NO. 18-35421

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN KERR EUGSTER,

Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, JUSTICES OF THE WASHINGTON SUPREME COURT, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON AT SPOKANE

No. 2:17-cv-00392-TOR
The Honorable Thomas O. Rice
Chief District Court Judge

APPELLEES' ANSWERING BRIEF

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I. INTRODUCTION

This Court need not reach the merits of this appeal, which challenges the constitutionality of mandatory attorney bar membership and licensing fees, because the district court properly found that Plaintiff-Appellant Stephen Eugster's claims were barred by res judicata, having been unsuccessfully made in several prior cases. In any event, two Supreme Court cases clearly establish that states may require attorneys to join and pay licensing fees to a state bar association as a condition of practicing law in the state. *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

Rather than address either of these grounds for dismissal, Mr. Eugster asks this Court to reverse the dismissal of his lawsuit challenging mandatory bar membership and licensing fees based solely on the unrelated decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.*, __ U.S. __, 138 S. Ct. 2448 (2018). But *Janus* addresses only the constitutionality of union agency fees, and does not overrule *Keller* or *Lathrop*.

This Court should affirm.

II. STATEMENT OF JURISDICTION

Defendants-Appellees agree with Mr. Eugster's statement of jurisdiction, with the clarification that Mr. Eugster's Notice of Appeal was filed on May 16, 2018.

III. STATEMENT OF THE ISSUES

1. Did the district court properly dismiss this lawsuit based on res judicata, where the claims Mr. Eugster brought were already rejected in his prior lawsuits?

2. The Supreme Court's decisions in *Lathrop* and *Keller* hold that states may require attorneys to join and pay licensing fees to a state bar association as a condition of practicing law in the state. Is Mr. Eugster's challenge to mandatory bar membership and licensing fees based on *Janus*, which addresses solely union agency fees, foreclosed by *Lathrop* and *Keller*?

IV. STATEMENT OF THE CASE

A. Mr. Eugster Has Made Numerous Unsuccessful Challenges To Mandatory Bar Membership and Licensing Fees

This lawsuit is one of many Mr. Eugster has pursued against certain Washington State Bar Association (WSBA) officials, including Paula Littlewood as Executive Director, and the Justices of the Washington Supreme

Court regarding the constitutionality of mandatory bar membership and licensing fees. The prior cases provide context and persuasive authority for the issues presented here. This Court may take judicial notice of these cases. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (court can "take judicial notice of matters of public record"); *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (taking notice of party's "five prior cases" in state and federal courts).

***Eugster I*:** In 2005, the WSBA charged Mr. Eugster with misconduct. *See In re Disciplinary Proceeding Against Eugster*, 209 P.3d 435, 438 (Wash. 2009) (*Eugster I*). After review by a hearing officer and the WSBA Disciplinary Board culminating in a recommendation of disbarment, Mr. Eugster appealed to the Washington Supreme Court, which suspended him for 18 months. *Id*. at 452.

***Eugster II*:** In January 2010, Mr. Eugster sued the WSBA, its officers, and the Justices, alleging that Washington's lawyer discipline system violates due process. *Eugster v. Wash. State Bar Ass'n*, No. CV 09-357, 2010 WL 2926237, at *1-2 (E.D. Wash. July 23, 2010) (*Eugster II*). The district court dismissed the case on standing and ripeness grounds, and this Court affirmed on both grounds. *Id.* at *11, *aff'd*, 474 F. App'x 624, 625 (9th Cir. 2012).

***Eugster III*:** In March 2015, Mr. Eugster filed another suit in federal court against the WSBA, its officials, and the Justices. *Eugster v. Wash. State Bar Ass'n*, No. C15-0375-JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) (*Eugster III*). Mr. Eugster claimed that bar membership and licensing fees, and the way fees are spent, violate his constitutional rights of speech and association. *Id.* at *2. The district court concluded Mr. Eugster had "grossly misstate[d]" and "misconstrued" governing precedent, which establishes that mandatory bar membership and fees are constitutional. *Id.* at *5-7 (citing cases). The district court also concluded Mr. Eugster's "mere mention" of WSBA activities and "bare assertion" that license fees were being misspent were "legally conclusory and thus insufficient" to state a claim. *Id.* at *7. Mr. Eugster appealed and this Court affirmed. *Eugster III*, 684 F. App'x 618, 619 (9th Cir. 2017).

