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STATE OF WASHINGTON
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BY SUSAN L. CARLSON
CLERK

No. 94733-3

SUPREME COURT OF THE STATE
OF WASHINGTON

STEPHEN KERR EUGSTER,

Appellant,

vs.

WASHINGTON STATE BAR ASSOCIATION, *et al.*

Respondents.

REPLY TO ANSWER TO PETITION FOR DISCRETIONARY REVIEW

Stephen Kerr Eugster
Appellant, Pro se

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FOREWORD

The WSBA's Answer to the Petition for Discretionary Review (Answer), consists of multiple fallacies of logic. Perhaps the most significant fallacy of logic has to do Petitioner's fundamental basis for the Petition. Eugster says the Court of Appeals exceeded its appellate jurisdiction. The WSBA does not deny this. Rather, the WSBA lawyers ignore the point.

WSBA defends itself by going off on a logic of its own. The WSBA begins its Answer to the Petition with a fallacy of logic - a Fallacy of Omission known as Stacking the Deck. The WSBA stacks the deck in its favor by purposely ignoring the fundamental question, whether the Court of Appeals acted outside the scope of its appellate jurisdiction. RCW 2.06.080 ("the court shall have exclusive appellate jurisdiction in all cases except. . . .").

Eugster's Reply to the Answer will follow its headings and subheadings (in quotes).

EUGSTER'S REPLY

I. "INTRODUCTION AND IDENTITY OF RESPONDENT"

At the outset of their Answer, lawyers for the WSBA Respondents, introduce their logic of the matter at hand. They completely ignore

Eugster's logic: that the Court of Appeals acted beyond its appellate jurisdiction. Instead, they say the case is about "settled principles of law that were properly applied, and do not warrant discretionary review." Answer at 1. The lawyers for the WSBA are going to tell us about the settled principles (but not really as we shall see), but they are not going to tell us what their position is concerning the Court of Appeal's violation of action in excess of its appellate jurisdiction.

Thus begins the Respondents' fallacies of logic - the first is a Fallacy of Omission known as Stacking the Deck.[1] It is a deliberate deception rather than an accident of logic, matters which prove a point are simply ignored. The fallacy is like the Straw-Man Argument, the attempt to prove an argument by failure to acknowledge the opponent's argument.

II. "COUNTER STATEMENT OF THE ISSUE"

In this part, the WSBA attorneys do what they have said they were going to do.

The WSBA lawyers say:

> "Whether discretionary review should be denied when Eugster fails to address any of this Court's mandatory grounds for such review and he is challenging (1) the Court of Appeals' well-established authority to affirm on an alternative ground and

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[1] *See* L. Kip Wheeler, LOGICAL FALLACIES HANDLIST, https://web.cn.edu/kwheeler/fallacies_list.html (2017/08/15). The Handlist in contained in the Appendix hereto at 22.

(2) the routine application of res judicata to a claim that should have been raised in a prior proceeding." Answer 1.

In this, the Respondent lawyers tell what they are going to do. They are going to move the Court away from the main issue – whether the Court of Appeals violated its jurisdiction, its appellate jurisdiction. This they do with Stacking the Deck and Straw Man fallacies of logic.

The logic of the Petition for Discretionary Review is grounded in the Issues presented in the Petition. These are restated with corrections as shown as follows:

1. Once the Court of Appeals decided that the trial court had jurisdiction over Eugster's Civil Rights Action contesting the constitutionality of the Washington State Bar Association Washington Lawyer Discipline System, was [the court's appellate jurisdiction concluded]?

2. Assuming for the sake of argument, the court could take over the case from the trial court, did the court commit error? It would seem so because, to apply its res judicata conclusion (wrong as it was), the court had to have first decided the system was not unconstitutional as Eugster contended.

3. Does the court have the authority to apply res judicata to a proceeding which has not been determined to have jurisdiction? For there

to be res judicata, it must be established the WSBA Discipline System had jurisdiction to consider the case Eugster was supposed to have brought his concerns to.

III. "STATEMENT OF THE CASE"

The WSBA lawyers' "Statement of The Case", in its purpose and entirety, is a Fallacy of Relevance, the fallacy appeals to evidence, examples, information which is not relevant to the Argument.

The purpose of the Statement of the Case is to create in the mind of the Court that Eugster is quite a bad fellow because of his cases, pro se and otherwise, involving the WSBA. The idea sought to be conveyed is similar to the quotation Chief Judge George Fearing placed at the beginning of his opinion in the case. "*Endless litigation leads to chaos.*"[2] The quotation is a fallacy of logic, a Component Fallacy known as Slippery Slope, if A happens, B . . X, Y, and Z will happen.

The Statement of The Case, in its entirety and in its purpose, is to mount a Fallacy of Relevance consisting of a Personal Attack

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[2] *Schroeder v. 171.74 Acres of Land, More or Less,* 318 F.2d 311, 314 (8th Cir. 1963) (emphasis added). *Eugster v. Wash. State Bar Ass'n,* No. 34345-6-III, Court of Appeals of Washington, Division Three, 198 Wn. App. 758; 2017 Wash. App. LEXIS 1024, May 2, 2017, Filed, Modified by, Motion granted by *Eugster v. Wash. State Bar Ass'n,* 2017 Wash. App. LEXIS 1308 (Wash. Ct. App., June 6, 2017) Reconsideration denied by *Eugster v. Wash. State Bar Ass'n,* 2017 Wash. App. LEXIS 1306 (Wash. Ct. App., June 6, 2017).

(*Argumentum Ad Hominem*) against Eugster. Here is what the lawyers say – "This case is one of multiple lawsuits Eugster has brought against the WSBA and its officials in recent years, ever since being disciplined for professional misconduct as a lawyer." "One year later. . . Eugster filed suit against the WSBA attacking the discipline system." "In 2015, Eugster filed suit against the WSBA again. . ." "Eugster then initiated this lawsuit against the WSBA and three WSBA officials." "In the meantime, Eugster has filed and pursued multiple additional lawsuits against the WSBA and its officials. . . ." See Answer, pages 1 - 5.

Referring to *Caruso and Ferguson v. WSBA et al*, No. 2:17-cv-00003, 2017 WL 19570777 (W.D. Wash. May 12, 2017) (The case is *Caruso v. Wash. State Bar Ass'n*, No. 2:17-CV- 00003, 2017 WL 1957077 (W.D. Wash. May 11, 2017), appeals docketed, No. 17-35410 (9th Cir. May 12, 2017), No. 17-35529 (9th Cir. June 26, 2017), the lawyers tell us:

> Most recently, the Western District of Washington sanctioned and awarded fees against Eugster for asserting a frivolous due process claim akin to the one he alleges here, involving "vague claims of bias without specific facts." *Caruso*, 2017 WL 1957077, at *4.

Answer at 5.

The fees against Eugster were gained by the WSBA because of a fraud on the District Court perpetrated by the lawyers for the WSBA. The pleading in which the fraud first appears is found in Plaintiff Caruso's

Response to Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Appendix 133. Eugster has appealed the order against him. *Eugster v. WSBA*, No. 17-35529 (9th Cir. June 26, 2017). On August 4, 2017, Eugster filed a Response to Motion to Consolidate the two appeals. The Response explains that the lawyers for the WSBA perpetrated a fraud on the District Court and that is one reason why consolidation of the appeals will not work. Response to Motion to Consolidate, Appendix 1.

IV. "ARGUMENT"

A. "The Court Need Not Appoint a Substitute Panel to Hear Eugster's Challenges to Routine, Settled Procedural Issues."

Having put their Stacking the Deck and Slippery Slope fallacies of logic into the mind of the Court and others who assist in the decision making and opinion writing, the lawyers for the WSBA dismiss the need to use WASH. CONST. art. IV, § 2(a), with this:

> [Eugster] identifies no valid basis for appointing substitute justices case. Eugster's petition raises only issues relating to routine and settled principles of legal procedure, not issues that are personal to any of the Justices of this Court.

Answer at 6.

The lawyers know better. The Justices of this Court cannot decide this case. The case is about the application of the Washington State Constitution, and the limit placed on appellate jurisdiction and statute on

the Court of Appeals. The case is not about "only issues relating to routine and settled principles" as the lawyers would have us believe under their Stacking the Deck and Slippery Slope fallacies of logic.

And, there is more to be said about whether the Court can avoid art. IV, § 2(a).

1. A Person Cannot Be a Judge in His Own Case.

The Court cannot decide the case. *Nemo Judex In Causa Sua* (Or *Nemo Judex In Sua Causa*). These legal maxims "mean[], literally, 'no-one should be a judge in his own cause.' It is a principle of natural justice that no person can judge a case in which they have an interest."[3]

This remains a principle of law in the State of Washington. The Court cannot be the judge in its own case. *State ex rel. Beam v. Fulwiler*, 76 Wash. 2d 313, 456 P.2d 322 (1969); *see also, State ex rel. Barnard v. Board of Education of City of Seattle*, 19 Wash. 8, 17, 52 P. 317, 320 (1898).

The Court would be a judge in its own case because in *McCleary v. State*, 173 Wash. 2d 477, 269 P. 3d 227 (2012) (*McCleary*), the Court is violating the Washington Constitution because it too, just as the Court of

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[3] *Nemo iudex in causa sua* - Wikipedia, https://en.wikipedia-.org/wiki/Nemo_iudex_in_causa_sua.

