Wash. July
7 23, 2010) ("*Eugster* II"). This investigation culminated in a letter from the
8 WSBA to Eugster in December of 2009 warning Eugster "to more carefully
9 analyze the law before filing lawsuits" but otherwise dismissing the matter. *Id.*
10 In January 2010, Eugster filed a complaint in this Court against the
11 WSBA and its officials, alleging that Washington's attorney discipline system
12 violated his due process rights. *See id.* at *2. This Court dismissed the case. *Id.*
13 at *11. Specifically, this Court determined that Eugster lacked standing to assert
14 his claims and that his claims were "unripe" because he did "not present
15 concrete legal issues…but rather, abstractions." *Id.* at *8 (internal quotations
16 omitted). The Ninth Circuit affirmed. 474 Fed. App'x 624 (9th Cir. 2012).
17 In September 2014, another grievance was filed against Eugster, within
18 two weeks of his being retained on a matter. ECF No. 8 at 23. The WSBA
19 immediately sent an acknowledgement of the grievance to Eugster. *See id.* In
20 November 2014, the WSBA notified Eugster that it was conducting an



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 investigation of the grievance. *See id.* at 24. Eugster was informed that the
2 investigation had been assigned to Managing Disciplinary Counsel, who began
3 corresponding with Eugster regarding the investigation. *See id.*

4 On March 12, 2015, Eugster filed another lawsuit in federal court against
5 the WSBA and its officials, this time in the Western District of Washington. *See*
6 *Eugster v. WSBA*, No. C15-0375-JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3,
7 2015) ("*Eugster* III"). In that lawsuit, Eugster complained that his constitutional
8 rights of association, speech, and due process were violated by the requirement
9 for membership in the state bar and payment of license fees in order to practice
10 law. *Id.* at 8-16. In support of these claims, Eugster explained that he did "not
11 wish to associate with the WSBA" because of what he believed to be
12 "significant problems" with the lawyer discipline system, including a failure to
13 provide "due process of law…." App. 1 (*Eugster* III Compl.) at 9-10.[1]

14 In September 2015, the district court in *Eugster* III dismissed Eugster's
15 complaint. 2015 WL 5175722, at *1. Specifically, the court determined Eugster
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17 [1] For the Court's convenience, relevant court filings are attached as appendices.
18 The Court may take judicial notice of these filings because they are referenced
19 in Eugster's complaint and are matters of public record. *See Daniels-Hall v.*
20 *Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *MGIC*, 803 F.2d at 504.



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1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 had "grossly misstate[d]" and "misconstrued" governing precedent, which
2 authorized mandatory bar membership and fees. *Id.* at *5. Eugster appealed to
3 the Ninth Circuit, and that appeal remains pending. *See Eugster* III, No. 15-
4 35743 (9th Cir. 2015).

5 In the meantime, the bar disciplinary process moved forward and the
6 latest grievance against Eugster continued to be investigated. In April 2015,
7 Eugster received notice that the ongoing investigation had been assigned to an
8 investigator, who met with Eugster to discuss the matter. ECF No. 8 at 25.
9 Eugster then received notice the investigation had been assigned to Disciplinary
10 Counsel, with whom Eugster corresponded. *See id.* In late September 2015,
11 Eugster received a request for more information, to which he responded. *See id.*
12 On November 5, 2015, Eugster was notified that Disciplinary Counsel would be
13 recommending a formal hearing on the pending grievance against him. *See id.*
14 at 26. A formal hearing has since been ordered. *See id.* at 26-27.

15 On November 9, 2015—four days after Eugster received notice of the
16 hearing recommendation—Eugster filed another lawsuit against the WSBA and
17 its officials, this time in Spokane County Superior Court. *Eugster v. WSBA*, No.
18 15204514-9 (Spok. Cnty. Super. Ct. 2015) ("*Eugster* IV"). Eugster's complaint
19 was largely identical to his complaint here, sounding in due process, but also
20 including damages claims. *See* App. 2 (*Eugster* IV Compl.), at 26-45. On April



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

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* App. 3 (*Eugster* IV order), at 2-4. Eugster appealed that decision to Division III of the Washington Court of Appeals, and that appeal remains pending.

