Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT E. CARUSO and SANDRA L. FERGUSON,

Plaintiffs,

v.

WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933); WASHINGTON STATE BAR ASSOCIATION after September 30, 2016 (WSBBA 2017): PAULA LITTLEWOOD, Executive Director, WSBA 1933 and WSBA 2017, in her official capacity; ROBIN LYNN HAYNES is the President of the WSBA 1933 and WSBA 2017, in her official capacity; DOUGLAS J. ENDE, Director of the WSBA 1933 and WSBA 2017 Office of Disciplinary Counsel, in his official capacity; WSBA 1933/WSBA 2017 BOARD OF GOVERNORS, namely: BRADFORD E. FURLONG-President-elect (2016-2017), *et al*.,

Defendants.

No. 2:17-cv-00003 RSM

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CLAIMS AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR: APRIL 21, 2017

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I. INTRODUCTION

In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has filed four prior *pro se* lawsuits against Defendant the Washington State Bar Association ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.[1] This lawsuit is no different, even though this time Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous arguments. Many of the arguments Plaintiffs make here are exactly the same arguments that this Court already rejected as meritless when Eugster brought them on his own behalf.[2] These arguments have no more merit when brought on behalf of others. This Court should reject Eugster's attempt to file another lawsuit alleging the same baseless claims.

Eugster tries, but fails, to distinguish this case from prior ones by arguing that the WSBA has been transformed into an entirely new organization, the "WSBA 2017," as a result of straightforward bylaws amendments relating to membership in the WSBA. Contrary to these assertions, Washington law expressly authorizes the WSBA to adopt rules relating to the practice of law in the state, including rules relating to bar membership and limited-license practices. The WSBA remains the same organization Eugster repeatedly has sued over the past two years. Accordingly, cutting through the irrelevant rhetoric, the First Amended Complaint raises only three core claims: first, that requiring bar membership and payment of license fees to practice

[1] In addition to this lawsuit, Eugster also recently filed yet another lawsuit against the WSBA and its officials in Thurston County Superior Court. *Eugster v. Supreme Court of the State of Wash., et al.*, Case No. 17-2-00228-34 (Thurston Cnty. Super. Ct. 2017).

[2] *See Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *2, 5-8 (W.D. Wash. Sept. 3, 2015) (dismissing objections to mandatory bar membership and fees and rejecting misreading of case law).

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law in Washington violates plaintiffs' constitutional rights of speech and association; second, that the WSBA lacks authority to discipline lawyers as a result of the bylaws amendments regarding membership in the WSBA; and third, that the WSBA's discipline system fails to provide adequate procedures to satisfy constitutional due process requirements. These claims are meritless and should be dismissed, for five independent reasons.

First, Plaintiffs' claims fail as a matter of law because (a) compulsory bar membership and fees have been repeatedly upheld as constitutional requirements to practice law; (b) the bylaws amendments do not eliminate the WSBA's authority to administer the Washington Supreme Court's lawyer discipline system, and (c) the numerous protections provided under the discipline system have been recognized as sufficient to satisfy due process. Second, any of Plaintiffs' claims related to lawyer discipline are barred under the *Younger* doctrine, given that each Plaintiff is subject to ongoing state discipline proceedings. Plaintiffs' objections must be brought within those proceedings, not in a collateral attack in federal court. Third, Plaintiffs' discipline-related claims are barred under the res judicata doctrine, because those claims already should have been brought, if at all, in Plaintiffs' prior disciplinary proceedings. Fourth, Plaintiffs' due process claim is generic, nebulous, and thus unripe. Fifth and finally, the WSBA is immune from suit.

Accordingly, Plaintiffs' claims should be dismissed with prejudice. For the same reasons, Plaintiffs' request for a preliminary injunction and summary judgment should be denied.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Prior Lawsuits Involving Eugster

This case is the latest in a number of proceedings involving both Eugster and the WSBA. The prior disputes provide context for Plaintiffs' arguments and issues presented in this case.

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This Court may take judicial notice of the public filings in these prior relevant 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."). The Court also may consider the decisions made in each case as persuasive authority.

***In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293 (2009) ("*Eugster* I"):** In 2005, the WSBA charged Eugster with numerous counts of attorney misconduct. *Id.* at 307. 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.

***Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010) ("*Eugster* II"):** In the meantime, the WSBA was investigating another complaint it had received against Eugster based on other conduct. *Id.* at *1. 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 United States District Court for the Eastern District of Washington against the WSBA and its officials, alleging that Washington's attorney discipline system violated his due process rights. *Id.* at *2. The district court dismissed the case. *Id.* at *11. Specifically, the court determined that Eugster lacked standing to assert his claims because he was not seeking "redress for an actual or imminent injury." *Id.* at *8 (internal

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quotations omitted). The district court also noted that "the Ninth Circuit has recognized bar associations as state agencies for purposes of Eleventh Amendment immunity" and dismissed Eugster's claims against the WSBA for that additional reason. *Id.* at *9. In an unpublished memorandum opinion, the Ninth Circuit affirmed on standing grounds and did not reach the immunity issue. 474 Fed. App'x 624 (9th Cir. 2012).

***Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("*Eugster* III"):** In September 2014, another grievance was filed against Eugster. *See Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016) ("*Eugster* V") (discussing disciplinary history). The WSBA notified Eugster that it was conducting an investigation of the grievance. *See id.* Eugster eventually was informed that the investigation had been assigned to Managing Disciplinary Counsel. *See id*. On March 12, 2015, Eugster filed another lawsuit against the WSBA and its officials, before this Court. *See Eugster* III. In *Eugster* III, Eugster complained that his constitutional rights of association and speech were violated by the requirements of state bar membership and payment of license fees in order to practice law. 2015 WL 5175722, at *2. In September 2015, this Court dismissed the complaint. *Id.* at *1. Specifically, this Court determined Eugster had "grossly misstate[d]" and "misconstrued" governing precedent, which authorizes mandatory bar membership and fees. *Id.* at *5. This Court also observed that the WSBA is immune from suit in federal court as an "investigative arm" of the State of Washington. *Id.* at *9.

Eugster appealed to the Ninth Circuit. Today, on March 21, 2017, the Ninth Circuit affirmed in an unpublished memorandum opinion, upholding "compulsory membership in the WSBA" and rejecting Eugster's lawsuit because "an attorney's mandatory membership with a state bar association is constitutional." *Eugster* III, No. 15-35743, Dkt. # 18-1 (9th Cir. Mar. 21,

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2017). The Ninth Circuit also noted that "[c]ontrary to Eugster's contention," it could not "overrule binding authority . . . ." *Id.* For the Court's convenience, a copy of the memorandum opinion is attached to this brief as Exhibit A.

***Eugster v. Wash. State Bar Ass'n*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015) ("*Eugster* IV"):** While *Eugster* III was progressing in this Court, the bar disciplinary process moved forward and the latest grievance against Eugster continued to be investigated. On November 5, 2015, Eugster was notified that Disciplinary Counsel would be recommending a formal hearing on the pending grievance against him. 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's complaint alleged that the lawyer discipline system violates his procedural due process rights. *See Eugster* V, 2016 WL 3632711, at *2 (discussing *Eugster* IV). The complaint also sought damages. *See id.* The superior court in *Eugster* IV ultimately 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 id.* Eugster appealed to Division III of the Washington Court of Appeals, and that appeal remains pending. *See Eugster* IV, No. 34345-6-III (Wash. Ct. App.).

***Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016) ("*Eugster* V"):** On December 22, 2015, soon after Eugster filed his lawsuit in Spokane County Superior Court (*Eugster* IV), Eugster filed yet another lawsuit against the WSBA's officials, this one another federal suit in the Eastern District of Washington. *Id.* Eugster's complaint sounded in due process, with allegations largely identical to those made in

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Eugster IV. *Id.* at *5. On June 29, 2016, the district court dismissed the complaint with prejudice, determining that Eugster's claims were barred under the res judicata doctrine. *Id.* at *4-6. Eugster appealed the decision to the Ninth Circuit Court of Appeals, and that appeal remains pending. *See Eugster* V, No. 16-35542 (9th Cir.).

***Eugster v. Wash. State Bar Ass'n*, No. 2:16-cv-01765 (W.D. Wash.) ("*Eugster* VI"):** On November 15, 2016, Eugster filed yet another lawsuit in this Court. *Id.* As in the present case, the complaint objected to compulsory bar membership and fees, asserted that the recent amendments to the WSBA's bylaws resulted in a new organization without disciplinary authority, and alleged that Washington's discipline system failed to meet procedural due process requirements. *See id.*, Dkt. # 1. Eugster filed a voluntary dismissal of the case on January 4, 2017—one day after he filed the present lawsuit on behalf of Plaintiffs. *See id.*, Dkt. # 3.

B. The Current Lawsuit

The current lawsuit was filed on January 3, 2017. *See* Dkt. # 1. Initially, the case was filed as a putative class action on behalf of all WSBA members, naming Plaintiffs Robert E. Caruso ("Caruso") and Sandra L. Ferguson ("Ferguson") as class representatives. *See id.* at 11. On February 21, Plaintiffs filed a First Amended Complaint, which asserts individual claims on behalf of Plaintiffs Caruso and Ferguson, abandoning all class claims. *See* Dkt. # 4. Caruso and Ferguson are practicing lawyers and active members of the WSBA. *See id.* at 5.