Appeals has done, is exercising power beyond the reach of its appellate jurisdiction. Supreme Court, WASH. CONST. art. IV, § 4; Court of Appeals, WASH. CONST. art. IV, § 30 and RCW 2.06.080.

2. *McCleary v. State.*

The lawyers were made aware of the problem the Justices have regarding the limit of appellate jurisdiction in *McCleary*. Eugster pointed out the Court had a conflict in the case because of the position it was taking in retaining jurisdiction after the case was decided in violation of its limited appellate jurisdiction. See the discussion the Court's role in *McCleary* in the Eugster's Petition for Discretionary Review. Appendix 33.

The WSBA did not mention this discussion. They were aware of the issue because they have told the Court that one of Eugster's lawsuits is *Eugster v. Supreme Ct. of the State of Wash.*, No.17-2-00228-34 (Thurston Cnty. Super. Ct. Feb. 3, 2017) (voluntarily dismissed by Eugster). A copy of the complaint can be found in the Appendix at 54. The main issue raised in the complaint is the Court's violation of its jurisdiction. It is acting as though it has original jurisdiction because it is acting outside of its authority.

Despite the non-suit, Eugster will pursue this matter further.

3. Violations of Code of Judicial Conduct and Law.

The Court must utilize WASH. CONST. art. IV, § 2(a), it does not have a choice.

The Washington Code of Judicial Conduct, CJC RULE 1.1, Compliance with the Law, provides: "A judge shall comply with the law, including the Code of Judicial Conduct. 'Law' encompasses court rules as well as statutes, constitutional provisions, and decisional law."

Judges of the Supreme Court are required to take an oath of office. WASH. CONST. art. IV, § 28:

> Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

See also, WASH. CONST. art. IV, § 30, and RCW 2.04.085 for the oath judges of the Court of Appeal must take:

> I do solemnly swear (or affirm, as the case may be), that I will support the Constitution of the United States and the Constitution of the State of Washington, and that I will faithfully and impartially discharge the duties of the office of judge of the court of appeals of the State of Washington to the best of my ability.

The justices of the Washington Supreme Court in *McCleary v. State* are violating WASH. CONST. art. IV, § 4 because, by retaining jurisdiction in the case, they are exceeding the Court's appellate jurisdiction. ("The supreme court shall have original jurisdiction in habeas corpus, and quo

warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, . . .") *Id.*

The judges of the Court of Appeals in this case have also violated its appellate jurisdiction. RCW 2.06.030 provides in pertinent part:

> The court shall be vested with all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgments, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state. Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all cases except. . . . [Emphasis added.] [The exceptions do not apply.]

Washington State Constitution – Original and Appellate Jurisdiction, Separation of Powers. "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." WASH. CONST. art. IV, § 1. The Supreme Court has been vested with defined parts of "judicial power." The Supreme Court "shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers" and "appellate jurisdiction in all actions and proceedings, . . ." WASH. CONST. art. IV, § 4.

The concept of "appellate jurisdiction" has long been known in American jurisprudence. *See, e.g.*, U. S. CONST. art. III, § 2.

The Washington Supreme Court confronted the issue of what "appellate jurisdiction" means in *City of Seattle v. Hesler*, 98 Wash. 2d 73,

81-82, 653 P.2d 631 (1982). There, the court said:

> Appellate jurisdiction is defined in BLACK'S LAW DICTIONARY 126 (Rev. 4th ed.1968) as "[t]he power and authority to take cognizance of a cause and proceed to its determination, not in its initial stages, but only after it has been finally decided by an inferior court, i.e., the power of review and determination on appeal, writ of error, certiorari, or other similar process." *Id.*

The United States Constitution is illustrative of judicial power and how this power is separated into parts. "In *Scott v. Sandford*, 60 U.S. 393, 401, 15 L. Ed. 691, 699 (1857) it was held that 'neither the legislative, executive nor judicial Departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution.'" Fred L. Fox, *Separation of Powers*, 5 WASH. & LEE L. REV. 185, 186 (1948).

Judge Fox, continued with explanation of separation of the judicial power, and using *Kilbourn v. Thompson*, 103 U.S. 168, 190-191, 26 L. Ed. 377, 387 (1881), further elaborated on separation of power:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers in trusted to Government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and-that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the

power appropriate to its own department and no other.
[Emphasis added.]

B. "Eugster Fails to Identify, Let Alone Demonstrate, Any Valid Basis for Discretionary Review."

WSBA lawyers say: "Even if the Court proceeds to consider Eugster's Petition despite his failure to address the governing standards, it still should conclude that none of the bases for discretionary review are satisfied." Answer 8. This statement is a fallacy of logic. It assumes Eugster's Petition failed to address the bases for discretionary review.

1. "The Court Of Appeals' Decision To Affirm On The Alternative Ground Of Res Judicata Does Not Conflict With Precedent."

The lawyers for the WSBA say that the Court of Appeals can approve a trial court's decision based on "any ground" or "any theory." This is not accurate. The "on any ground or any theory" concept requires a record in the trial court. The Appellate Court does not have a right to make a record, to decide facts, to decide the law as to a record it purports to have made.

The lawyers have failed to disclose the requirements which must be met for an affirmance on any theory or any ground. These terms are limited to the record of the trial court. The Court of Appeals cannot, under appellate jurisdiction, make trial court decisions as to what the record is. The record must be the source of "any theory or any ground" of the

decision.

The lawyers for the WSBA have an interesting self-important way of making their arguments. For example, they say, "[b]ut it is a well-established general rule of appellate practice" in Washington that an appellate court may affirm a trial court ruling on "any theory," even if different from what was relied on by the trial court. They cite *Sprague v. Sumitomo Forestry Co.*, 104 Wash. 2d 751, 758, 709 P.2d 1200 (1985); yet, the case requires a record.

> It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge. *Cheney v. Mountlake Terrace*, 87 Wash. 2d 338, 552 P.2d 184 (1976). Although the jury verdict cannot be upheld under the resale method of determining damages, we find that the record supports the verdict under the alternate method of establishing damages, computed by measuring the difference between the market price and the contract price as provided in RCW 62A.2-708. [Emphasis added.]

The WSBA lawyers cite *Nast v. Michels*, 107 Wash. 2d 300, 308, 730 P.2d 54 (1986). There, the court said:

> Although the PDA does not control the copying charge issue, an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court. *Reed v. Streib*, 65 Wash. 2d 700, 709, 399 P.2d 338 (1965). *Id.*

The WSBA also cites *Hannum v. Friedt*, 88 Wash. App. 881, 889–90, 947 P.2d 760 (1997) (affirming dismissal for failure to state a claim even though trial court dismissed on the basis of immunity). The

court said:

> The trial court dismissed Hannum's suit against Gerrish on summary judgment based on Gerrish's absolute immunity from suit. Although dismissal of the claim by summary judgment was correct, the proper ground for dismissal was Hannum's failure to state a claim upon which relief could be granted. We can affirm on any grounds established by the pleadings and supported by the proof. [Emphasis added.] *Id.*

" We can affirm on an alternate theory if it is established by the pleadings and supported by proof." *State v. Collins*, 110 Wash. 2d 253, 258 n. 2, 751 P.2d 837 (1988). *See also, State v. Marks*, 95 Wash. App. 537, 977 P.2d 606, 607 (1999).

The WSBA lawyers want the court to uncritically look at what they say. They look at the case in a way which suits them best, but it is wishful thinking. They desire to have the Court adopt their wishful thinking. Sometimes, it is quite awful. *See* Response to Motion to Consolidate. Appendix 1.

The WSBA lawyers claim "Eugster ignores this precedent" and that under RAP 12.2 an "'appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.'" Answer 9. The lawyers claim RAP 12.2 allows the court to overlook the rules under which it conducts its constitutional work. They want this court to ignore the shear incontrovertible fact, the court does not have authority to act in excess of

its jurisdiction, which is not original jurisdiction, rather it is appellate jurisdiction. WASH. CONST. art. IV, § 6.

"Eugster also argues that the Court of Appeals erred in determining that his lawsuit is barred under the res judicata doctrine. The lawyers have no idea what they are talking about. However, they would like the court to agree with them, Eugster should have brought his claims up at the time he was disciplined in commencing in 2005 and finally ending when he was reinstated in 2011. Eugster did not know at the time the WSBA Washington Lawyer Discipline System was so unfair as it was, in and of itself, a violation of a lawyer's right under the Fifth Amendment to procedural due process of law. This was fact asserted by Eugster in his complaint. Appendix 86.

This brings us to this issue: How can the court claim Eugster was bound to have brought the issue up to the Hearing Officer and keep at it throughout his experience with the hearing officer, the review committees, the Disciplinary Board and the Supreme Court. Where are the facts, what does the record say, what does Eugster's complaint say?

The Court of Appeals has no power to claim res judicata, because the court supposedly from which the "res judicata" flowed, did not have jurisdiction. Or to put it another way, the court even if it could do what it did (try the case as if it had original jurisdiction), would have a trial on the

issue of the constitutionality of the system.

2. "Eugster Raises Settled Issues of Appellate Procedure and Preclusion, Not Significant Constitutional Questions."

Surely proper enforcement of limitations of "appellate jurisdiction" is a significant question under the Washington constitution. It is even more significant because of the retention of jurisdiction in spite of the limitation of appellate jurisdiction. The court is violating separation of power under the Washington constitution. Under the constitution, the power of a court on appeal does not have constitutional power to exercise original jurisdiction.

