

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.

Appeal from the United States District Court for the
Eastern District of Washington, No. 2:17-cv-00392-TOR
Chief District Judge Thomas O. Rice

REPLY OF APPELLANT

Stephen Kerr Eugster
EUGSTER LAW OFFICE PSC
2418 West Pacific Avenue
Spokane, Washington 99201
(509) 624-5566
eugster@eugsterlaw.com

Appellant Pro Se

TABLE OF CONTENTS

ARGUMENT 1

I. RES JUDICATA 1

A. The Cases. 2

B. Standards. 3

C. Res Judicata Is Lacking. 4

1. Parties. 4

2. Claims. 4

II. JANUS, LATHROP AND KELLER 5

A. Janus v. AFSCME. 5

**III. INFRINGEMENTS OF MR. EUGSTER’S
FUNDAMENTAL RIGHTS FAIL CONSTITUTIONAL
SCRUTINY** 6

IV. MONOPOLY OF THE PRACTICE OF LAW 7

CONCLUSION 8

TABLE OF AUTHORITIES

Table of Cases

<i>A Metal Source, LLC v. All Metal Sales, Inc.</i> , No. 14-3951, at *4 (6th Cir. 2015)	3
<i>Janus v. American Federation of State, County, and Municipal Employees</i> , Council 31, No. 16-1466, 585 U.S. ____ (2018)	1, 5, 6, 8
<i>Karim-Panahi v. Los Angeles Police Dep't.</i> , 839 F.2d 621, 627 n. 4 (9th Cir. 1988)	3
<i>Keller v. California State Bar</i> , 496 U.S. 1 (1990)	1, 5, 6, 8
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961)	1, 5, 6, 8
<i>MGA Entertainment, Inc. v. Mattel, Inc.</i> , Case No.: CV 11-01063 DOC(RNBx) at *7 (C.D. Cal. Oct. 20, 2011)	3
<i>North Carolina State Board of Dental Examiners v.</i> <i>Federal Trade Commission</i> , 574 U.S. ____, 135 S. Ct. 1101 (2015)	7
<i>Owens v. Kaiser Found. Health Plan, Inc.</i> , 244 F.3d 708, 713 (9th Cir. 2001)	4, 5
<i>Stewart v. U.S. Bancorp</i> , 297 F.3d 953, 956 (9th Cir. 2002)	4
<i>Turtle Island Restoration Network v. U.S. Dep't of State</i> , 673 F.3d 914, 917-18 (9th Cir. 2012)	4

Winget v. JP Morgan Chase Bank, N.A.,
537 F.3d 565, 572 (6th Cir. 2008) 3

Statutes

RCW 2.48.170 7

RCW 2.48.180 7

Rules and Regulations

Administrative Practice Rule 12 5

Administrative Practice Rule 28 5

Fed.R.Civ.P. 8(c) 3

General Rule 12.2 5, 7, 8

General Rule 12.3 5

Other Authorities

<https://reason.com/volokh/2018/11/09/-compelled-subsidies-and-the-first-amendm> 6

Terry Radtke, *The Last Stage in Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934-1956*, 81 MARQ. L. REV. 1001, 1002 (1998) 2

William Baude and Eugene Volokh, *Compelled Subsidies and The First Amendment*, 172 HARV. L. REV. 171 (2018) 6

ARGUMENT

In their Answering Brief, Appellees, Washington State Bar Association and Justices of the Washington State Supreme Court, set forth two issues.

First, they ask “[d]id the district court properly dismiss this lawsuit based on res judicata, where the claims Mr. Eugster brought were already rejected in his prior lawsuits?”

The second issue begins with a statement about *Lathrop v. Donohue*, 367 U.S. 820 (1961) and *Keller v. California State Bar*, 496 U.S. 1 (1990). “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.”

This is followed with a question: “Is Mr. Eugster’s challenge to mandatory bar membership and licensing fees based on *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, No. 16-1466, 585 U.S. ____ (2018), which addresses solely union agency fees, foreclosed by *Lathrop* and *Keller*?” Answering Brief, Statement of the Issues 2, (footnote omitted).

I. RES JUDICATA

Appellees present their res judicata assertion with this heading:

The District Court Properly Dismissed Mr. Eugster’s

Lawsuit on Res Judicata Grounds, Because His Claims Duplicated His Prior Unsuccessful Lawsuits. Answering Brief 8.