The First Amended Complaint raises three claims: First, it asserts that requiring bar membership and payment of license fees in order to practice law violates Plaintiffs' constitutional rights of association and speech. *See* Dkt. # 4 at 32-34. Second, it asserts that as a result of recent amendments to the WSBA's bylaws, the WSBA is a new organization that no longer has authority to discipline lawyers in Washington. *See id.* at 34-35. Third, it asserts that

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Washington's lawyer discipline system violates procedural due process requirements. *See id.* at 35-36. The Amended Complaint also alleges claims for declaratory relief and failure to meet "constitutional scrutiny," which are derivative arguments that are subsumed under the three claims identified above. *See id.* at 31-32, 36-38.

C. Prior and Current Disciplinary Matters Against Plaintiffs

Each Plaintiff in this case has previously been subject to disciplinary action for professional misconduct and is also currently subject to an ongoing disciplinary matter. The Court may take judicial notice of state bar records from disciplinary matters. *See White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010) (noting that "state bar records reflecting disciplinary proceedings" were "appropriate for judicial notice"); *Jackson v. Med. Bd. of Cal.*, 424 Fed. App'x 670, 670 (9th Cir. 2011) (granting "request to take judicial notice of . . . State Bar Association records"). Copies of relevant bar documents are attached to this motion as Exhibits for the Court's convenience.

Plaintiff Caruso previously received an admonition in 2015 for ordering a supervised junior lawyer to withdraw immediately from a case without ensuring proper notice or steps to protect his client's interests. *See* Ex. B. More recently, Caruso had a grievance filed against him. *See* Ex. C. Upon review after an investigation by the Office of Disciplinary Counsel, a Review Committee has ordered a public hearing on the alleged misconduct. *See id.*

Plaintiff Ferguson previously was suspended from the practice of law for appearing ex parte without notice to opposing counsel, failing to disclose all relevant facts at an ex parte hearing, and obtaining relief through misrepresentation and deceit. *In re Ferguson*, 170 Wn.2d 916, 921 (2011). More recently, Ferguson had a grievance filed against her that is currently under investigation by the Office of Disciplinary Counsel. Dkt. # 15 at 4; Dkt. # 11 at 1.

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D. Procedural History

The Court has set a briefing schedule for dispositive motions in this case pursuant to a stipulation between the parties. *See* Dkt. # 14 at 3. On March 1, 2017, Plaintiffs filed their Motion for Summary Judgment. *See* Dkt. # 8. On March 3, 2017, Plaintiffs inexplicably also filed a Motion for Preliminary Injunction, making largely the same arguments in support of Plaintiffs' claims in this case. *See* Dkt. # 15. The motion for a preliminary injunction also requests that the Court "stay the discipline endeavors of [the WSBA] until the issues in this case can be decided." *Id.* at 3. The WSBA now requests that the Court deny Plaintiffs' motions and dismiss their claims with prejudice, as set forth below.

III. STATEMENT OF ISSUES

1. Whether requiring bar membership and payment of license fees in order to practice law is constitutional.

2. Whether the WSBA remains authorized to administer the Washington Supreme Court's lawyer discipline system notwithstanding recent amendments to its bylaws designating certain classes of limited-license practitioners as members.

3. Whether Washington's lawyer discipline system—which provides notice, the right to a hearing, the ability to call and cross-examine witnesses, a "clear preponderance" evidentiary burden on the WSBA, and procedures for independent review by the Washington Supreme Court—meets constitutional due process requirements.

4. Whether the *Younger* abstention doctrine bars Plaintiffs from asserting their discipline-related claims in federal court rather than within the discipline proceedings that are currently underway to resolve pending charges against them.

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5. Whether the res judicata doctrine bars Plaintiffs' discipline-related claims because their objections should have been asserted, if at all, within the prior disciplinary proceedings against them.

6. Whether Plaintiffs' due process claim is unripe because it lacks any specific allegation of a deprivation of due process.

7. Whether the WSBA is immune from suit in federal court as an arm of the Washington Supreme Court.

IV. STANDARDS OF REVIEW

A complaint must be dismissed under Federal Rule of Civil Procedure ("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 "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); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). Instead, the complaint must allege "specific facts" establishing the plausibility of a legally valid claim. *Eclectic Props. E., LLC v. Marcus & Millichapt Co.*, 751 F.3d 990, 999 (9th Cir. 2014). Otherwise, the complaint must be dismissed.