3. "Eugster's Appeal Does Not Implicate a Substantial Public Interest."

The appeal implicates a substantial public interest regarding the implications of the Court of Appeals or the Supreme Court using a power neither has. One must consider: What happens when the Supreme Court decides to retain jurisdiction? The Court moves into the political realty and uses its power to dictate to the Washington Executive and Legislature what its political power says things should be like. Political power on an arbitrary basis. The implications are frightening. The concern regarding tyranny by the court is now a part of the jurisprudence of the Supreme Court and the Court of Appeals.

V. "CONCLUSION"

The WSBA's Conclusion is the product of fallacies of logic and an effort to gain the court's attention, just as Chief Judge Fearing began his opinion with "*Endless litigation leads to chaos.*"

EUGSTER'S CONCLUSION

The Court must impanel a temporary Supreme Court under WASH. CONST. art. IV, § 2(a) for the purpose of determining whether the Petition for Discretionary Review should be granted.

Even if the court believed the Court of Appeals had a right to affirm on any ground, including grounds, which are not a part of the trial court record, it cannot do so without first addressing the issue of whether the WSBA Lawyer Discipline System was, or was not, in violation of Eugster's right to due process of law under the Fifth Amendment.

An affirmance based on "any theory," "any ground," requires the ground based on the record and proof before the court. Here, the court has gone outside of the record and assumed a fact to be in existence – that the WSBA Lawyer Discipline System did not violate Eugster's Fifth Amendment fundamental right to the procedural due process of law.

Coming back to Judge Fearing's beginning quotation -- "*Endless litigation leads to chaos*" – one must conclude Judge Fearing and the concurring judges have taken the quotation and have turned it into the rule of the case. They have decided that when the WSBA commences a

disciplinary action as it did regarding Eugster, Eugster must raise his constitutional concerns in his discipline proceeding. Because he did not, he cannot raise them now. .

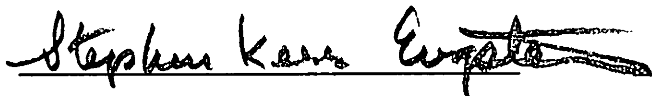
They are saying "endless litigation" consists of the action brought against Eugster and the claim which Eugster could have raised. Thus, in Eugster's case and every other case involving the same set of facts, "chaos" is avoided.

Or stated another way, the rule established by the Court of Appeals is this: A lawyer cannot bring a claim against the WSBA unless she brings it in the first discipline proceeding brought against her by the WSBA.

Surely, WASH, CONST. art. IV, Section 2(a) will be acknowledged as the step this Court must take at this point in the proceedings.

August 16, 2017.

Respectfully submitted,



Stephen Kerr Eugster, WSBA # 2003
Appellant, Pro Se

PROOF OF SERVICE

I at this moment certify that on August 16, 2017, by previous agreement of counsel, I emailed, the preceding document including its Appendix (which follows this Proof of Service to counsel listed below at their respective e-mail addresses. I also certify that I filed the preceding document including its Appendix electronically with the Clerk of the Supreme Court of the State of Washington.

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August 16, 2017.

Stephen Kerr Eugster

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FOR THE NINTH CIRCUIT

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Plaintiffs-Appellants,
v.

WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933; et al.,

Defendants - Appellees.</td><td>No. 17-35410

D.C. No. 2:17-cv-00003-RSM
U.S. District Court for Western Washington, Seattle

RESPONSE TO MOTION TO CONSOLIDATE APPEALS</td></tr>
<tr><td>STEPHEN KERR EUGSTER,

Pro se-Appellant,
v.

WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933; et al.,

Defendants - Appellees.</td><td>No. 17-35529

D.C. No. 2:17-cv-00003-RSM
U.S. District Court for Western Washington, Seattle

RESPONSE TO MOTION TO CONSOLIDATE APPEALS</td></tr>
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT E. CARUSO and SANDRA L. FERGUSON, Plaintiffs-Appellants, v. WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933; *et al.,* Defendants - Appellees.	No. 17-35410 D.C. No. 2:17-cv-00003-RSM U.S. District Court for Western Washington, Seattle **RESPONSE TO MOTION TO CONSOLIDATE APPEALS**
STEPHEN KERR EUGSTER, Pro se-Appellant, v. WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933; *et al.,* Defendants - Appellees.	No. 17-35529 D.C. No. 2:17-cv-00003-RSM U.S. District Court for Western Washington, Seattle **RESPONSE TO MOTION TO CONSOLIDATE APPEALS**

I. INTRODUCTION

I.

The lawyers for the WSBA Defendants in *Robert E. Caruso and Sandra L. Ferguson v. WSBA,* No. 2:17-cv-00003-RSM WAWD, 9th Circuit No. 17-35410, have perpetrated a fraud on the District Court.

The fraud begins, or perhaps became apparent, in WSBA's Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Dkt. # 16, App. 274.

II. BACKGROUND AND PROCEDURAL HISTORY

A. There are Two Separate Cases on Appeal.

There are two appeals in this matter. The first is the appeal of the dismissal of *Robert E. Caruso and Sandra L. Ferguson v. WSBA*, Appeal, No. 17-35410 (Caruso Appeal). The second is the appeal of the order awarding attorney fees against pro se Stephen Kerr Eugster, *Stephen Kerr Eugster v. WSBA*, 9th Circuit No. 17-35529 (Eugster Appeal).

B. Background.

In their Motion for Consolidation, the lawyers for the WSBA tell of "The Parties and Claims in the Underlying Case." Motion for Consolidation at 2. They say the District Court Plaintiffs, *Robert E. Caruso and Sandra L. Ferguson,* filed

their complaint on January 3, 2017, and amended their complaint on February 21, 2017. Dkt. # 4, App. 1. Next, they say on March 21, 2017, the WSBA filed a "Motion to Dismiss."

That's it. The lawyers for the WSBA fail to tell the Court the whole truth of the procedural record. The "Motion to Dismiss" was not a motion to dismiss; its true name is "Motion to Dismiss and Objection Plaintiffs' Motions for Summary Judgment and Preliminary Injunction." Dkt. # 16, App. 274.

C. Procedural Matters.

After the amended complaint had been filed (Dkt. # 4, App. 1), the lawyers had a telephone conference on February 28, 2017. Dkt. # 35-6, App. 448. The amended complaint was discussed. The lawyers agreed to a stipulation and order regarding scheduling. On March 2, 2017, the Stipulation and Order for Briefing Schedule was entered. Dkt. # 14, App. 810.

On March 1, 2017, Plaintiffs filed their Motion for Summary Judgment. Dkt. # 8, App. 41, and related declarations, Dkt. # 9, App. 65; Dkt. # 10, App. 802; and Dkt. # 11, App. 807. On March 3, 2017, Plaintiffs filed their Motion for Preliminary Injunction. Dkt. # 15, App. 251. On March 21, 2017, WSBA filed their Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Dkt. # 16, App. 274. On April 6, 2017,

Plaintiffs filed their Response to Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Dkt. # 18, App. 310. The Response was together with a declaration by Stephen Eugster. Dkt. # 9, App. 321.

The WSBA Defendants filed their Reply to the Plaintiffs Response April 18, 2017 and filed their Reply to Response to Motion. Dkt. # 21, App. 341. On April 27, 2017, WSBA Defendants filed a Motion for Attorney Fees. Dkt. # 22, App. 356. On May 11, 2017, the Court entered its Order on Motion for Summary Judgment. Dkt. # 28, App. 381. The case closed on May 11, 2017. At that time, Defendant's Motion for Attorney Fees Against Stephen Eugster remained pending. On May 23, 2017, the Court rendered its order on Motion for Attorney Fees. Dkt. # 33, App. 403. Judgment of the court was entered May 11, 2017. Dkt. # 29, App. 390. The record shows the Motion to Dismiss, so called by the WSBA, was not an isolated motion. It was a part of the Plaintiffs' Motion for Summary Judgment (Dkt. # 8, App. 41) and Plaintiffs' Motion for Preliminary Injunction. Dkt, # 15, App. 251.

III. ARGUMENT

A. Standards.

Fraud on the court may be raised the first time on appeal. In *Hendricks &*

Lewis PLLC v. Clinton, 766 F.3d 991,1000 (9th Cir., 2014), the court held that perpetration of a fraud on the district court may be raised for the first time on appeal. The district court said:

> "Courts have inherent equity power to vacate judgments obtained by fraud." *United States v. Estate of Stonehill*, 660 F.3d 415, 443 (9th Cir.2011) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)); *see also Dixon v. Comm'r*, 316 F.3d 1041, 1046 (9th Cir.2003) ("Courts possess the inherent power to vacate or amend a judgment obtained by fraud on the court."). We have held that "[w]hen we conclude that the integrity of the judicial process has been harmed . . . and the fraud rises to the level of 'an unconscionable plan or scheme which is designed to improperly influence the court in its decisions,' we not only can act, we should." Dixon, 316 F.3d at 1046 (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir.1960)).

The standards and elements of fraud on the court are as follows:

> [A] party seeking to show fraud on the court to present clear and convincing evidence of the following elements: "1) [conduct] on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court." *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010); (quoting *Carter v. Anderson*, 585 F.3d 1007, 1011-12 (6th Cir. 2009)).