Finally, on December 22, 2015, Eugster filed the present lawsuit against the WSBA's officials. *See* ECF No. 1. Eugster's "Amended and Restated" complaint alleges two claims for relief. *See* ECF No. 8 at 2-3, 27-34. Eugster's primary claim, which is his "focus" throughout the complaint, is that Washington's lawyer discipline system "violates Procedural Due Process." *Id.* at 32. Eugster also alleges that the discipline system violates his First Amendment rights, and in particular his "Associational Freedoms." *Id.* at 3, 31. Defendants now move to dismiss the Amended and Restated Complaint under Federal Rules of Civil Procedure ("Rules") 12(b)(1) and 12(b)(6).

## III. STANDARD OF REVIEW

A complaint must be dismissed under Rule 12(b)(1) if the claims asserted are not ripe for adjudication. *See, e.g.*, *Chandler v. State Farm Mut. Auto. Ins.*



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 *Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010). The burden is on the plaintiff to
2 demonstrate ripeness. *See id.*

3 A complaint must be dismissed under Rule 12(b)(6) if it "lacks a
4 cognizable legal theory" or "fails to allege sufficient facts to support a
5 cognizable legal theory." *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir.
6 2013). A complaint "that offers labels and conclusions, a formulaic recitation of
7 the elements of a cause of action, or naked assertions devoid of further factual
8 enhancement will not suffice." *Landers v. Quality Commc'ns, Inc.*, 771 F.3d
9 638, 641 (9th Cir. 2014) (internal marks omitted). Instead, the complaint must
10 allege "specific facts" establishing the plausibility of a valid claim. *Eclectic*
11 *Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 999 (9th Cir. 2014).

12 **IV. ARGUMENT**

13 **A. Eugster's Due Process Claim Should Be Dismissed.**

14 Eugster's procedural due process claim is unripe, legally deficient on the
15 merits, and barred under the doctrine of res judicata. Each of these reasons is
16 independently sufficient to warrant dismissal of Eugster's due process claim.

17 1. <u>Eugster's due process claim is not ripe.</u>

18 Eugster's due process claim should be dismissed because it is not ripe for
19 adjudication. The ripeness doctrine requires a claimant to present "concrete
20 legal issues" rather than mere "abstractions." *Mont. Env't'l Info. Ctr. v. Stone-*



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 *Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (internal quotations omitted).
2 Further, a claimant must allege injury that "is sufficiently direct and immediate"
3 to warrant judicial review. *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978)
4 (internal quotations omitted). These requirements "sharpen[] the presentation of
5 issues upon which the court so largely depends for illumination of difficult
6 constitutional questions." *Id.* at 738 (internal quotations omitted).
7 Here, Eugster complains about the lawyer discipline system only in the
8 abstract, without alleging any particular deprivation of due process that he has
9 suffered or is likely to suffer. *See* ECF No. 8 at 31-34. He describes various
10 components of the discipline system, but without stating how those components
11 have been or will be used to violate his due process rights. *See* ECF No. 8 at 6-
12 23. He also insists he "will be injured," but he never explains how. *Id.* at 34.
13 As a result, Eugster has failed to present "concrete legal issues" or any "direct
14 and immediate" injury and his claim is unripe. *See Pence*, 586 F.2d at 737-38.
15 Eugster's vague allegations are especially deficient in the context of a
16 procedural due process challenge. None of Eugster's objections arise from the
17 application of the discipline system to him—instead, they are objections to the
18 system in theory. But as the Ninth Circuit has observed, "the very nature of due
19 process negates any concept of inflexible procedures universally applicable to
20 every imaginable situation." *Pence*, 586 F.2d at 737 (internal quotations



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 omitted). In other words, it is generally impossible to evaluate the sufficiency of
2 procedures in a vacuum, without application to a particular case and without
3 consideration of context and details. As the Ninth Circuit made clear in *Pence*, a
4 procedural due process challenge "requires factual development, and should not
5 be decided in the abstract." *Id.* at 736-37 (dismissing as unripe a challenge to
6 regulations that had "not yet been applied to [the] plaintiffs").