***Eugster IV*:** In November 2015, Mr. Eugster filed another lawsuit against the WSBA and its officials in state court. *Eugster v. Wash. State Bar Ass'n*, 397 P.3d 131, 136 (Wash. Ct. App. 2017) (*Eugster IV*). Yet again, Mr. Eugster claimed that the lawyer discipline system violates procedural due process requirements. *Id.* at 138. The superior court dismissed with prejudice, and Division III of the Washington Court of Appeals affirmed, holding res judicata barred Mr. Eugster's challenge because he should have raised it, if at all, in his

prior discipline proceeding in *Eugster I*. *Id.* at 149. Mr. Eugster petitioned the Washington Supreme Court for review, which was denied. *See Eugster IV*, 404 P.3d 493 (Wash. 2017).

***Eugster V*:** In December 2015, one month after filing *Eugster IV*, Mr. Eugster filed a twin complaint in the Eastern District of Washington. *Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) (*Eugster V*). Mr. Eugster again claimed that the lawyer discipline system "violates procedural due process." *Id.* at *1. The district court dismissed with prejudice, holding Mr. Eugster's claim was barred by res judicata. *Id.* at *4-6. This Court filed a memorandum disposition affirming dismissal, and denied Mr. Eugster's petition for rehearing en banc. *See Eugster V*, No. 16-35542 (9th Cir.).

***Eugster VI*:** In November 2016, Mr. Eugster filed another lawsuit against the WSBA and its officials in the Western District of Washington. *Eugster v. Wash. State Bar Ass'n*, No. 2:16-cv-01765 (W.D. Wash.) (*Eugster VI*). As before, Mr. Eugster asserted claims that compulsory bar membership and fees are unconstitutional and that the lawyer discipline system violates due process. *See id.* He also argued that recent WSBA bylaw amendments, formally designating limited license practitioners as members, created a "new" WSBA

lacking regulatory authority. *Id.* Mr. Eugster voluntarily dismissed the case on January 4, 2017. *Id.*

***Caruso*:** One day after dismissing *Eugster VI*, Mr. Eugster filed a nearly identical suit on behalf of two other previously disciplined attorneys. *Caruso v. Wash. State Bar Ass'n*, No. C17-003 RSM, 2017 WL 1957077, at *1 (W.D. Wash. May 11, 2017). Mr. Eugster filed the case initially as a putative class action on behalf of all WSBA members, but abandoned the class claims soon after. *Id.* The district court dismissed the case with prejudice for failure to state a claim, holding that (1) substantial authority establishes compelled bar membership and license fees are constitutional; (2) the WSBA remains the same entity and retains its regulatory authority notwithstanding the recent bylaw amendments; and (3) the lawyer discipline system provides due process. *Id.* at *2-4. The court sanctioned Mr. Eugster for filing a "legally and factually baseless" lawsuit and ordered payment of the WSBA's fees. 2017 WL 2256782, at *4 (W.D. Wash. May 23, 2017). This Court filed memorandum opinions affirming the district court's dismissal and sanctions orders, and denying Mr. Eugster's petitions for en banc review. *See Caruso*, Nos. 17-35410, 17-35529 (9th Cir.).

B. In the Case Below, Mr. Eugster Pursued the Same Claims He Previously Lost

On November 25, 2017, Mr. Eugster filed the present suit, initially against the WSBA and its Executive Director, and later against Executive Director Littlewood and the nine Justices of the Washington Supreme Court. ER 32-33. In his Amended Complaint, Mr. Eugster again claimed that bar membership and licensing fees violate his constitutional rights and that the discipline system failed to satisfy due process. ER 71-72. He also reasserted his challenge from *Eugster III* against the use of fees. ER 73. In support of his claims, Mr. Eugster also argued that the Washington Supreme Court and WSBA constituted a monopoly over the practice of law. ER 60, 61, 63, 68-71.

The Defendants jointly moved to dismiss Mr. Eugster's claims based on res judicata, collateral estoppel, failure to state a claim, and lack of justiciability. ER 79-105. The district court granted the motion and dismissed all of Mr. Eugster's claims based on res judicata, and additionally for failure to state a claim as to any claim based on antitrust law. ER 51.

Mr. Eugster appealed to this Court only the dismissal of his challenge to the constitutionality of mandatory bar membership and licensing fees.