Additionally, where an action against an entity is barred by sovereign immunity, the claims against that entity must be dismissed pursuant to Rule 12(b)(1). *Proctor v. United States*, 781 F.2d 752, 753 (9th Cir. 1986).

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V. ARGUMENT

A. Plaintiffs' Claims Regarding Mandatory Bar Membership, License Fees, and Lawyer Discipline Fail as a Matter of Law.

Plaintiffs' Amended Complaint should be dismissed because it fails to state a valid claim for entitlement to relief. Plaintiffs object to requirements that have been repeatedly upheld as constitutional, make unsupported and convoluted allegations about the WSBA's organizational status without any basis in law, and complain about a system that offers robust procedural protections that are more than sufficient to satisfy due process requirements. In sum, none of Plaintiffs' three claims has any merit.

1. Requiring bar membership and license fees to practice law is constitutional.

Plaintiffs' first claim is that requiring bar membership and license fees to practice law violates their constitutional rights of association and speech. Plaintiffs acknowledge that this claim has nothing to do with the WSBA's recent bylaws amendments. *See* Dkt. # 4 at 32 ("Plaintiff[s] cannot be compelled to be [] members of WSBA 1933 or WSBA 2017."). Instead, Plaintiffs more broadly question whether Washington can "impose a mandatory fee on lawyers" to "subsidize efforts" intended to "improve the quality of legal services." *Id.* at 17.

Plaintiffs' question already has been answered by several prior courts. As this Court explained in *Eugster* III, "[n]otwithstanding Mr. Eugster's mischaracterization of case law, several binding decisions" establish that such requirements are indeed constitutional. 2015 WL 5175722, at *5 (citing *Lathrop v. Donohue*, 367 U.S. 820, 827-28, 832-33 (1961); *Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990); *O'Connor v. State of Nev.*, 27 F.3d 357, 361 (9th Cir. 1994); *Gardner v. State Bar of Nev.*, 284 F.3d 1040, 1042 (9th Cir. 2002); and *Morrow v. State Bar of Cal.*, 188 F.3d 1174, 1177 (9th Cir. 1999)); *see also* Ex. A. Although Plaintiffs call into question

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the Supreme Court's longstanding decision in *Lathrop*, *see* Dkt. # 8 at 16-17, they fail to explain their reasons for doing so and ignore the numerous subsequent cases that place this issue beyond any doubt. In *Keller*, for example, the Supreme Court reaffirmed that lawyers "may be required to join and pay dues to the State Bar," noting that this form of mandatory association and payment is "justified by the State's interest in regulating the legal profession and improving the quality of legal services." 496 U.S. at 4, 13.

The established law on mandatory bar membership and fees is not only clear, it is also consistent with basic First Amendment principles. Mandatory bar membership does not materially limit the freedom of attorneys such as Plaintiffs to associate and speak. Plaintiffs remain "free to attend or not attend [bar] meetings or vote in [bar] elections," and they are not forced "to associate with anyone." *Lathrop*, 367 U.S. at 828. Likewise, Plaintiffs are not required "to express any particular ideas or make any particular utterances of any kind," and they remain able "to express their own views or to disagree with the positions of the Bar." *Morrow*, 188 F.3d at 1176. Although Plaintiffs are required to pay mandatory license fees, those mandatory fees are warranted by the state's strong interest in regulating the practice of law and improving legal services in the state.

Ignoring this binding precedent, Plaintiffs repeatedly cite to *Knox v. Serv. Emp'ees Int'l Union*, 132 S. Ct. 2277 (2012) and *In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 286 Neb. 1018 (2013) ("*In re Petition for Rule Change*"). *See* Dkt. # 4 at 37-38; Dkt. # 8 at 19-20; Dkt. # 15 at 16. Both cases are distinguishable and irrelevant. *Knox* discussed the evolving standards governing "compulsory subsidies for private speech" in the context of commercial enterprises and unions—rather than compelled payment of licensing fees to a mandatory bar association. 132 S. Ct. at 2289; *see also Rosenthal v. Justices of the Supreme*

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Ct. of Cal., 910 F.2d 561, 566 (9th Cir. 1990) (noting that the "'substantial analogy'" between unions and bar associations "does not establish that [a] bar association *is* a labor union" and "substantial differences remain" (quoting *Keller*)). More recently, the Supreme Court specifically confirmed that mandatory bars are distinguishable from the union context, serve strong state interests, and still withstand constitutional scrutiny. *Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014).