7 Here, all of Eugster's objections to the discipline system are abstract and
8 premature. Eugster complains about "vast differences among hearing officers"
9 and alleges "[n]ot all hearing officers understand the trial process and the rules
10 of evidence." *Id.* at 21. Given that a hearing officer has not yet been assigned to
11 Eugster's case, however, these complaints are entirely speculative. *See Hirsh v.*
12 *Justices of Supreme Ct.*, 67 F.3d 708, 714 (9th Cir. 1995) (noting bar officers are
13 "entitled to a presumption of honesty and integrity"). Moreover, the system
14 provides due process protections relating to the assignment of hearing officers.
15 *See, e.g.,* Wash. R. Enf't of Lawyer Conduct ("ELC") 10.2(b) (providing
16 procedures for disqualification of hearing officers).

17 Eugster also complains about the deference the Washington Supreme
18 Court allegedly affords to the WSBA Disciplinary Board. *See* ECF No. 8 at 23.
19 But again, without allegations of an actual instance of improper deference in
20 Eugster's case, this issue cannot be evaluated or adjudicated. Regardless, as



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

Eugster's own prior case demonstrates, the Washington Supreme Court does depart from hearing officer and/or Disciplinary Board recommendations. *See Eugster* I, 166 Wn.2d at 299 (deviating from unanimous Board recommendation of disbarment to impose 18-month suspension); *see also, e.g.*, *In re Blanchard*, 158 Wn.2d 317, 330 (2006) ("[W]hile we do not lightly depart from the Board's recommendation, we are not bound by it." (internal marks omitted)).[2]

In sum, Eugster's objections to the discipline system are too vague and abstract to be adjudicated. This Court should once again dismiss Eugster's due process challenge because it is not ripe. *See Eugster* II, 2010 WL 2926237, at *8 (rejecting prior challenge as too abstract), *aff'd*, 474 Fed. App'x at 625.

2. Eugster has failed to identify a violation of due process.

Even if Eugster could bring an abstract challenge to the lawyer discipline system (which he cannot), his due process claim also fails because he does not identify a single procedural deficiency within that system, much less a deficiency of constitutional magnitude. Eugster ignores governing precedent on

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[2] Eugster also overlooks that the Ninth Circuit has upheld such a framework of deference in a prior case. *Rosenthal v. Justices of the Supreme Ct. of Cal.*, 910 F.2d 561, 564 (9th Cir. 1990) (upholding system in which state supreme court gave "great weight" to board's findings but was "not bound by them").



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1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

this issue and raises various objections that have no legal significance. His complaint is thus devoid of any "specific facts" establishing a genuine due process violation. *Eclectic Props.*, 751 F.3d at 999.

In the context of lawyer discipline, the Ninth Circuit has recognized that due process consists primarily of "notice and an opportunity to be heard." *Rosenthal v. Justices of the Supreme Ct. of Cal.*, 910 F.2d 561, 564 (9th Cir. 1990). Under Washington's system, lawyers are afforded these protections. *See* ELC 4.1, 5.7, 10.3. Thus, Washington's system comports with minimum due process requirements.

In fact, the Ninth Circuit already has reviewed a lawyer discipline system identical to Washington's in all relevant respects, and held that such a system is more than adequate. In *Rosenthal*, the court concluded that California's bar system provides disciplined lawyers "with more than constitutionally sufficient procedural due process." 910 F.2d 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)



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 (burden on state to prove misconduct "by a clear preponderance"); ELC Title 12
2 (supreme court review). As with the system considered in *Rosenthal*,
3 Washington's discipline system provides more than adequate process.
4 Eugster ignores the governing precedent on this issue and instead alleges
5 an assortment of standalone objections to Washington's system. *See* ECF No. 8
6 at 19-23, 32-34. None of Eugster's objections rises to the level of a
7 constitutional violation. For example, Eugster objects to the Washington
8 Supreme Court's delegation of authority to the WSBA to administer the
9 discipline system. *See id.* at 33. But the Washington Supreme Court maintains
10 exclusive authority over the system, establishes the rules that govern the WSBA,
11 and retains ultimate decision-making power in each case. *See, e.g.*, *Hahn v.*
12 *Boeing Co.*, 95 Wn.2d 28, 34 (1980); ELC Title 2. The Supreme Court is
13 merely "assisted" by the WSBA acting as its "agent." *Hahn*, 95 Wn.2d at 34.
14 Eugster does not articulate how such a framework violates due process.
15 Additionally, Eugster objects that the WSBA suffers from an
16 impermissible "conflict of interest," both because of its mission to promote "the
17 interests of member lawyers" and because of potentially overlapping roles of bar
18 officials. ECF No. 8 at 20, 33. But Eugster does not articulate why the
19 WSBA's interest in advancing the legal profession renders its role in the
20 discipline system a due process violation. Nor does he explain why the