V. SUMMARY OF ARGUMENT

The district court properly dismissed Mr. Eugster's lawsuit based on res judicata and failure to state a claim, neither of which Mr. Eugster addresses on appeal. Instead, Mr. Eugster claims that the United States Supreme Court's recent decision in *Janus* makes mandatory bar membership and licensing fees unconstitutional, but *Janus* did no such thing.

Janus is about the constitutionality of compelling public employees to financially support private unions, and says nothing about the constitutionality of compelling attorneys to pay fees to be used for the purposes of regulating the legal profession and improving the quality of legal services available to the public. The majority opinion in *Janus* does not even mention the two definitive Supreme Court cases regarding mandatory bar membership and dues payments, *Lathrop* and *Keller*, let alone overrule those cases. Moreover, arguments challenging the reasoning underlying *Lathrop* and *Keller* are premature: Supreme Court precedent remains binding unless and until it is overruled by the Supreme Court. There is no basis for this Court to entertain Mr. Eugster's arguments about why the reasoning in *Janus* renders mandatory bar membership and dues unconstitutional.

Mr. Eugster has waived any other argument on appeal by not specifically addressing it in his opening brief.

This Court should affirm the district court's dismissal of Mr. Eugster's lawsuit.

VI. 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.* A plaintiff is not entitled to rely on mere conclusory allegations. *Id.*

On appeal, the Court need only address issues or arguments that are specifically addressed in a party's opening brief. *Brownfield v. City of Yakima*,

612 F.3d 1140 (9th Cir. 2010); *Christian Legal Soc. Chapter of Univ. of California v. Wu*, 626 F.3d 483 (9th Cir. 2010).

VII. ARGUMENT

A. The District Court Properly Dismissed Mr. Eugster's Lawsuit on Res Judicata Grounds, Because His Claims Duplicated His Prior Unsuccessful Lawsuits

Mr. Eugster's only claim advanced on appeal is that mandatory attorney bar membership and licensing fees violate the First Amendment. Appellant's Br. at 1, 6. Since he has made and lost that challenge before, the district court properly concluded that res judicata bars Mr. Eugster from making that claim again. Additionally, Mr. Eugster does not even address res judicata in his opening brief on appeal. He has, therefore, waived argument as to its applicability, and this Court could affirm on that basis alone. *Brownfield*, 612 F.3d at 1149 n.4; *Christian Legal Soc. Chapter of Univ. of California*, 626 F.3d at 485. If the Court reviews the district court's decision that Mr. Eugster's lawsuit is barred by res judicata, it should affirm.

The purpose of res judicata, also called claim preclusion, is to "avoid[] repetitive litigation, conserv[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 quotes omitted). In determining whether res judicata bars a claim, federal courts apply the law of the jurisdiction in which each prior judgment was rendered. *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984). Ninth Circuit law and Washington law are substantially aligned regarding application of the doctrine. *See Kuhlman v. Thomas*, 897 P.2d 365, 368 n.3 (Wash. Ct. App. 1995) (noting overlap). In particular, a final judgment on the merits bars a later action between the same parties, or those in privity with them, over claims that were or could have been raised in the prior action. *W. Radio Servs. Co., Inc. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997); *Kelly-Hansen v. Kelly-Hansen*, 941 P.2d 1108, 1112-13 (Wash. Ct. App. 1997).

Here, Mr. Eugster challenges on appeal only whether mandatory licensing fees or bar membership amounts to forced speech or association in violation of the First and Fourteenth Amendments. Appellant's Br. at 6. The district court correctly concluded that those challenges were already squarely addressed in Mr. Eugster's prior cases, and his attempt to distinguish this case is meritless.

1. Mr. Eugster Already Lost His Challenge to Mandatory Bar Membership and Licensing Fees Under the First and Fourteenth Amendments

Mr. Eugster claims that the requirement to maintain bar membership and pay license fees to practice law violates his constitutional rights of association

and speech. ER 71-72; Appellant's Br. at 1, 6. Mr. Eugster already raised this claim in *Eugster III*. 2015 WL 5175722 at *1. His arguments were rejected on the merits. *See Eugster III*, 684 F. App'x at 619. Because he already litigated this claim unsuccessfully, Mr. Eugster is unquestionably barred from re-litigating it here. *W. Radio*, 123 F.3d at 1192. Mr. Eugster also could have raised this claim in any of his other suits, including when he challenged the lawyer discipline system in *Eugster IV* and *V*. 397 P.3d at 138; 2016 WL 3632711. Mr. Eugster did not, and is barred from raising it here for this additional reason. *See Kelly-Hansen*, 941 P.2d at 1113; *W. Radio*, 123 F.3d at 1192.