Likewise, *In re Petition for Rule Change* involved the Nebraska Supreme Court opting to limit the use of mandatory bar fees to regulation purposes, rather than improvement of the legal profession. Plaintiffs fail to acknowledge, however, that the Nebraska Supreme Court's decision was made as a policy decision in response to a petition for a rule change, not a change necessitated for constitutional reasons. *See* 286 Neb. at 1018-19, 1034. Accordingly, Plaintiffs' Second and Third Claims for Relief, which challenge mandatory bar membership and fees, lack merit and should be dismissed as a matter of law.

2. The WSBA remains the same association authorized to administer the Washington Supreme Court's lawyer discipline system.

Plaintiffs' second claim is that the WSBA "came to an end" due to certain bylaws amendments, and that as a result, the WSBA is no longer authorized to administer the Washington Supreme Court's lawyer discipline system. Dkt. # 4 at 9. At issue are amendments the WSBA made to bylaws provisions relating to bar "membership" to include limited-license practitioners whom the WSBA already regulated (namely "Limited Practice Officers," or "LPOs," and "Limited License Legal Technicians," or "LLLTs"). *See, e.g.*, Dkt. # 15 at 5-6, 11. Plaintiffs' assertions that these bylaws amendments terminated the WSBA's existence, created a

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new entity, and nullified the WSBA's authority to administer lawyer discipline in Washington are meritless and should be rejected.

Without citation to authority, Plaintiffs assert that the bylaws amendments somehow remove the WSBA from the purview of the State Bar Act, chapter 2.48 RCW. *See, e.g.*, Dkt. # 8 at 10. To the contrary, the State Bar Act establishes the WSBA as an "agency of the state," RCW 2.48.010, and gives the WSBA Board of Governors the power to adopt rules governing bar membership and discipline:

> The said board of governors shall [] have power, in its discretion, from time to time to adopt rules, subject to the approval of the supreme court, fixing the qualifications, requirements and procedure for admission to the practice of law; . . . to appoint boards or committees to examine applicants for admission; and, to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court; and, with such approval, to prescribe rules establishing the procedure for the investigation and hearing of such matters . . . .

RCW 2.48.060. Pursuant to and consistent with the State Bar Act and other Washington law, the WSBA regularly amends its bylaws regarding any number of matters relevant to the practice of law in Washington, including bar membership and limited-license practices. *See also* RCW 2.48.050 (noting WSBA board has discretion to adopt rules "from time to time" concerning "membership" and "all other matters" affecting "the organization and functioning of the state bar"); WSBA Bylaws at 72-73 (providing that the Bylaws may be amended by the Board of Governors at a regular meeting).[3] Such amendments do not render the WSBA a new organization or entity. *See* RCW 2.48.050; WSBA Bylaws at 72-73; *cf.* Fletcher Cyclopedia of the Law of Corps. §§ 6, 4176 (2016) (noting a corporate entity's existence "presumptively

[3] *Available at* http://www.wsba.org/~/media/Files/About%20WSBA/Governance/WSBA%20Bylaws/Current%20Bylaws.ashx (last visited Mar. 17, 2017).

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continues . . . irrespective of . . . its component members" and "a person who becomes . . . a member . . . does so with . . . implied assent that its bylaws may be amended").

As Plaintiffs point out, the State Bar Act also states that "all persons who are admitted to practice in accordance with the provisions of RCW 2.48.010 through 2.48.180 . . . shall become by that fact active members of the state bar." RCW 2.48.021. But Plaintiffs never specify how this requirement has been violated. Plaintiffs also ignore that the statutes referenced within and incorporated into RCW 2.48.021—including RCW 2.48.050 and .060—empower the WSBA Board of Governors to set rules for membership and for admission to practice law, and do not preclude the WSBA from establishing membership for limited-license practitioners.

Furthermore, the recent bylaws amendments are consistent with Washington General Rule 12.1, the Washington Supreme Court's statement of the purposes and authorized activities of the WSBA. Nothing in the amendments changes the WSBA into something beyond what the Washington Supreme Court has authorized, in its inherent authority over the practice of law. *See, e.g., State ex rel. Schwab v. Wash. State Bar Ass'n*, 80 Wn.2d 266, 269, 493 P.2d 1237 (1972) ("In short, membership in the state bar association and authorization to continue in the practice of law coexist under the aegis of one authority, the Supreme Court."); *Hahn v. Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980) (noting Washington Supreme Court is "assisted" by the WSBA acting as its "agent").