The heading is not true. As will be shown, Mr. Eugster's claims in this were not duplicated in his prior lawsuits. *Infra* at 5.

A. The Cases.

The lawsuits appellees refer to are as follows:

Eugster II. *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**) *11, *aff'd*, 474 F. App'x 624, 625 (9th Cir. 2012). The WSBA in this case was an "integrated bar association."¹

Eugster III. *Eugster v. Wash. State Bar Ass'n*, No. C15-0375-JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) (**Eugster III**), *affirmed* 684 F. App'x 618, 619 (9th Cir. 2017). The WSBA in this case was an "integrated bar association."

Eugster IV. *Eugster v. Wash. State Bar Ass'n*, 198 Wash. App. 758, 397 P.3d 131 (2017) (**Eugster IV**). The WSBA in this case was an "integrated bar association."

Eugster V. *Eugster V. Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016

¹ "Integrated bar association" means a bar association created on the basis of the model of the integrated bar association of the Integrated Bar Association Movement of the American Judicature Society in 1914. *See*, Terry Radtke, *The Last Stage in Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934-1956*, 81 MARQ. L. REV. 1001, 1002 (1998).

WL 3632711 (E.D. Wash. June 29, 2016) (**Eugster V**). The WSBA in this case was an “integrated bar association.”

Caruso. *Caruso v. Wash. State Bar Ass’n*, No. C17-003 RSM, 2017 WL 1957077, at *1 (W.D. Wash. May 11, 2017) *affirmed*, *Caruso*, Nos. 17-35410, 17-35529 (9th Cir.). The WSBA in this case was regarded as “integrated bar association.”

B. Standards.

It cannot be said these cases are res judicata unless the standards applicable to res judicata are met.

The party asserting the defense of res judicata bears the burden of proof. *A Metal Source, LLC v. All Metal Sales, Inc.*, No. 14-3951, at *4 (6th Cir. 2015) (“We also review de novo a district court’s application of res judicata, with the party asserting the defense bearing the burden of proof. *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 572 (6th Cir. 2008).”); *MGA Entertainment, Inc. v. Mattel, Inc.*, Case No.: CV 11-01063 DOC(RNBx) at *7 (C.D. Cal. Oct. 20, 2011) (“because res judicata is an affirmative defense, the burden is on Defendants, as the parties asserting it, to prove all of its elements. *See Fed.R.Civ.P. 8(c)*; *Karim-Panahi v. Los Angeles Police Dep’t.*, 839 F.2d 621, 627 n. 4 (9th Cir. 1988) (abrogated on other grounds).”)

"Res judicata, or claim preclusion, prohibits lawsuits on 'any claims that were raised or could have been raised' in a prior action." *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)). Res judicata applies when there is: (1) identity or privity between the parties; (2) a final judgment on the merits; and (3) identity of claims. *Id.*

"(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 917-18 (9th Cir. 2012). "The last factor—whether the claims arise out of the same core set of facts—is most important." *See Id.*

C. Res Judicata Is Lacking.

1. Parties.

The parties in this case are different from the parties in previous cases are different but with the exception of Eugster III (but this is of no consequence because Eugster III was an integrated association of lawyers only.)

2. Claims.

Neither res judicata nor claim preclusion applies to this case because the cases

involved did not involve the same claims as this case. This case is about the WSBA under General Rule 12.3, that is an integrated association of lawyers, limited practice officers,² and limited license legal technicians.³ The facts about the WSBA in Eugster III, IV, and Caruso were those an WSBA prior to the effective date of General Rule 12.2.

This case is different because it addresses the WSBA under General Rule 12.2 which became effective after September 1, 2017. The transactional nucleus facts of facts are not the same as the nucleus of facts in the previous cases. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) ("The central criterion in determining whether there is an identity of claims between the first and second adjudications is whether the two suits arise out of the same transactional nucleus of facts.").

II. JANUS, LATHROP AND KELLER

A. *Janus v. AFSCME*.

In *Janus v. AFSCME*, the Court "held that requiring public employees to pay union agency fees is categorically unconstitutional, even when the money is used for collective bargaining. Such public-sector collective bargaining, the majority held, is

² Administrative Practice Rule 12.