2. Mr. Eugster Already Lost His Challenge to the Use of Licensing Fees

Mr. Eugster also claimed below, but does not appear to argue on appeal, that the WSBA improperly spends his fees for "purposes not germane to the practice of law," in violation of his constitutional rights of association and speech. ER 73. Mr. Eugster already raised this claim in *Eugster III*. *See* 2015 WL 5175722, at *2-3. His arguments were rejected because they lacked specificity and he failed to identify any improper spending. *See Eugster III*, 684 F. App'x at 619. Eugster also could have raised this claim again in any

of his other suits, but did not. On either basis, this claim is barred, if even preserved in this appeal. *See W. Radio*, 123 F.3d at 1192; *Kelly-Hansen*, 941 P.2d at 1113.

3. Mr. Eugster's Asserted Distinctions, including the *Janus* Case, Are Irrelevant and Meritless

Mr. Eugster made two arguments below to distinguish this case from his prior cases, and makes one new argument on appeal based on intervening case law. First, he asserted this is a case of "first impression" because of WSBA bylaw amendments designating limited license practitioners as members. ER 55. He appears to continue that line of argument on appeal, although not explicitly. *See, e.g.*, Appellant's Br. at 2-4, 11. Second, he attempted to distinguish his claims by asserting a new theory that the Washington Supreme Court and WSBA constitute a monopoly. *See* ER 68-71. He does not continue that argument on appeal, even implicitly. On appeal, Mr. Eugster argues only that the intervening *Janus* case warrants a fresh look at his case. None of the alleged distinctions, even if preserved, affect the outcome here.

As to the bylaw amendments, this is not an issue of first impression: Mr. Eugster already raised the same argument in *Caruso* and it was rejected as frivolous. *See* 2017 WL 1957077 at *3. The argument remains frivolous here.

Further, as Mr. Eugster acknowledged, the Washington Supreme Court and WSBA have authorized and regulated limited license practitioners since at least 1983. *See* ER 61. Indeed, Mr. Eugster already unsuccessfully challenged spending for such regulation in *Eugster III*. *See* 2015 WL 5175722 at *7. Thus, the issue of limited license practice is not new, it has been or should have been litigated in each of Mr. Eugster's prior suits, and it does not affect the outcome here.

Importantly, as previously noted, Mr. Eugster never explains how the designation of limited license practitioners as WSBA members makes any difference to his claims. *See* ER 54-78; Appellant's Br. Nor could he. Mandatory bar membership and licensing fees still serve strong state interests. The WSBA's expenditures are also legitimate either way. Accordingly, res judicata still applies here. *See, e.g.*, *Davidson v. Kitsap Cty.*, 937 P.2d 1309, 1314 (Wash. Ct. App. 1997) (holding res judicata barred review where asserted change in circumstances was irrelevant).

Mr. Eugster also failed to explain why his monopoly theory would make any difference to his claims, even if properly preserved on appeal. *See* ER 54-78; Appellant's Br. Mr. Eugster pleaded below and appeals now only his claim that compelled bar dues and membership violate his First and Fourteenth

Amendment rights. ER 66-75; Appellant's Br. Whether the Supreme Court and the WSBA have complied with antitrust laws is distinct from any alleged violations of the First Amendment or due process requirements, which are the only claims Eugster ever pleaded and even possibly preserved. *See* ER 66-75. In any event, this Court has already rejected the theory that a state supreme court's supervision over a state bar association could constitute an unlawful monopoly. *See Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 609-10 (9th Cir. 2005); *see also State ex rel. Schwab v. Washington State Bar Ass'n*, 493 P.2d 1237, 1238-39 (Wash. 1972) (describing Washington Supreme Court's supervisory relationship with WSBA).

Finally, Mr. Eugster appears to take the position on appeal that the *Janus* case allows him to bring claims he has already brought and lost in prior cases. But as explained more thoroughly below, *Janus* exclusively addresses mandatory union agency fees, and has nothing to do with mandatory bar membership and licensing fees. Thus, there has been no change in the law with respect to the constitutionality of mandatory bar membership and fees, so this Court need not consider whether such a change would be an appropriate exception to res judicata. *See Paulo v. Holder*, 669 F.3d 911, 918-19 (9th Cir.