Moreover, limited-license practitioners are nothing new. As an example, for decades certain "qualified law students" have been licensed to practice in limited circumstances. *State v. Cook*, 84 Wn.2d 342, 346, 525 P.2d 761 (1974) (discussing Washington Admission and Practice Rule (APR) 9 (adopted effective June 4, 1970)). LPOs have been licensed by the Washington Supreme Court since 1983 and regulated by the WSBA since 2002. *See* APR 12 (adopted

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effective January 21, 1983 and amended July 1, 2002). The rule creating LLLTs and delegating regulation to the WSBA was adopted in 2012, well before the recent bylaws amendments. *See* APR 28 (adopted effective September 1, 2012). Indeed, Plaintiffs' counsel already specifically complained about the LPO and LLLT Boards in one of his prior lawsuits. *See Eugster* III, 2015 WL 5175722, at *7. Thus, prior to the recent bylaws amendments, LPOs and LLLTs were already licensed by the Washington Supreme Court and regulated by the WSBA, but were not defined as members of the bar under the WSBA Bylaws; now they are. These bylaws amendments do not in any way alter the existence of the WSBA or its authority to administer the Washington Supreme Court's lawyer discipline system.

In sum, the WSBA remains the "agent" of the Washington Supreme Court tasked with administering its lawyer discipline system. *Hahn*, 95 Wn.2d at 34; *see also* Wash. Rules for Enf't of Lawyer Conduct ("ELC") 1.3(a). Accordingly, Plaintiffs' Fourth Claim for Relief, which asserts that the WSBA lacks the authority to administer the lawyer discipline system, fails as a matter of law and should be dismissed with prejudice.

3. Washington's lawyer discipline system provides protections that satisfy procedural due process requirements.

Plaintiffs' third claim is that the Washington Supreme Court's lawyer discipline system fails to provide adequate procedures to satisfy due process requirements. Plaintiffs make vague allegations that the structure and operation of the lawyer discipline system as a whole is not "fair." *See* Dkt. # 4 at 15-31; Dkt. # 8 at 22; Dkt. # 15 at 18-20. Again, Plaintiffs ignore governing precedent regarding the operation of lawyer discipline systems.

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*

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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) (burden on state to prove misconduct "by a clear preponderance"); ELC Title 12 (supreme court review). As with the system considered in *Rosenthal*, Washington's discipline system provides more than adequate process.

Plaintiffs complain mostly about impartiality, but this objection is especially groundless. *See* Dkt. # 15 at 17-20. Plaintiffs overlook that 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, the Ninth Circuit has "specifically rejected" the notion that a state supreme court has "an inherent conflict of interest" in reviewing "state bar disciplinary proceedings." *Canatella v. California*, 404 F.3d

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1106, 1112 (9th Cir. 2005). The Ninth Circuit has also 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). In other words, Plaintiffs would need to allege and present "actual evidence" of bias specific to a given adjudicator to overcome the "presumption of honesty and integrity in those serving as adjudicators." *Canatella*, 404 F.3d at 1112 (internal quotes omitted); *see also Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995). Plaintiffs have not done so, and their claim is thus meritless.

Washington's lawyer discipline system unquestionably comports with due process requirements. Accordingly, Plaintiffs' Fifth Claim for Relief should be dismissed with prejudice. Moreover, because Plaintiffs' First and Sixth Claims for Relief rely entirely on their other failed claims, those claims also fail as a matter of law and should be dismissed with prejudice.

B. Plaintiffs' Discipline-Related Claims Are Barred Under the *Younger* Doctrine and Must Be Raised Within Their Disciplinary Proceedings.

Plaintiffs' Fourth and Fifth Claims for Relief, which concern the lawyer discipline system, also should be dismissed under the *Younger* abstention doctrine, because Plaintiffs are prohibited from using these proceedings as a way of interfering with ongoing state bar disciplinary actions. 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.*

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Garden State Bar Ass'n, 457 U.S. 423, 434-35 (1982). Additionally, constitutional and other objections may be litigated within such disciplinary proceedings. *See, e.g.*, ELC 10.1, 10.8.

Here, pending disciplinary matters against each Plaintiff are ongoing and merit abstention. A formal hearing already has been ordered against Caruso. *See* Ex. C. Under Washington's rules, once "a matter is ordered to hearing," as here, a formal complaint must be filed as a matter of course. ELC 10.3(a)(1). Likewise, the ongoing investigation of Ferguson is governed by detailed Washington rules and also constitutes a substantive part of the disciplinary process. *See* ELC Title 5; *cf. Alsager v. Bd. of Osteopathic Medicine and Surgery*, 945 F. Supp. 2d 1190, 1195 (W.D. Wash. 2013) ("The Board's investigation of Plaintiff's conduct constitutes a state initiated 'ongoing proceeding' for the purpose of *Younger* abstention." (citing cases)); *In re Scannell*, 169 Wn.2d 723, 740 (2010) (holding that lawsuit filed during initial bar investigation "was not preexisting" and did not warrant disqualification of hearing officers named as defendants in lawsuit).