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 allegedly overlapping roles of WSBA officials violate due process. Regardless,
2 the Ninth Circuit previously has rejected such objections. *See Hirsh*, 67 F.3d at
3 714 (rejecting suggestion that "the State Bar" having "both investigative and
4 adjudicative functions" creates an "unacceptable risk of bias"); *Standing Comm.*
5 *on Discipline v. Yagman*, 55 F.3d 1430, 1435-36 (9th Cir. 1995) ("So long as the
6 judges hearing the [lawyer] misconduct charges are not biased…there is no
7 legitimate cause for concern over the composition and partiality of the [initial
8 disciplinary committee].").

9 Eugster further complains that the standard of proof in disciplinary
10 proceedings "should be at least 'clear and convincing evidence'…." ECF No. 8
11 at 22. But the ELCs do require proof of misconduct "by a clear preponderance
12 of the evidence," ELC 10.14(b), which is equivalent to the "clear and
13 convincing" standard Eugster demands, *see, e.g.*, *Costanzo v. Magnano*, 99
14 Wash. 679, 679-80 (1918); *Mansour v. King County*, 131 Wn. App. 255, 266
15 (2006). Regardless, Eugster does not claim that such a standard is
16 constitutionally required. In fact, the Ninth Circuit rejected a similar complaint
17 in *Rosenthal* and emphasized that the "presumption of innocence…does not
18 apply in a lawyer disbarment proceeding." 910 F.2d at 564.

19 Eugster makes various additional objections, each of which is vague,
20 unexplained, and unsupported. *See* ECF No. 8 at 19 (objecting to discretion of



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 disciplinary officials to "'investigate any alleged or apparent misconduct by a
2 lawyer'" (quoting ELC 5.3)); *id.* at 22 (discussing role of "expert testimony" in
3 proceedings); *id.* (asserting, without explanation, that the "Rules of Professional
4 Conduct" in "many instances" do not "define what is permitted and not
5 permitted"). These objections are all deficient as a matter of law. Eugster has
6 thus failed to identify any plausible due process violation.

7 3. Eugster's abstract due process claim could have been raised earlier and is now barred by the doctrine of res judicata.

8 Eugster's due process claim also should be dismissed because the claim
9 should have been alleged in prior litigation and is now barred by the doctrine of
10 res judicata. The doctrine of res judicata "bars litigation in a subsequent action
11 of any claims that were raised or could have been raised in the prior action."
12 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).
13 The doctrine applies whenever there is a prior "final judgment" between the
14 same or related parties and "the two suits arise out of the same transactional
15 nucleus of facts." *Id.* at 713-14 (internal quotes omitted). Here, there are two
16 relevant prior judgments, either one of which precludes Eugster's claim.

17 First, Eugster should have asserted his due process claim in *Eugster* III,
18 his federal lawsuit from last year challenging mandatory bar membership, which
19 was dismissed with prejudice. Such a dismissal qualifies as a final judgment for
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PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 res judicata purposes. *See, e.g.*, *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th
2 Cir. 2002). That prior lawsuit arose out of the same nucleus of facts, namely,
3 Eugster's involvement with and abstract objections to Washington's lawyer
4 discipline system. *See, e.g.*, App. 1 at 9-11. Eugster alleged a deprivation of
5 due process at the time—he simply chose not to assert a separate due process
6 claim, as he has done here. *See id.* at 10.