2011) (holding "even assuming change of law is an exception to res judicata," it is not applicable where case did not, in fact, change applicable law).

In sum, the district court's dismissal of Mr. Eugster's claims based on res judicata was correct, and Mr. Eugster has waived argument on that issue since he does not address it in his opening brief. On either basis, this Court should affirm.

B. Mr. Eugster's Challenges to Mandatory Bar Membership and Attorney Licensing Fees Also Fail on the Merits

If the Court reaches the merits of Mr. Eugster's appeal, it should affirm the district court's dismissal because Mr. Eugster's claims fail as a matter of law. *Lathrop* and *Keller* unquestionably hold that states may require attorneys to join and pay licensing fees to an integrated bar, and *Janus* does not overrule either case.

1. The Supreme Court's Decisions in *Lathrop* and *Keller* Establish That Mandatory Attorney Bar Membership and Licensing Fees Are Constitutional

Two Supreme Court cases hold that mandatory bar membership and licensing fees are constitutional. *Lathrop*, 367 U.S. at 820; *Keller*, 496 U.S. at 14. Despite the fact that Mr. Eugster does not even cite to either of these decisions, they control the merits of this case.

The Supreme Court first addressed the constitutionality of mandatory bar associations and licensing fees 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 was "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. 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.* Thus, a

seven-justice majority of the Supreme Court agreed that requiring mandatory bar membership and payment of dues does not violate the Constitution.

Nearly 30 years later, the Supreme Court addressed the question left unresolved by *Lathrop*: how mandatory bar dues may be spent. In *Keller*, the Court held that 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. 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.").[1]

[1] The Court in *Keller* also opined that "an integrated bar could certainly" meet its constitutional obligation to ensure members are not forced to pay for non-mandatory expenditures by "adopting the sort of procedures described in" *Chicago Teachers Union, Local No. 1 AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986). *Keller*, 496 U.S. at 16-17. There, the Court outlined a set of procedures by which a union in an agency-shop relationship could comply with the Constitution, namely, providing "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310.

Mr. Eugster does not challenge the adequacy of the WSBA's procedures or any specific expenditures on appeal.

Mr. Eugster's substantive claims on appeal, to the extent properly made, are entirely governed by *Lathrop* and *Keller*. On appeal, Mr. Eugster argues only that his "right to practice law cannot be conditioned on his payment of dues to the WSBA/Supreme Court," and that the compelled dues also "amounts to the forced association of Eugster with the WSBA/Supreme Court." Appellant's Br. at 6. As was the case in *Lathrop* and *Keller*, the only compelled act Mr. Eugster alleges is the payment of licensing fees. *See, e.g.*, ER 60, ¶¶ 20-23 ("Plaintiff is compelled to pay dues to the WSBA."). Mr. Eugster has not disputed that he 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 *Keller*, 496 U.S. at 17, and *Lathrop*, 367 U.S. at 820, 827–28.

Consistent with those cases, this Court has confirmed that "lawyers admitted to practice in the State may be required to join and pay dues to the State Bar," and "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." *Morrow v. State Bar of California*, 188 F.3d 1174, 1176-77 (9th Cir. 1999) (internal quotations omitted) (quoting *Keller*, 496 U.S. at 4); *Gardner v. State Bar of Nevada*, 284 F.3d 1040, 1042-43 (9th. Cir. 2002) (quoting *Keller*, 496 U.S. at 4).

Mr. Eugster fails to even cite to *Lathrop*, *Keller*, or this Court's cases on the subject, let alone explain why those cases do not control the outcome in his case. In his request for oral argument, Mr. Eugster pegs this case as one of "first impression concerning the integrated associations of 'legal services' 'professionals'." Appellant's Br. at 11. Presumably, he is alluding to an argument that *Lathrop* and *Keller* do not apply to cases like this, where the mandatory bar consists of non-lawyer licensed legal professionals, in addition to attorneys. *See, e.g.*, ER 117 (arguing in response to Motion to Dismiss that the WSBA became a "new kind of 'bar association' " in 2017 consisting of lawyers, limited practice officers, and limited license legal technicians). But Mr. Eugster does not explain here, and he did not argue below, why the expansion of the WSBA to include additional licensed legal professionals, even if accurately stated, makes any difference to whether *Lathrop* and *Keller* apply with respect

to full-fledged attorneys like him. *See* ER 106-23. Neither case hinges on the mandatory bar being limited to attorneys versus including other licensed legal professionals.