In light of the formal disciplinary proceedings ongoing against both Plaintiffs, this case presents a substantial risk of precisely the type of interference that the *Younger* doctrine is intended to prevent. Indeed, Plaintiffs have specifically asked this Court to "stay the discipline endeavors" against them. Dkt. # 15 at 3. To avoid any such interference, this Court should abstain from litigating Plaintiffs' collateral attack on the Washington disciplinary process.

This case stands in contrast to the circumstances in which the Ninth Circuit has allowed bar discipline challenges to proceed in federal court. In *Canatella v. State of California*, 304 F.3d 843 (9th Cir. 2002), for example, the court allowed a lawyer's challenge to proceed because "no affirmative action had been taken by the State Bar" and the only relevant state rule provided that bar proceedings commenced with "the filing of an initial pleading," which had not occurred.

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304 F.3d at 850-51. Washington has a similar rule regarding the formal commencement of a disciplinary proceeding, *see* ELC 10.3(b), but this case is very different than *Canatella*.

Here, the WSBA has taken a number of affirmative steps within the discipline system, *see* Ex. C; Dkt. # 15 at 4; Dkt. # 11 at 1, whereas in *Canatella* there was no ongoing disciplinary investigation, 304 F.3d at 851 (noting that the "only procedural step that had occurred" was "Canatella's act of self-reporting").[4] In this case, an investigative report and recommendation already has been completed regarding the grievance against Caruso, *see* ELC 5.7(c); an order for a public hearing already has been issued, *see* Ex. C; and a formal complaint is forthcoming, *see* ELC 10.3(a)(1). Likewise, a grievance against Ferguson already has been processed and an investigation is underway. Dkt. # 15 at 4; Dkt. # 11 at 1. Moreover, the Washington Supreme Court has ruled, in a case where a lawyer under investigation sought to disqualify bar officials by filing a separate lawsuit against them, that the disciplinary investigations were "pending ELC proceedings" that preexisted his lawsuit. *Scannell*, 169 Wn.2d at 740. In sum, the potential for interference with ongoing state proceedings against Plaintiffs is both clear and substantial. Thus, this Court should dismiss Plaintiffs' Fourth and Fifth Claims for Relief regarding the WSBA's disciplinary authority and procedural due process.

C. Plaintiffs' Discipline-Related Claims Also Should Have Been Raised in Their Prior Disciplinary Proceedings and Are Thus Barred Under the Res Judicata Doctrine.

Plaintiffs' Fourth and Fifth Claims for Relief also should be dismissed under the doctrine of res judicata; their discipline-related claims should have been raised, if at all, in their prior disciplinary proceedings. Res judicata is intended to "avoid[] repetitive litigation, conserv[e]

[4] 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.

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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). 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).

Under Washington law, 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." *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997). There is "no simple all-inclusive test" for determining whether specific claims should have been asserted in a prior proceeding. *Id.* at 330. "Instead, it is necessary to consider a variety of factors," including, for example, whether "there were valid reasons" not to assert the claims earlier. *Id.* at 331.

Here, Plaintiffs should have raised their objections related to the discipline system in their prior discipline proceedings. Caruso was disciplined in 2015 and Ferguson in 2011. As noted above, limited-license practitioners had already begun to be licensed and regulated by the WSBA at the time. Further, the discipline system generally had the same structure and provided lawyers with the same procedural protections that it does now. Plaintiffs could have raised their objections in those proceedings, and should now be precluded from wasting scarce judicial resources on their belated arguments. Accordingly, this Court also should dismiss Plaintiffs' Fourth and Fifth Claims for Relief regarding the WSBA's disciplinary authority and procedural due process on res judicata grounds.

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D. Plaintiffs' Due Process Objections Are Unripe.

Plaintiffs' Fifth Claim for Relief, their due process claim, also should be dismissed because it is not ripe for adjudication. The ripeness doctrine requires a claimant to present "concrete legal issues" rather than mere "abstractions." *Mont. Env't'l Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014) (internal quotations omitted). Further, 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, Plaintiffs complain about the lawyer discipline system only in the abstract, without alleging any particular deprivation of due process that they have suffered or are likely to suffer. *See* Dkt. # 4 at 15-31. They describe various components of the discipline system, but without stating how those components have been or will be used to violate their due process rights. *See id.* As a result, Plaintiffs have failed to present concrete legal issues or any "direct and immediate" injury and their claim is unripe. *See Pence*, 586 F.2d at 737-38.