B. <u>The Fraud Began with WSBA's Motion to Dismiss</u>

1. <u>Fraud – WSBA's Motion to Dismiss [and Opposition to Plaintiffs'Motions for Summary Judgment and Preliminary Injunction].</u>

On March 21, 2017, WSBA filed what their lawyers call a "**Motion to Dismiss.**" It is a highly unusual document. It makes the person of Stephen Kerr Eugster the basis upon which the case is to be dismissed. The beginning of the fraud on the District Court is found in WSBA Motion to Dismiss in the "Introduction" and "Conclusion."

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. [Footnotes omitted.] Dkt. # 16, App. 274.

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. *Id.*

C. <u>The Fraud Dissected.</u>

1. WSBA's Premise is A Fraud.

The greatest fraud in the fraud perpetrated in the Introduction is this: The lawyers do not disclose that all they have to say about pro se Eugster's efforts in his pro se cases is based on the false premise that pro se Eugster's previous cases addressed WSBA, which at the time was a common integrated bar association, an association limited to lawyers. The lawyers were and are well aware that the Caruso Case addressed a WSBA which, as of January 1, 2017, became a WSBA whose members are lawyers, Limited Practice Officers, and Limited License Legal Technicians. The lawyers had a duty to disclose this before they said pro se Eugster's cases were the same as the Caruso Case.

2. WSBA Ad Hominem Attack and False Statements.

The lawyers say: "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."

The lawyers do not tell the court what Washington's bar system was when pro se Eugster engaged the WSBA. They failed to disclose a material fact, as has been said they failed to disclose that the WSBA then was not the WSBA after January 1, 2017. They knew the cases were not the same. One would also think they knew

that if they had disclosed this, the entire fraud would fail. Dkt. # 4, Amended Complaint, App. 1.

They falsely denigrate pro se Eugster by saying the cases were a crusade against the system. The "crusade" was this: In Case III, pro se Eugster tried to get the case of *Lathrop v. Donohue*, 367 U.S. 820 (1961) overruled. Pro se Eugster even petitioned the United States Supreme Court for a writ of certiorari, which was not granted. Petition for Writ of Certiorari, App. 524. The lawyers fail to disclose that a continued *Lathrop v. Donohue* would have no bearing in the Caruso Case because it was a single lawyer member association case, not a multiple member association as in the Caruso Case.

Case IV and Case V were brought against the WSBA which was then a single member association. The lawyers for the WSBA are aware res judicata requires the same facts and the same parties.

3. False Statements about Pro Se Eugster's Efforts.

The lawyers say: "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.

The falsehood of this statement is the failure to disclose that the WSBA then

was not the WSBA of the Caruso Case.

There is yet another falsehood in the statement – that "each such lawsuit was meritless." The lawsuits were not meritless. To say the suits were meritless requires that they did not have merit and were dismissed. The fact that Case IV and Case V were dismissed on the basis that the court said it did not have jurisdiction to hear the case does not mean they were meritless. Dkt. # 29, Order of Dismissal, App. 519 and Dkt. # 19, Order Granting Motion to Dismiss, App. 842. The merits were not gotten to. Of course, the lawyers know that so they do not disclose the cases were dismissed on jurisdictional grounds.

And again, they fail to disclose that the facts in the pro se Eugster cases involved the WSBA then, not the WSBA after January 1, 2017.

4. "Eugster Enlisted Other Lawyers."

The lawyers say: "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."

"This lawsuit," the lawyers say, is "no different." This is an intentionally false statement. "This lawsuit" is entirely different again because the WSBA as of January 1, 2017 was a multi-member "bar [sic] association."

5. Arguments Were Not Rejected As Meritless.

The lawyers say: "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.

The arguments here are not the same as were made in the pro se Eugster cases.

The cases were not rejected as meritless. They were rejected because the court said it did not have jurisdiction to decide the cases. Case IV was rejected because the Superior Court said the Washington State Supreme Court had exclusive jurisdiction. Case V was rejected because the District Court judge held that the decision in Case IV was res judicata. This case is on appeal. The lawyers for the WSBA fail to disclose these essential facts. They certainly were aware of them. *Id.*

6. 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.

The lawyers say: "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." The facts of a new lawsuit against the bar would not be the same as the pro se cases.

D. "Conclusion" of the Motion.

The Conclusion consists of a restatement, with some additional nuances about pro se Eugster, is:

(A) "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."

(B) "Enlisting other lawyers to serve as named plaintiffs does not change the outcome."

(C) "As with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice."

But, the Conclusion is more than a restatement of what has already been said; it is proof that the WSBA lawyers see what pro se Eugster is said to have done, said to be, which is part and parcel, of the Motion to Dismiss. What they say is the reason to dismiss the case is what pro se Eugster had done in the past. That is to say, the *raison d'être* of the case is pro se Eugster.

E. Plaintiffs' Response to Motion to Dismiss and Declarations.

Caruso filed his Response to the Motion to Dismiss on April 6, 2017. Dkt. # 18, App. 310. Within a few hours, the WSBA lawyers served an unfiled Motion for Attorney Fees. The Motion was filed 21 days after it was served to comply with Rule 11(c)(2).

F. WSBA Files Motion for Attorney Fees.

The lawyers for the WSBA filed a Motion for Attorney Fees on April 27, 2017, 21 days after the unfiled Motion for Attorney Fees was served on pro se Eugster. Dkt. # 22, App. 356.

The Motion for Attorney Fees said:

I. INTRODUCTION

> This lawsuit is part of one previously disciplined lawyer's ongoing campaign against the Washington State Bar Association ("WSBA"). In response to multiple grievance investigations against him and resulting sanctions for established misconduct, Plaintiffs' counsel Stephen K. Eugster ("Eugster") has repeatedly advanced frivolous, meritless, and harassing claims against the WSBA in court. Just within the last three years, Eugster has filed five *pro se* suits against the WSBA and its officials. Four were dismissed at the pleadings stage; the fifth was recently initiated before the Thurston County Superior Court and is scheduled for a dispositive motion hearing in May 2017. In this case, Eugster has enlisted two other disciplined lawyers as named plaintiffs, in order to submit his same frivolous arguments for yet another round of judicial review. The WSBA, for the first time amidst this seemingly endless series of lawsuits, requests payment of its fees and expenses for defending against Eugster.

V. CONCLUSION

> In this case, Eugster brought a frivolous, harassing lawsuit; filed a series of lengthy complaints and duplicative motions; and furthered his broader ongoing strategy—an unending series of baseless suits against the WSBA in courts across Washington State. The imposition of fees and expenses pursuant to Rule 11, Section 1927, and the court's inherent authority would appropriately sanction and deter this conduct. The WSBA thus respectfully requests that this Court order Eugster to pay the WSBA's reasonable attorney fees and expenses incurred in defending this lawsuit and that the Court grant the WSBA leave to file a statement of its attorney reasonable fees and costs incurred in this matter.

As readily perceived, the conduct of the fraud on the court is restated

in the Motion for Attorney Fees. The conduct with respect of pro se Eugster raises a host of problems for the lawyers of the WSBA and the WSBA leadership lawyers. *See* below at 17.

G. District Court Grants the WSBA's Motion to Dismiss.

The Court signed and entered the Order Granting Motion to Dismiss, Dkt. # 28, App. 381. The Order shows that District Court was deceived by the lawyers' fraudulent statements and conduct, thus establishing the 5th element of fraud on the court, that the conduct "deceives the court." As a result of the conduct, the Court treated the Motion to Dismiss in isolation of Plaintiffs' Motions For Summary Judgment and Preliminary Injunction. The court dealt with the "Motion to Dismiss" first. Order #28 at 3, line 9, App. 381. Having done that, the court granted the Motion to Dismiss (with prejudice). As for Plaintiffs' Motion for Summary Judgment and Motion for Preliminary Injunction, each was "Denied" as "Moot." Dkt. # 28 at 9, App. 381. The two motions should have been considered as they were part of motions which preceded the Motion to Dismiss. The whole process should have been treated as a summary judgment motion.

The Motion To Dismiss was considered as an isolated Rule 12(b)(6) motion using the standards for such a motion. See the "Legal Standard" section in the

Order, Dkt. # 28 at 3, App. 382.

IV. CONSOLIDATION IS INAPPROPRIATE

A. Fraud on the Court.

By clear and convincing evidence, it is established that the lawyers for the WSBA have successfully perpetrated fraud on the District Court. All of the elements have been met: "1) the lawyers are officers of the court who engaged in conduct, 2) directed to the judicial machinery itself; 3) the conduct is intentionally false, willfully blind to the truth, or is in reckless disregard of the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court."

The WSBA lawyers seek to consolidate the Eugster Appeal with the Caruso Appeal. They seek to do so for the same reason they made pro se Eugster the centerpiece of their Motion to Dismiss. They want the Court of Appeals to react the same way the District Court acted. They want the Court in the Caruso Appeal to have the same negative and false regard for Eugster they convinced the District Court to have. They want the ad hominem argument to shore up results of their false statements, their failure to disclose material facts, their intentional misrepresentation of the character of the bar as a single class lawyer member organization. They do not want the Court to see the WSBA for what it is today and

has been since January 1, 2017 – a "bar association of lawyers, Limited Practice Officers and Limited License Legal Technicians" which violate Plaintiff Caruso's First, Fifth and Fourteenth Amendment Rights. Dkt. # 4, Amended Complaint, App. 1.

B. Consolidation Is Not Appropriate.

WSBA lawyers cite many cases in support of consolidation. When one looks closely at the cases, however, they will find they do not support consolidation.