Even if properly articulated below and on appeal, Mr. Eugster's theory has already been rejected in at least one of his earlier cases, and, accordingly, is barred from relitigation here. Where an issue or claim has already been litigated in a prior case, it cannot generally be relitigated in subsequent actions by the same party. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (applying collateral estoppel to issue decided in prior action); *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 956 P.2d 312, 316 (Wash. 1998) (same); *see also W. Radio*, 123 F.3d at 1192 (noting res judicata bars litigation of claim that already was or could have been raised in a prior action); *Kelly-Hansen*, 941 P.2d at 1112-13 (same). As the district court noted below, "the alleged distinction" between the WSBA before and after it included limited license practitioners was "previously raised, considered, and rejected" in *Caruso*, which Mr. Eugster litigated in privity with his clients. ER 14-15 (citing *Caruso*, 2017 WL 1957077 at *3). Mr. Eugster does not challenge the district court's finding that "there exists a substantial identity" between Mr. Eugster and his clients in *Caruso*. *See* ER 15. Mr. Eugster also unsuccessfully challenged the

WSBA's authority to spend money on limited license practitioners in *Eugster III*, 2015 WL 5175722, at *7. Accordingly, the final judgments on the merits in *Caruso* and *Eugster III* bar relitigation of any argument that *Lathrop* and *Keller* do not apply to Mr. Eugster's challenge to the WSBA.

Mr. Eugster goes on to argue about unrelated First Amendment jurisprudence developed after *Lathrop* and *Keller*, and why, applying it here, mandatory membership in the WSBA, including the payment of licensing fees, would not pass muster under the tests articulated in those recent cases. Appellant's Br. at 7-11. But, as explained next, the cases cited by Mr. Eugster do not apply to mandatory bar membership and licensing fees. *Lathrop* and *Keller* remain the controlling cases regarding mandatory bar membership and licensing fees. Accordingly, this Court should apply *Lathrop* and *Keller* on this appeal.

2. *Janus* Does Not Modify *Lathrop* or *Keller*, and Has No Applicability to Attorney Bar Membership and Licensing Fees

Mr. Eugster hinges his entire appeal on his claim that the Supreme Court's "recent decision in *Janus v. AFSCME* applies to this case," and "the facts [in this case] are indistinguishable" from the facts in *Janus*. Appellant's Br. at 7-8. He is wrong. *Janus* is solely about the constitutionality of union agency fees, and

does not address mandatory bar associations at all. Thus, this case is still governed only by *Lathrop* and *Keller*.

Fundamentally, the *Janus* case is about whether public employees may be forced to financially subsidize certain activities performed by private unions. It has nothing to do with attorney bar dues and membership, and does not overrule *Lathrop* or *Keller*. In *Janus*, the Supreme Court held that public employees who choose not to join a union may not be compelled to pay agency fees to the union, intended to cover their fair share of the costs of collective bargaining and other representational activities. 138 S. Ct. at 2459-60. The Court concluded that such an arrangement "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern," without serving "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id*. at 2460, 2464. In so holding, the Court overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a long-standing case in which agency fees were deemed constitutional because they furthered the state's interests of labor peace and avoiding the risk of free riders. *Janus*, 138 S. Ct. at 2460.

Nowhere in the majority *Janus* opinion does the Court overrule any case other than *Abood*, much less discuss the impact that *Janus* will have on the

Court's other First Amendment cases. In fact, the majority opinion does not even mention *Lathrop* or *Keller*. 138 S. Ct. at 2460-86. At best, Justice Ginsburg in her dissent notes that the reasoning in *Abood*, the case overruled by the majority in *Janus*, was adopted in many other Supreme Court cases, including *Keller*. 138 S. Ct. at 2498 (Ginsburg, J., dissenting). But in the same breath, Justice Ginsburg reaffirms that that the majority opinion in *Janus* "does not question" the viability of those cases. *Id.*

In a preceding case relied upon in *Janus*, the Court reaffirmed that *Keller* "fits comfortably within the framework" applied to invalidate union agency fees. *Harris v. Quinn*, 134 S. Ct. 2618, 2643-44 (2014). The Court there noted its invalidation of agency fees was "wholly consistent with" *Keller*, because mandatory membership and licensing fees sufficiently served the "State's interest in regulating the legal profession and improving the quality of legal services," and "States also 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." *Id.* In contrast, the Court in *Harris* and *Janus* found that the state's proffered interests in labor peace and avoiding the risk of free riders were not sufficiently furthered by imposing agency fees. *Janus*, 138 S. Ct. at 2466 (citing *Harris*, 134 S. Ct. at 2639).