³ Administrative Practice Rule 28.

itself inherently political. And the government interests in mandating such payments don't suffice to justify such requirements. [Footnotes omitted].” William Baude and Eugene Volokh, *Compelled Subsidies and The First Amendment*, 172 HARV. L. REV. 171 (2018). *See also*, <https://reason.com/volokh/2018/11/09/-compelled-subsidies-and-the-first-amendm>.

Second, they say that *Keller v California State Bar*, 496 U.S. 1 (1990) and *Lathrop v. Donohue*, 367 U.S. 820 (1961) “clearly establish that states may require attorneys to join and pay licensing fees to the state bar association as a condition of practicing law in the state.” Response at 1.

The application of *Janus v. AFSCME* in the setting of this case does not involve *Lathrop* or *Keller*. The “WSBA” in this case is an association of lawyers, limited practice officers, and limited license legal technicians. *Lathrop* and *Keller* apply only to the common integrated bar association; that is, associations of lawyers only.⁴

III. INFRINGEMENTS OF MR. EUGSTER’S FUNDAMENTAL RIGHTS FAIL CONSTITUTIONAL SCRUTINY

Appellees say Mr. Eugster’s challenges “fail on the merits.” Appellees Response page 16 and following. They are in error. Appellees’ infringements fail

⁴ See footnote 1.

under exacting or strict constitutional scrutiny. Appellant's Opening Brief 8 - 11.

IV. MONOPOLY OF THE PRACTICE OF LAW

Appellees fail to understand Mr. Eugster's objection regarding monopoly created by Washington Supreme Court General Rule 12.2.

The court made the WSBA a state-created government monopoly over the practice of law in the State of Washington. *See, e.g.*, RCW 2.48.170, RCW 2.48.180. Mr. Eugster's point is not to question whether such a monopoly is illegal. *But see, North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. ___, 135 S. Ct. 1101 (2015).

He simply does not want to be a member of an association which is a government monopoly of the practice of law in the state of Washington. Nor does Plaintiff want to be a member with other members of the WSBA, the lawyers, limited practice officers, and limited license legal technicians who make up the monopoly; here, of an association which is a government monopoly of the practice of law in the state of Washington.

Mr. Eugster is compelled to pay dues to the WSBA, which dues can be set by the Supreme Court. Such dues are used in part for the maintenance, administration, and promotion of the limitation of the right to practice law in the hands of the monopoly; that is, the WSBA and the Supreme Court. Mr. Eugster

does not want his dues to be used for such purposes, such expression, and support of programs of the monopoly.

The Supreme Court and the WSBA are infringing on Mr. Eugster's fundamental rights under the First and Fourteenth Amendments. Such infringements do withstand exacting or strict constitutional scrutiny.

CONCLUSION

Janus v. AFSCME applies to the facts of the case at hand, making it a violation of Eugster's right to practice his profession on the condition he pays dues to the WSBA. Under the circumstances, neither *Lathrop v. Donohue* nor *Keller v. State Bar of California*, have application to the WSBA of GR 12.2.

The infringements of Mr. Eugster's fundamental First and Fourteenth Amendment rights of freedom of association and non-association and freedom of speech and expression by the WSBA and Supreme Court do not meet exacting or constitutional scrutiny. Appellant's Opening Brief 8 - 11.

November 21, 2018.

Respectfully submitted,
s/ Stephen Kerr Eugster
Stephen Kerr Eugster

EUGSTER LAW OFFICE PSC
2418 West Pacific Avenue
Spokane, Washington 99201
(509) 624-5566
eugster@eugsterlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2018, I electronically filed the foregoing with the Clerk of the Court of Appeals CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

November 21, 2018.

s/Stephen Kerr Eugster
STEPHEN KERR EUGSTER

CERTIFICATE OF COMPLIANCE

This brief complies with the word-length limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(I). This brief contains _____ words, excluding the portions outlined in Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman type.

November 21, 2018.

/s/ Stephen Kerr Eugster
Stephen Kerr Eugster
EUGSTER LAW OFFICE PSC
2418 West Pacific Avenue
Spokane, Washington 99201
(509) 990-9115
eugster@eugsterlaw.com

\\SPOKANEMAIN\Wip\A_A_Cases_WSBA\Case_13_Const_WSBA_WAED\Appeal\2018_11_22_Reply Brief_Case 13.wpd