First, they cite *United States v. Washington*, 573 F.2d 1121, 1123 (9th Cir. 1978) and of it say "(consolidation may be ordered where the court in its discretion deems it appropriate and in the interest of justice)." However, the court also mentioned the issue of jurisdiction regarding consolidation matters. "Consolidation under Federal Rule of Appellate Procedure 3(b) may be ordered where the court in its discretion deems it appropriate and in the interests of justice, but each of the matters to be consolidated must be within the jurisdiction of the court." *Id.,* 573 F.2d at 1123, (emphasis added). As will be later discussed, there is a jurisdictional issue which is foremost in the Eugster Appeal. *See* below at 17.

The next case is *Medlin v. Palmer,* 874 F.2d 1085, 1088 (5th Cir. 1989) (court consolidated appeals on its own motion where three separate

appeals arose from the same set of operative facts). But, this statement does not apply here; the appeals are not based on the same "operative facts."

Speaking of consolidation to "promote efficiency rather than piecemeal appeals," *Metcalf v. Borba*, 681 F.2d 1183, 1188 (9th Cir. 1982) is cited. But what the court is concerned about has to do with rules which make attorney fee motions and decisions part of the case, and not part of a separate case. The Eugster Appeal is a separate case. *Id.*

Octane Fitness, LLC v. Icon Health & Fitness, Inc., 134 S. Ct. 1749, 1756 (2014) is cited for the proposition where attorney fees under the Lanham Act necessarily involved consideration of "the substantive strength of a party's litigating position." *Octane Fitness* does not apply here because the issue under the Lanham Act had to do with facts as to an "exceptional circumstances" factual determination. The strength of a party's position had to do with the "exceptional circumstances" issue.

C. Caruso and Eugster Will Each be Prejudiced by Consolidation of the Appeals.

1. Caruso.

Appellant Caruso has already been subjected to the WSBA lawyers' efforts to prejudice the District Court. The prejudice will be extended to the Court of Appeals if the appeals in these separate cases are consolidated. As we have already

observed, prejudiced by the fact the WSBA brought Eugster into the proceedings conducted a false and personal attack on Eugster. Likewise, he will be prejudiced in this appeal if the wrongdoing is continued into Caruso's appeal.

2. Eugster.

Pro se Eugster will be prejudiced if his appeal is not considered independently of the Caruso Appeal. His objections to the fees motion will be subverted by the WSBA lawyers' fraud on the court in *Caruso and Ferguson v. WSBA* which was set out in the WSBA's Motion to Dismiss. Dkt. # 16, App. 274.

Furthermore, pro se Eugster's issues in the case against him go well beyond the fraud on the court. First, there is the issue of the Safe Harbor Rule. Rule 12(c)(2).

Second, there is the issue of whether factual issues claimed by the WSBA lawyers in the Motion for Fees have evidentiary support as required by Rule 11(b)(3).

Third, there is the issue of whether the claims and contentions have support as required by Rule 11(b)(2).

Fourth, there is the issue of the true purpose of the motion for attorney fees. It was not for sanctions under Rule 11; it was instead, a means by which the lawyers for the WSBA could obtain an order against pro se Eugster for actions he had

previously brought against the WSBA. It was to bring Eugster in as a party and claim Eugster should pay attorneys fee because of his previous pro se litigation involving the WSBA. See page 6 of the motion.

Fifth, pro se Eugster raises jurisdictional concerns; the District Court did not have jurisdiction under Rule 11 to entertain the Motion for Attorney Fees. Dkt. # 22, App. 356.

V. CONCLUSION

What the lawyers for the WSBA have done is shocking. They have defamed Stephen Kerr Eugster as a lawyer for his clients and have trashed him for the purpose of getting the District Court to order Eugster to pay because of what he did representing himself in previous litigation.

They have not told the truth; they have failed to disclose material facts.

The lawyers for the WSBA and WSBA lawyer leaders have shown they have no qualms about doing what they have done. Their view is that the WSBA must prevail at all costs. The morality they advance is this: The end justifies the means. Their view of the legal process is that the work of the court is to make "judgments of power."

The consolidation of the appeals would be improper and would not serve the interests of justice.

August 4, 2017.

Respectfully submitted,

EUGSTER LAW OFFICE, PSC

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Stephen Kerr Eugster
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PRO SE STEPHEN KERR EUGSTER

_s/Stephen Kerr Eugster
Stephen Kerr Eugster, Pro se

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing along with its appendix with the Clerk of the Court for the United States District Court Western District of Washington trial court CM/ECF system on August 4, 2017, I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the trial court CM/ECF system.

I further certify that on August 4, 2017, I emailed, the foregoing document, including its appendix to counsel listed below at their respective email addresses:

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August 4, 2017.

s/Stephen Kerr Eugster

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Logical Fallacies Handlist:

Fallacies are statements that might sound reasonable or superficially true but are actually flawed or dishonest. When readers detect them, these logical fallacies backfire by making the audience think the writer is (a) unintelligent or (b) deceptive. It is important to avoid them in your own arguments, and it is also important to be able to spot them in others' arguments so a false line of reasoning won't fool you. Think of this as intellectual *kung-fu*: the vital art of self-defense in a debate. For extra impact, learn both the Latin terms and the English equivalents. You can click here to download a PDF version of this material.

In general, one useful way to organize fallacies is by category. We have below **fallacies of relevance**, **component fallacies**, **fallacies of ambiguity**, and **fallacies of omission**. We will discuss each type in turn. The last point to discuss is **Occam's Razor**.

FALLACIES OF RELEVANCE: These fallacies appeal to evidence or examples that are not relevant to the argument at hand.

Appeal to Force (*Argumentum Ad Baculum* or the "Might-Makes-Right" Fallacy): This argument uses force, the threat of force, or some other unpleasant backlash to make the audience accept a conclusion. It commonly appears as a last resort when evidence or rational arguments fail to convince a reader. If the debate is about whether or not 2+2=4, an opponent's argument that he will smash your nose in if you don't agree with his claim doesn't change the truth of an issue. Logically, this consideration has nothing to do with the points under consideration. The fallacy is not limited to threats of violence, however. The fallacy includes threats of any unpleasant backlash--financial, professional, and so on. Example: "Superintendent, you should cut the school budget by $16,000. I need not remind you that past school boards have fired superintendents who cannot keep down costs." While intimidation may force the superintendent to conform, it does not convince him that the choice to cut the budget was the most beneficial for the school or community. Lobbyists use this method when they remind legislators that they represent so many thousand votes in the legislators' constituencies and threaten to throw the politician out of office if he doesn't vote the way they want. Teachers use this method if they state that students should hold the same political or philosophical position as the teachers or risk failing the class. Note that it is isn't a logical fallacy, however, to assert that students must fulfill certain requirements in the course or risk failing the class!

Genetic Fallacy: The genetic fallacy is the claim that an idea, product, or person must be untrustworthy because of its racial, geographic, or ethnic origin. "That car can't possibly be any good! It was made in Japan!" Or, "Why should I listen to her argument? She comes from California, and we all know those people are flakes." Or, "Ha! I'm not reading that book. It was published in Tennessee, and we know all Tennessee folk are hillbillies and rednecks!" This type of fallacy is closely related to the fallacy of *argumentum ad hominem* or **personal attack**, appearing immediately below.

Personal Attack (*Argumentum Ad Hominem*, literally, "argument toward the man." Also called "Poisoning the Well"): Attacking or praising the people who make an argument, rather than discussing the argument itself. This practice is fallacious because the personal character of an individual is logically irrelevant to the truth or falseness of the argument itself. The statement "2+2=4" is true regardless if it is stated by criminals, congressmen, or pastors. There are two subcategories:

(1) **Abusive**: To argue that proposals, assertions, or arguments must be false or dangerous because they originate with atheists, Christians, Muslims, communists, capitalists, the John Birch Society, Catholics, anti-Catholics,

racists, anti-racists, feminists, misogynists (or any other group) is fallacious. This persuasion comes from irrational psychological transference rather than from an appeal to evidence or logic concerning the issue at hand. This is similar to the **genetic fallacy**, and only an anti-intellectual would argue otherwise.

(2) **Circumstantial**: To argue that an opponent should accept or reject an argument because of circumstances in his or her life. If one's adversary is a clergyman, suggesting that he should accept a particular argument because not to do so would be incompatible with the scriptures is such a fallacy. To argue that, because the reader is a Republican or Democrat, she must vote for a specific measure is likewise a circumstantial fallacy. The opponent's special circumstances have no control over the truth or untruth of a specific contention. The speaker or writer must find additional evidence beyond that to make a strong case. This is also similar to the **genetic fallacy** in some ways. If you are a college student who wants to learn rational thought, you simply must avoid circumstantial fallacies.

Argumentum ad Populum (Literally "Argument to the People"): Using an appeal to popular assent, often by arousing the feelings and enthusiasm of the multitude rather than building an argument. It is a favorite device with the propagandist, the demagogue, and the advertiser. An example of this type of argument is Shakespeare's version of Mark Antony's funeral oration for Julius Caesar. There are three basic approaches:

(1) **Bandwagon Approach**: "Everybody is doing it." This *argumentum ad populum* asserts that, since the majority of people believes an argument or chooses a particular course of action, the argument must be true, or the course of action must be followed, or the decision must be the best choice. For instance, "85% of consumers purchase IBM computers rather than Macintosh; all those people can't be wrong. IBM must make the best computers." Popular acceptance of any argument does not prove it to be valid, nor does popular use of any product necessarily prove it is the best one. After all, 85% of people may once have thought planet earth was flat, but that majority's belief didn't mean the earth really *was* flat when they believed it! Keep this in mind, and remember that everybody should avoid this type of logical fallacy.