Likewise, *Knox v. Service Employees International Union*, an opinion cited by Mr. Eugster for the level of scrutiny he claims should apply to this case, also singularly focuses on a public-sector union's ability "to require objecting nonmembers to pay a special fee for the purpose of financing the union's political and ideological activities." 567 U.S. 298, 302 (2012). It is equally inapposite here.

Even if an argument could be made that *Lathrop* and *Keller* should be reevaluated in light of *Janus*, those cases remain binding unless and until the Supreme Court overrules them. The Supreme Court has cautioned against lower courts concluding that a recent case has, "by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237–38 (1997). Instead, " '[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.' " *Id.* at 237-38 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Ninth Circuit case law is in accord. *Musladin v. Lamarque*, 555 F.3d 830, 837 (9th Cir. 2009) (applying *Agostini*); *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 697 (9th Cir. 2011) (same); *Porter v. Winter*, 603 F.3d 1113,

1117 (9th Cir. 2010) (same); *Luna v. Kernan*, 784 F.3d 640, 649 (9th Cir. 2015) (same). "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). Thus, even if Mr. Eugster did articulate an argument for how the reasoning in *Janus* undermines the holdings in *Lathrop* and *Keller*, those cases continue to govern the constitutionality of mandatory bar membership and licensing fees in front of this Court.

In sum, Supreme Court and Ninth Circuit precedent conclusively establish that states may require attorneys to join and pay licensing fees to an integrated bar association. *Janus* and its predecessors, *Harris* and *Knox*, change nothing in that regard. Thus, Mr. Eugster's challenge to Washington's integrated bar and collection of licensing fees was properly dismissed.

C. Mr. Eugster Has Waived All Other Issues and Claims by Not Specifically and Distinctly Arguing Them in His Opening Brief

Mr. Eugster made a number of claims and arguments below that he does not advance in this appeal. *Compare* ER 54-78 (Amended Complaint) *and* ER 106-22 (Response to Motion to Dismiss) *with* Appellant's Br. As previously noted, Mr. Eugster does not even argue that the district court was wrong when it

dismissed his lawsuit based on res judicata. *See* Appellant's Br. He has, therefore, waived all those arguments on appeal. *Brownfield*, 612 F.3d at 1149 n.4 ("We review only issues [that] are argued specifically and distinctly in a party's opening brief."); *Christian Legal Soc. Chapter of Univ. of California*, 626 F.3d at 485 ("Within the opening brief, claims must be clearly articulated in (1) 'a statement of the issues presented for review'; (2) 'a summary of the argument'; and (3) 'the argument' section itself. Fed. R. App. P. 28. Compliance with the rules is not a mere formality, as we've repeatedly held that 'failure to comply with Rule 28, by itself, is sufficient ground to justify dismissal of an appeal.' " (quoting *In re O'Brien*, 312 F.3d 1135, 1136 (9th Cir. 2002))).

This Court should affirm the district court's order because Mr. Eugster makes no argument on appeal for reversal other than asserting that *Janus* applies to his case. In doing so, Mr. Eugster has waived all other arguments. Since, as explained above, *Janus* does not address the constitutionality of mandatory bar membership and licensing fees, Mr. Eugster's appeal is without merit.

VIII. CONCLUSION

This Court should affirm the district court's dismissal of Mr. Eugster's lawsuit.

RESPECTFULLY SUBMITTED this 31st day of October, 2018.

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STATEMENT OF RELATED CASES

Robert Caruso v. Washington State Bar Association, et al., No. 18-35557 (9th Cir.): A pending appeal from a prefiling order that the District Court for the Western District of Washington entered against Mr. Eugster, based on his extensive history of litigation against the Washington State Bar Association and related parties, including this case.

DATED this 31st day of October, 2018.

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Signature of Attorney or Unrepresented Litigant: /s/ Alicia O. Young

Date: 10/31/2018

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9th Circuit Case Number(s) 18-35421

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