7 Second, Eugster should have raised the same objections even earlier, in
8 *Eugster* I, his prior disciplinary proceedings. As the court in *Eugster* IV
9 observed, Washington's discipline system provides an adequate forum for
10 adjudicating any given due process objections. *See* App. 3 at 3; *see also, e.g.*,
11 *Blanchard*, 158 Wn.2d at 330-31. Accordingly, Eugster already "had the
12 opportunity to raise his constitutional concerns with the Washington Supreme
13 Court in his prior discipline case." App. 3 at 3. Eugster should not be allowed
14 to continue engaging in serial litigation against the WSBA and its officials.
15 Under the doctrine of res judicata, his due process claim must be dismissed.

16 **B. Eugster's First Amendment Claim Also Should Be Dismissed.**

17 Eugster's second claim in this case alleges a violation of his First
18 Amendment rights. *See* ECF No. 8 at 3, 27-31. This claim also is barred by the
19 doctrine of res judicata and legally deficient on the merits. Each of these
20 reasons is independently sufficient to warrant dismissal of Eugster's claim.



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 1. Eugster's First Amendment claim already has been adjudicated.

2 Eugster's First Amendment claim should be dismissed because it already
3 was adjudicated in prior litigation and is now barred by the doctrine of res
4 judicata. As explained above, the doctrine of res judicata applies whenever
5 there is a prior "final judgment" between the same or related parties and "the
6 two suits arise out of the same transactional nucleus of facts." *Owens*, 244 F.3d
7 at 713-14 (internal quotations omitted).

8 In this case, Eugster is asserting a First Amendment claim that already
9 was asserted and dismissed with prejudice in *Eugster* III. *See* 2015 WL
10 5175722, at *2, 8, 9. Specifically, Eugster already claimed that "mandatory
11 WSBA membership violates his First and Fourteenth Amendment freedoms by
12 compelling association…." *Id.* at *2. Eugster now reasserts the same claim—in
13 fact, the relevant language in Eugster's Amended and Restated Complaint was
14 taken verbatim from Eugster's appellate brief in *Eugster* III. *Compare* App. 4
15 (*Eugster* III brief) at 17-18, 20-25, *with* ECF No. 8 at 27-31 (complaint). This
16 claim already was dismissed and is now barred by the doctrine of res judicata.

17 2. Eugster's First Amendment claim is legally meritless.

18 Eugster's First Amendment claim also should be dismissed because it
19 lacks merit as a matter of constitutional law. As the court in *Eugster* III
20 observed, "the Supreme Court and Ninth Circuit have held…several times, and



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

in no uncertain terms" that mandatory bar membership does not infringe on First Amendment rights. 2015 WL 5175722, at *5 (citing *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Morrow v. State Bar of Cal.*, 188 F.3d 1174 (9th Cir. 1999)). As in *Eugster* III, these precedents "bind this court" and require dismissal of Eugster's claim. *Id.*

**C. This Court Should Abstain to Avoid Interfering with the Ongoing Disciplinary Proceedings Against Eugster.**

This Court also should dismiss Eugster's entire complaint under the *Younger* abstention doctrine, to avoid interference with the ongoing bar proceedings against Eugster. Under the *Younger* doctrine, abstention is required "to avoid interference in a state-court civil action" when there are "ongoing state proceedings" that "implicate important state interests" and the federal plaintiff's claims may be litigated "in the state proceedings." *M&A Gabaee v. Comm'y Redev't Agency*, 419 F.3d 1036, 1039 (9th Cir. 2005). The U.S. Supreme Court previously has determined that lawyer disciplinary proceedings qualify as proceedings that implicate important state interests. *See, e.g.*, *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434-35 (1982). Additionally, due process objections may be litigated within such disciplinary proceedings. *See, e.g.*, ELC 10.1, 10.8.