(2) **Patriotic Approach**: "Draping oneself in the flag." This argument asserts that a certain stance is true or correct because it is somehow patriotic, and that those who disagree are unpatriotic. It overlaps with ***pathos*** and ***argumentum ad hominem*** to a certain extent. The best way to spot it is to look for emotionally charged terms like Americanism, rugged individualism, motherhood, patriotism, godless communism, etc. A true American would never use this approach. And a truly free man will exercise his American right to drink beer, since beer belongs in this great country of ours.This approach is unworthy of a good citizen.

(3) **Snob Approach**: This type of ***argumentum ad populum*** doesn't assert "everybody is doing it," but rather that "all the best people are doing it." For instance, "Any true intellectual would recognize the necessity for studying logical fallacies." The implication is that anyone who fails to recognize the truth of the author's assertion is not an intellectual, and thus the reader had best recognize that necessity.

In all three of these examples, the rhetorician does not supply evidence that an argument is true; he merely makes assertions about people who agree or disagree with the argument. For Christian students in religious schools like Carson-Newman, we might add a fourth category, "**Covering Oneself in the Cross.**" This argument asserts that a certain political or denominational stance is true or correct because it is somehow "Christian," and that anyone who disagrees is behaving in an "un-Christian" or "godless" manner. (It is similar to the

patriotic approach except it substitutes a gloss of piety instead of patriotism.) Examples include the various "Christian Voting Guides" that appear near election time, many of them published by non-Church related organizations with hidden financial/political agendas, or the stereotypical crooked used-car salesman who keeps a pair of bibles on his dashboard in order to win the trust of those he would fleece. Keep in mind Moliere's question in *Tartuffe*: "Is not a face quite different than a mask?" Is not the appearance of Christianity quite different than actual Christianity? Christians should beware of such manipulation since they are especially vulnerable to it.

Appeal to Tradition (*Argumentum Ad Traditionem; aka Argumentum Ad Antiquitatem*): This line of thought asserts that a premise must be true because people have always believed it or done it. For example, "We know the earth is flat because generations have thought that for centuries!" Alternatively, the appeal to tradition might conclude that the premise has always worked in the past and will thus always work in the future: "Jefferson City has kept its urban growth boundary at six miles for the past thirty years. That has been good enough for thirty years, so why should we change it now? If it ain't broke, don't fix it." Such an argument is appealing in that it seems to be common sense, but it ignores important questions. Might an alternative policy work even better than the old one? Are there drawbacks to that long-standing policy? Are circumstances changing from the way they were thirty years ago? Has new evidence emerged that might throw that long-standing policy into doubt?

Appeal to Improper Authority (*Argumentum Ad Verecundium,* literally "argument from that which is improper"): An appeal to an improper authority, such as a famous person or a source that may not be reliable or who might not know anything about the topic. This fallacy attempts to capitalize upon feelings of respect or familiarity with a famous individual. It is not fallacious to refer to an admitted authority if the individual's expertise is within a strict field of knowledge. On the other hand, to cite Einstein to settle an argument about education or economics is fallacious. To cite Darwin, an authority on biology, on religious matters is fallacious. To cite Cardinal Spellman on legal problems is fallacious. The worst offenders usually involve movie stars and psychic hotlines. A subcategory is the **Appeal to Biased Authority**. In this sort of appeal, the authority is one who actually *is* knowledgeable on the matter, but one who may have professional or personal motivations that render his professional judgment suspect: for instance, "To determine whether fraternities are beneficial to this campus, we interviewed all the frat presidents." Or again, "To find out whether or not sludge-mining really is endangering the Tuskogee salamander's breeding grounds, we interviewed the owners of the sludge-mines, who declared there is no problem." Indeed, it is important to get "both viewpoints" on an argument, but basing a substantial part of your argument on a source that has personal, professional, or financial interests at stake may lead to biased arguments. As Upton Sinclair once stated, "It's difficult to get a man to understand something when his salary depends upon his not understanding it." Sinclair is pointing out that even a knowledgeable authority might not be entirely rational on a topic when he has economic incentives that bias his thinking.

Appeal to Emotion *(Argumentum Ad Misericordiam,* literally, "argument from pity"): An emotional appeal concerning what should be a logical issue during a debate. While ***pathos*** generally works to reinforce a reader's sense of duty or outrage at some abuse, if a writer tries to use emotion merely for the sake of getting the reader to accept what should be a logical conclusion, the argument is a fallacy. For example, in the 1880s, prosecutors in a Virginia court presented overwhelming proof that a boy was guilty of murdering his parents with an ax. The defense presented a "not-guilty" plea for on the grounds that the boy was now an orphan, with no one to look after his interests if the court was not lenient. This appeal to emotion obviously seems misplaced, and the argument is irrelevant to the question of whether or not he did the crime.

Argument from Adverse Consequences: Asserting that an argument must be false because the implications of it being true would create negative results. For instance, "The medical tests show that Grandma has advanced cancer. However, that *can't* be true because then she would die! I refuse to believe it!" The argument is illogical because truth and

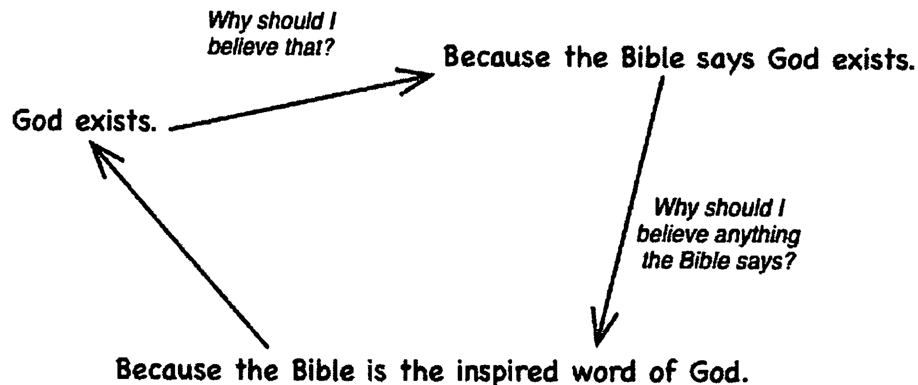
falsity are not contingent based upon how much we like or dislike the consequences of that truth. Grandma, indeed, might have cancer, in spite of how negative that fact may be or how cruelly it may affect us.

Argument from Personal Incredulity: Asserting that opponent's argument must be false because you personally don't understand it or can't follow its technicalities. For instance, one person might assert, "I don't understand that engineer's argument about how airplanes can fly. Therefore, I cannot believe that airplanes are able to fly." *Au contraire*, that speaker's own mental limitations do not limit the physical world—so airplanes may very well be able to fly in spite of a person's inability to understand how they work. One person's comprehension is not relevant to the truth of a matter.

COMPONENT FALLACIES: Component fallacies are errors in inductive and deductive reasoning or in syllogistic terms that fail to overlap.

Begging the Question (also called *Petitio Principii*, this term is sometimes used interchangeably with **Circular Reasoning**): If writers assume as evidence for their argument the very conclusion they are attempting to prove, they engage in the fallacy of begging the question. The most common form of this fallacy is when the first claim is initially loaded with the very conclusion one has yet to prove. For instance, suppose a particular student group states, "Useless courses like English 101 should be dropped from the college's curriculum." The members of the student group then immediately move on in the argument, illustrating that spending money on a useless course is something nobody wants. Yes, we all agree that spending money on useless courses is a bad thing. However, those students never did prove that English 101 was *itself* a useless course--they merely "begged the question" and moved on to the next "safe" part of the argument, skipping over the part that's the real controversy, the heart of the matter, the most important component. Begging the question is often hidden in the form of a **complex question** (see below).

Circular Reasoning is closely related to **begging the question**. Often the writers using this fallacy word take one idea and phrase it in two statements. The assertions differ sufficiently to obscure the fact that that the same proposition occurs as both a premise and a conclusion. The speaker or author then tries to "prove" his or her assertion by merely repeating it in different words. Richard Whately wrote in *Elements of Logic* (London 1826): "To allow every man unbounded freedom of speech must always be on the whole, advantageous to the state; for it is highly conducive to the interest of the community that each individual should enjoy a liberty perfectly unlimited of expressing his sentiments." Obviously the premise is not logically irrelevant to the conclusion, for if the premise is true the conclusion must also be true. It is, however, logically irrelevant in *proving* the conclusion. In the example, the author is repeating the same point in different words, and then attempting to "prove" the first assertion with the second one. A more complex but equally fallacious type of circular reasoning is to create a circular chain of reasoning like this one: "God exists." "How do you know that God exists?" "The Bible says so." "Why should I believe the Bible?" "Because it's the inspired word of God." If we draw this out as a chart, it looks like this:



The so-called "final proof" relies on unproven evidence set forth initially as the subject of debate. Basically, the argument goes in an endless circle, with each step of the argument relying on a previous one, which in turn relies on the first argument yet to be proven. Surely God deserves a more intelligible argument than the circular reasoning proposed in this example!