Plaintiffs' vague allegations are especially deficient in the context of a procedural due process challenge. None of their objections arise from the application of the discipline system to them—instead, they are objections to the system in theory. But as the Ninth Circuit 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 Ninth Circuit made clear in *Pence*, a procedural due process

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challenge "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, all of Plaintiffs' objections to the discipline system are abstract and premature. They complain about "vast differences among hearing officers" and allege that "[n]ot all hearing officers understand the trial process and the rules of evidence." Dkt. # 4 at 28. Given that a hearing officer has not yet been assigned to either of their cases, however, these complaints are entirely speculative. *See Hirsh*, 67 F.3d at 714 (noting bar officers are "entitled to a presumption of honesty and integrity"). Moreover, the system provides due process protections relating to the assignment of hearing officers. *See, e.g.*, ELC 10.2(b) (providing procedures for disqualification of hearing officers).

Plaintiffs also complain about the deference the Washington Supreme Court allegedly affords to the WSBA Disciplinary Board. *See* Dkt. # 4 at 30. But again, without allegations of an actual instance of improper deference in either of their cases, this issue cannot be evaluated or adjudicated. As *Eugster* I demonstrates, the Washington Supreme Court departs from hearing officer and/or Disciplinary Board recommendations when it sees fit to do so. *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)).[5]

[5] Plaintiffs also ignore that the Ninth Circuit upheld such a framework of deference in *Rosenthal*. *See* 910 F.2d at 564 (upholding system in which state supreme court gave "great weight" to board's findings but was "not bound by them").

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In sum, Plaintiffs' objections to the discipline system are too vague and abstract to be adjudicated. This Court should dismiss Plaintiffs' Fifth Claim for Relief because it is not ripe, as in previous related cases. *See Eugster* II, 2010 WL 2926237, at *8 (rejecting prior challenge as too abstract), *aff'd*, 474 Fed. App'x at 625.

E. The WSBA Is Immune from Suit.

Finally, the WSBA should be dismissed from this case because it is immune from suit. In the context of challenges to bar requirements or regulation, the Ninth Circuit has recognized unified bar associations such as the WSBA are state agencies for the purposes of Eleventh Amendment immunity. *See Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985) (affirming dismissal of state bar association from case seeking to enjoin enforcement of bar rule); *Ginter v. State Bar of Nev.*, 625 F.2d 829, 830 (9th Cir. 1980) ("[T]he Nevada State Bar Association, as an arm of the state, is not subject to suit under the Eleventh Amendment."). Indeed, this issue has been previously adjudicated multiple times between Plaintiffs' counsel and the WSBA in federal court, against Plaintiffs' counsel. *See Eugster* II, 2010 WL 2926237, at *9 (noting that "the Ninth Circuit has recognized bar associations as state agencies for the purposes of Eleventh Amendment immunity" and dismissing claims against the WSBA for that added reason), *aff'd on other grounds*, 474 Fed. App'x 624 (9th Cir. 2012); *Eugster* III, 2015 WL 5175722, at *9 ("[A]s a federal court in this state has already apprised Mr. Eugster, the WSBA is a state agency immunized from suit by the Eleventh Amendment."). In sum, under well-settled Ninth Circuit law, the WSBA is immune from suit and the claims against it should be dismissed.

F. The Amended Complaint Should Be Dismissed with Prejudice.

This Court should dismiss Plaintiffs' claims with prejudice. Plaintiffs already have amended their complaint once and their allegations are so deficient and speculative, as well as

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barred by the *Younger*, res judicata, and immunity doctrines, 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).

G. Plaintiffs Have Failed to Make the Showings Necessary for Summary Judgment or a Preliminary Injunction.

By asserting flawed claims subject to dismissal, Plaintiffs have also failed to demonstrate entitlement to summary judgment or a preliminary injunction. As explained above, Plaintiffs' Amended Complaint lacks any legal merit and should be dismissed with prejudice. Accordingly, Plaintiffs are not entitled to judgment "as a matter of law" on summary judgment. Fed. R. Civ. Pro. 56(a). Nor have Plaintiffs demonstrated a likelihood of success "on the merits" as required for a preliminary injunction. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2009). Moreover, Plaintiffs fail to specify any potential irreparable harm that would result if a preliminary injunction is not issued. *See* Dkt. # 15 at 20. Indeed, as Plaintiffs' disciplinary history demonstrates, irreparable harm is far more likely to result if Plaintiffs are no longer subject to regulatory oversight in the practice of law. For the same reason, the balance of equities and public interest tip sharply in favor of denying Plaintiffs' unsupported requests.

VI. CONCLUSION

This case is one in a long line of frivolous attempts by Plaintiffs' counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other lawyers to serve as named plaintiffs does not change the outcome. As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice.

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DATED this 21st day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2017, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to the following:

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