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 Here, the pending disciplinary proceedings against Eugster are ongoing
2 and merit abstention for two reasons. First, the disciplinary investigation of
3 Eugster is governed by detailed Washington rules and constitutes a formal and
4 substantive part of the disciplinary process. *See* ELC Title 5; *cf. Alsager v. Bd.*
5 *of Osteopathic Medicine and Surgery*, 945 F. Supp. 2d 1190, 1195 (W.D. Wash.
6 2013) ("The Board's investigation of Plaintiff's conduct constitutes a state
7 initiated 'ongoing proceeding' for the purpose of *Younger* abstention." (citing
8 cases)); *In re Scannell*, 169 Wn.2d 723, 740 (2010) (holding that lawsuit filed
9 during initial bar investigation "was not preexisting" and did not warrant
10 disqualification of hearing officers named as defendants in lawsuit).
11 Second, a formal hearing already has been ordered and is thus inevitable.
12 *See* ECF No. 8 at 26-27. Under Washington's rules, once "a matter is ordered to
13 hearing," as here, a formal complaint must be filed as a matter of course. ELC
14 10.3(a)(1). This case thus presents a substantial risk of precisely the type of
15 interference that the *Younger* doctrine is intended to prevent. To avoid such
16 interference, this Court should abstain from litigating Eugster's collateral attack
17 on the Washington disciplinary process.
18 This case stands in contrast to the circumstances in which the Ninth
19 Circuit has allowed bar discipline challenges to proceed in federal court. In
20 *Canatella v. State of California*, 304 F.3d 843 (9th Cir. 2002), for example, the



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 court allowed a lawyer's challenge to go forward because "no affirmative action
2 had been taken by the State Bar" and the only relevant state rule provided that
3 bar proceedings commenced with "the filing of an initial pleading," which had
4 not yet occurred. 304 F.3d at 850-51. Although Washington has a similar rule
5 regarding the formal commencement of disciplinary proceedings, *see* ELC
6 10.3(b), this case is very different than *Canatella*.

7 Here, the WSBA has taken a number of affirmative steps within the
8 discipline system, *see* ECF No. 8 at 23-27, whereas in *Canatella* there was no
9 ongoing disciplinary investigation, 304 F.3d at 851 (noting that the "only
10 procedural step that had occurred" was "Canatella's act of self-reporting"). In
11 this case, an investigative report and recommendation already has been
12 completed regarding the grievance against Eugster, *see* ELC 5.7(c); an order for
13 a public hearing already has been issued to him, *see* ECF No. 8 at 26-27 & App.
14 B; and a formal complaint is forthcoming, *see* ELC 10.3(a)(1). Moreover, the
15 Washington Supreme Court has ruled, in a case where a lawyer subject to
16 disciplinary investigations sought to disqualify bar officials by filing a separate
17 lawsuit against them, that the disciplinary investigations were "pending ELC
18 proceedings" that preexisted his lawsuit. *Scannell*, 169 Wn.2d at 740. In sum,
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PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

the potential for interference with the ongoing state proceedings against Eugster is both apparent and substantial. Thus, this Court should dismiss his claims.[3]

**D. Eugster's Complaint Should Be Dismissed with Prejudice.**

This Court should dismiss Eugster's claims with prejudice. Eugster already has amended his complaint once and his allegations are so speculative and deficient, as well as barred by legal doctrines such as res judicata and *Younger*, that they do not warrant an opportunity for further amendment. *See, e.g.*, *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).

## V. CONCLUSION

Eugster fails to state a cognizable legal claim for relief in this case. His claims are unripe, legally insufficient, barred under the res judicata doctrine, and should be dismissed under the *Younger* abstention doctrine. For each of these reasons, the Court should dismiss this case with prejudice.

[3] Although the holding of *Canatella* is inapplicable here, Defendants believe the Ninth Circuit's decision in *Canatella* is inconsistent with Supreme Court precedent, allows for too much interference with state disciplinary proceedings, and ultimately should be overruled.



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

1 DATED this 9th day of May, 2016.

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3 PACIFICA LAW GROUP LLP

4 By *s/ Paul J. Lawrence*
Paul J. Lawrence, WSBA #13557
5 Jessica A. Skelton, WSBA #36748
Taki V. Flevaris, WSBA #42555

6 Attorneys for Defendants

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PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500

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## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2016, I electronically filed the foregoing document with the United States District Court ECF system, which will send notification of such filing to the following:

Stephen Kerr Eugster
Eugster Law Office PSC
2418 West Pacific Avenue
Spokane, WA 99201-6422
Phone: 509.624.5566
Fax: 866.565.2341
Email: eugster@eugsterlaw.com

Dated this 9th day of May, 2016.

Sydney Henderson



PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2000
SEATTLE, WASHINGTON 98101-3404
TELEPHONE: (206) 245 1700
FACSIMILE: (206) 245 17500