Hasty Generalization (*Dicto Simpliciter*, also called "Jumping to Conclusions," "Converse Accident"): Mistaken use of inductive reasoning when there are too few samples to prove a point. Example: "Susan failed Biology 101. Herman failed Biology 101. Egbert failed Biology 101. I therefore conclude that most students who take Biology 101 will fail it." In understanding and characterizing general situations, a logician cannot normally examine every single example. However, the examples used in inductive reasoning should be typical of the problem or situation at hand. Maybe Susan, Herman, and Egbert are exceptionally poor students. Maybe they were sick and missed too many lectures that term to pass. If a logician wants to make the case that most students will fail Biology 101, she should (a) get a very large sample--at least one larger than three--or (b) if that isn't possible, she will need to go out of his way to prove to the reader that her three samples are somehow representative of the norm. If a logician considers only exceptional or dramatic cases and generalizes a rule that fits these alone, the author commits the fallacy of hasty generalization.

One common type of hasty generalization is the **Fallacy of Accident**. This error occurs when one applies a general rule to a particular case when accidental circumstances render the general rule inapplicable. For example, in Plato's *Republic*, Plato finds an exception to the general rule that one should return what one has borrowed: "Suppose that a friend when in his right mind has deposited arms with me and asks for them when he is not in his right mind. Ought I to give the weapons back to him? No one would say that I ought or that I should be right in doing so. . . ." What is true in general may not be true universally and without qualification. So remember, generalizations are bad. All of them. Every single last one. Except, of course, for those that are not.

Another common example of this fallacy is the **misleading statistic**. Suppose an individual argues that women must be incompetent drivers, and he points out that last Tuesday at the Department of Motor Vehicles, 50% of the women who took the driving test failed. That would seem to be compelling evidence from the way the statistic is set forth. However, if only two women took the test that day, the results would be far less clear-cut. Incidentally, the cartoon *Dilbert* makes much of an incompetent manager who cannot perceive misleading statistics. He does a statistical study of when employees call in sick and cannot come to work during the five-day work week. He becomes furious to learn that 40% of office "sick-days" occur on Mondays (20%) and Fridays (20%)--just in time to create a three-day weekend. Suspecting fraud, he decides to punish his workers. The irony, of course, is that these two days compose 40% of a five day work week, so the numbers are

completely average. Similar nonsense emerges when parents or teachers complain that "50% of students perform at or below the national average on standardized tests in mathematics and verbal aptitude." Of course they do! The very nature of an average implies that!

False Cause: This fallacy establishes a cause/effect relationship that does not exist. There are various Latin names for various analyses of the fallacy. The two most common include these types:

(1) ***Non Causa Pro Causa*** (Literally, "Not the cause for a cause"): A general, catch-all category for mistaking a false cause of an event for the real cause.

(2) ***Post Hoc, Ergo Propter Hoc*** (Literally: "After this, therefore because of this"): This type of false cause occurs when the writer mistakenly assumes that, because the first event preceded the second event, it must mean the first event caused the later one. Sometimes it does, but sometimes it doesn't. It is the honest writer's job to establish clearly that connection rather than merely assert it exists. Example: "A black cat crossed my path at noon. An hour later, my mother had a heart-attack. Because the first event occurred earlier, it must have caused the bad luck later." This is how superstitions begin.

The most common examples are arguments that viewing a particular movie or show, or listening to a particular type of music "caused" the listener to perform an antisocial act--to snort coke, shoot classmates, or take up a life of crime. These may be potential suspects for the cause, but the mere fact that an individual did these acts and subsequently behaved in a certain way does not yet conclusively rule out other causes. Perhaps the listener had an abusive home-life or school-life, suffered from a chemical imbalance leading to depression and paranoia, or made a bad choice in his companions. Other potential causes must be examined before asserting that only one event or circumstance alone earlier in time *caused* a event or behavior later. For more information, see **correlation and causation**.

Irrelevant Conclusion (***Ignorantio Elenchi***): This fallacy occurs when a rhetorician adapts an argument purporting to establish a particular conclusion and directs it to prove a different conclusion. For example, when a particular proposal for housing legislation is under consideration, a legislator may argue that decent housing for all people is desirable. Everyone, presumably, will agree. However, the question at hand concerns a particular measure. The question really isn't, "Is it good to have decent housing?" The question really is, "Will this particular measure actually provide it or is there a better alternative?" This type of fallacy is a common one in student papers when students use a shared assumption--such as the fact that decent housing is a desirable thing to have--and then spend the bulk of their essays focused on that fact rather than the real question at issue. It's similar to **begging the question**, above.

One of the most common forms of *Ignorantio Elenchi* is the "**Red Herring**." A red herring is a deliberate attempt to change the subject or divert the argument from the real question at issue to some side-point; for instance, "Senator Jones should not be held accountable for cheating on his income tax. After all, there are other senators who have done far worse things." Another example: "I should not pay a fine for reckless driving. There are many other people on the street who are dangerous criminals and rapists, and the police should be chasing them, not harassing a decent tax-paying citizen like me." Certainly, worse criminals do exist, but that it is another issue! The questions at hand are (1) did the speaker drive recklessly, and (2) should he pay a fine for it?

Another similar example of the red herring is the fallacy known as ***Tu Quoque*** (Latin for "And you too!"), which asserts that the advice or argument must be false simply because the person presenting the advice doesn't consistently follow it herself. For instance, "Susan the yoga instructor claims that a low-fat diet and exercise are good for you--but I saw her

last week pigging out on oreos, so her argument must be a load of hogwash." Or, "Reverend Jeremias claims that theft is wrong, but how can theft be wrong if Jeremias himself admits he stole objects when he was a child?" Or "Thomas Jefferson made many arguments about equality and liberty for all Americans, but he himself kept slaves, so we can dismiss any thoughts he had on those topics."

Straw Man Argument: A subtype of the **red herring**, this fallacy includes any lame attempt to "prove" an argument by overstating, exaggerating, or over-simplifying the arguments of the opposing side. Such an approach is building a straw man argument. The name comes from the idea of a boxer or fighter who meticulously fashions a false opponent out of straw, like a scarecrow, and then easily knocks it over in the ring before his admiring audience. His "victory" is a hollow mockery, of course, because the straw-stuffed opponent is incapable of fighting back. When a writer makes a cartoon-like caricature of the opposing argument, ignoring the real or subtle points of contention, and then proceeds to knock down each "fake" point one-by-one, he has created a straw man argument.

For instance, one speaker might be engaged in a debate concerning welfare. The opponent argues, "Tennessee should increase funding to unemployed single mothers during the first year after childbirth because they need sufficient money to provide medical care for their newborn children." The second speaker retorts, "My opponent believes that some parasites who don't work should get a free ride from the tax money of hard-working honest citizens. I'll show you why he's wrong . . ." In this example, the second speaker is engaging in a straw man strategy, distorting the opposition's statement about medical care for newborn children into an oversimplified form so he can more easily appear to "win." However, the second speaker is only defeating a dummy-argument rather than honestly engaging in the real nuances of the debate.

Non Sequitur (literally, "It does not follow"): A *non sequitur* is any argument that does not follow from the previous statements. Usually what happened is that the writer leaped from A to B and then jumped to D, leaving out step C of an argument she thought through in her head, but did not put down on paper. The phrase is applicable in general to any type of logical fallacy, but logicians use the term particularly in reference to syllogistic errors such as the **undistributed middle term**, ***non causa pro causa***, and ***ignorantio elenchi***. A common example would be an argument along these lines: "Giving up our nuclear arsenal in the 1980's weakened the United States' military. Giving up nuclear weaponry also weakened China in the 1990s. For this reason, it is wrong to try to outlaw pistols and rifles in the United States today." There's obviously a step or two missing here.

The "Slippery Slope" Fallacy (also called "The Camel's Nose Fallacy") is a ***non sequitur*** in which the speaker argues that, once the first step is undertaken, a second or third step will inevitably follow, much like the way one step on a slippery incline will cause a person to fall and slide all the way to the bottom. It is also called "the Camel's Nose Fallacy" because of the image of a sheik who let his camel stick its nose into his tent on a cold night. The idea is that the sheik is afraid to let the camel stick its nose into the tent because once the beast sticks in its nose, it will inevitably stick in its head, and then its neck, and eventually its whole body. However, this sort of thinking does not allow for any possibility of stopping the process. It simply assumes that, once the nose is in, the rest must follow--that the sheik can't stop the progression once it has begun--and thus the argument is a logical fallacy. For instance, if one were to argue, "If we allow the government to infringe upon our right to privacy on the Internet, it will then feel free to infringe upon our privacy on the telephone. After that, FBI agents will be reading our mail. Then they will be placing cameras in our houses. We must not let any governmental agency interfere with our Internet communications, or privacy will completely vanish in the United States." Such thinking is fallacious; no logical proof has been provided yet that infringement in one area will necessarily lead to infringement in another, no more than a person buying a single can of Coca-Cola in a grocery store would indicate the person will inevitably go on to buy every item available in the store, helpless to stop herself. So remember to avoid the slippery slope fallacy; once you use one, you may find yourself using more and more logical fallacies.

Either/Or Fallacy (also called "the Black-and-White Fallacy," "Excluded Middle," "False Dilemma," or "False Dichotomy"): This fallacy occurs when a writer builds an argument upon the assumption that there are only two choices or possible outcomes when actually there are several. Outcomes are seldom so simple. This fallacy most frequently appears in connection to sweeping generalizations: "Either we must ban X or the American way of life will collapse." "We go to war with Canada, or else Canada will eventually grow in population and overwhelm the United States." "Either you drink Burpsy Cola, or you will have no friends and no social life." Either you must avoid either/or fallacies, or everyone will think you are foolish.

Faulty Analogy: Relying only on comparisons to prove a point rather than arguing deductively and inductively. For example, "education is like cake; a small amount tastes sweet, but eat too much and your teeth will rot out. Likewise, more than two years of education is bad for a student." The analogy is only acceptable to the degree a reader thinks that education is similar to cake. As you can see, faulty analogies are like flimsy wood, and just as no carpenter would build a house out of flimsy wood, no writer should ever construct an argument out of flimsy material.

Undistributed Middle Term: A specific type of error in deductive reasoning in which the minor premise and the major premise of a **syllogism** might or might not overlap. Consider these two examples: (1) "All reptiles are cold-blooded. All snakes are reptiles. All snakes are cold-blooded." In the first example, the middle term "snakes" fits in the categories of both "reptile" and "things-that-are-cold-blooded." (2) "All snails are cold-blooded. All snakes are cold-blooded. All snails are snakes." In the second example, the middle term of "snakes" does not fit into the categories of both "things-that-are-cold-blooded" and "snails." Sometimes, **equivocation** (see below) leads to an undistributed middle term.

Contradictory Premises (also known as a logical paradox): Establishing a premise in such a way that it contradicts another, earlier premise. For instance, "If God can do anything, he can make a stone so heavy that he can't lift it." The first premise establishes a deity that has the irresistible capacity to move other objects. The second premise establishes an immovable object impervious to any movement. If the first object capable of moving anything exists, by definition, the immovable object cannot exist, and *vice-versa.*

Closely related is the fallacy of **Special Pleading**, in which the writer creates a universal principle, then insists that principle does not for some reason apply to the issue at hand. For instance, "Everything must have a source or creator. Therefore God must exist and he must have created the world. What? Who created God? Well, God is eternal and unchanging--He has no source or creator." In such an assertion, either God must have His own source or creator, or else the universal principle of everything having a source or creator must be set aside—the person making the argument can't have it both ways.

FALLACIES OF AMBIGUITY: These errors occur with ambiguous words or phrases, the meanings of which shift and change in the course of discussion. Such more or less subtle changes can render arguments fallacious.

Equivocation: Using a word in a different way than the author used it in the original premise, or changing definitions halfway through a discussion. When we use the same word or phrase in different senses within one line of argument, we commit the fallacy of equivocation. Consider this example: "Plato says the end of a thing is its perfection; I say that death is the end of life; hence, death is the perfection of life." Here the word *end* means "goal" in Plato's usage, but it means "last event" or "termination" in the author's second usage. Clearly, the speaker is twisting Plato's meaning of the word to draw a very different conclusion. Compare with ***amphiboly***, below.

Amphiboly (from the Greek word "indeterminate"): This fallacy is similar to equivocation. Here, the ambiguity results from grammatical construction. A statement may be true according to one interpretation of how each word functions in a sentence and false

according to another. When a premise works with an interpretation that is true, but the conclusion uses the secondary "false" interpretation, we have the fallacy of *amphiboly* on our hands. In the command, "Save soap and waste paper," the amphibolous use of "waste" results in the problem of determining whether "waste" functions as a verb or as an adjective.

Composition: This fallacy is a result of reasoning from the properties of the parts of the whole to the properties of the whole itself--it is an inductive error. Such an argument might hold that, because every individual part of a large tractor is lightweight, the entire machine also must be lightweight. This fallacy is similar to **Hasty Generalization** (see above), but it focuses on parts of a single whole rather than using too few examples to create a categorical generalization. Also compare it with **Division** (see below).

Division: This fallacy is the reverse of **composition**. It is the misapplication of deductive reasoning. One fallacy of division argues falsely that what is true of the whole must be true of individual parts. Such an argument notes that, "Microtech is a company with great influence in the California legislature. Egbert Smith works at Microtech. He must have great influence in the California legislature." This is not necessarily true. Egbert might work as a graveyard shift security guard or as the copy-machine repairman at Microtech--positions requiring little interaction with the California legislature. Another fallacy of division attributes the properties of the whole to the individual member of the whole: "Sunsurf is a company that sells environmentally safe products. Susan Jones is a worker at Sunsurf. She must be an environmentally minded individual." (Perhaps she is motivated by money alone?)

Fallacy of Reification (Also called "**Fallacy of Misplaced Concreteness**" by Alfred North Whitehead): The fallacy of treating a word or an idea as equivalent to the actual thing represented by that word or idea, or the fallacy of treating an abstraction or process as equivalent to a concrete object or thing. In the first case, we might imagine a reformer trying to eliminate illicit lust by banning all mention of extra-marital affairs or certain sexual acts in publications. The problem is that eliminating the words for these deeds is not the same as eliminating the deeds themselves. In the second case, we might imagine a person or declaring "a war on poverty." In this case, the fallacy comes from the fact that "war" implies a concrete struggle with another concrete entity which can surrender or be exterminated. "Poverty," however is an abstraction that cannot surrender or sign peace treaties, cannot be shot or bombed, etc. Reification of the concept merely muddles the issue of what policies to follow and leads to sloppy thinking about the best way to handle a problem. It is closely related to and overlaps with **faulty analogy** and **equivocation**.

FALLACIES OF OMISSION: These errors occur because the logician leaves out necessary material in an argument or misdirects others from missing information.

Stacking the Deck: In this fallacy, the speaker "stacks the deck" in her favor by ignoring examples that disprove the point and listing only those examples that support her case. This fallacy is closely related to hasty generalization, but the term usually implies deliberate deception rather than an accidental logical error. Contrast it with the **straw man argument**.

'No True Scotsman' Fallacy: Attempting to **stack the deck** specifically by defining terms in such a narrow or unrealistic manner as to exclude or omit relevant examples from a sample. For instance, suppose speaker #1 asserts, "The Scottish national character is brave and patriotic. No Scottish soldier has ever fled the field of battle in the face of the enemy." Speaker #2 objects, "Ah, but what about Lucas MacDurgan? He fled from German troops in World War I." Speaker #1 retorts, "Well, obviously he doesn't count as a true Scotsman because he did not live up to Scottish ideals, thus he forfeited his Scottish identity." By this fallacious reasoning, any individual who would serve as evidence contradicting the first speaker's assertion is conveniently and automatically dismissed from consideration. We commonly see this fallacy when a company asserts that it cannot be blamed for one of its particularly unsafe or shoddy products because that particular one doesn't live up to its

normally high standards, and thus shouldn't "count" against its fine reputation. Likewise, defenders of Christianity as a positive historical influence in their zeal might argue the atrocities of the eight Crusades do not "count" in an argument because the Crusaders weren't living up to Christian ideals, and thus aren't really Christians, etc. So, remember this fallacy. Philosophers and logicians never use it, and anyone who does use it by definition is not really a philosopher or logician.

Argument from the Negative: Arguing from the negative asserts that, since one position is untenable, the opposite stance must be true. This fallacy is often used interchangeably with ***Argumentum Ad Ignorantium*** (listed below) and the ***either/or fallacy*** (listed above). For instance, one might mistakenly argue that, since the Newtonian theory of mathematics is not one hundred percent accurate, Einstein's theory of relativity must be true. Perhaps not. Perhaps the theories of quantum mechanics are more accurate, and Einstein's theory is flawed. Perhaps they are all wrong. Disproving an opponent's argument does not necessarily mean your own argument must be true automatically, no more than disproving your opponent's assertion that 2+2=5 would automatically mean your argument that 2+2=7 must be the correct one. Keeping this mind, students should remember that arguments from the negative are bad, arguments from the positive must automatically be good.

Appeal to a Lack of Evidence (*Argumentum Ad Ignorantium*, literally "Argument from Ignorance"): Appealing to a lack of information to prove a point, or arguing that, since the opposition cannot disprove a claim, the opposite stance must be true. An example of such an argument is the assertion that ghosts must exist because no one has been able to prove that they do not exist. Logicians know this is a logical fallacy because no competing argument has yet revealed itself.

Hypothesis Contrary to Fact (*Argumentum Ad Speculum*): Trying to prove something in the real world by using imaginary examples alone, or asserting that, if hypothetically *X* had occurred, *Y* would have been the result. For instance, suppose an individual asserts that if Einstein had been aborted *in utero*, the world would never have learned about relativity, or that if Monet had been trained as a butcher rather than going to college, the impressionistic movement would have never influenced modern art. Such hypotheses are misleading lines of argument because it is often possible that some other individual would have solved the relativistic equations or introduced an impressionistic art style. The speculation might make an interesting thought-experiment, but it is simply useless when it comes to actually proving anything about the real world. A common example is the idea that one "owes" her success to another individual who taught her. For instance, "You owe me part of your increased salary. If I hadn't taught you how to recognize logical fallacies, you would be flipping hamburgers at McDonald's for minimum wages right now instead of taking in hundreds of thousands of dollars as a lawyer." Perhaps. But perhaps the audience would have learned about logical fallacies elsewhere, so the hypothetical situation described is meaningless.

Complex Question (Also called the "Loaded Question"): Phrasing a question or statement in such as way as to imply another unproven statement is true without evidence or discussion. This fallacy often overlaps with **begging the question** (above), since it also presupposes a definite answer to a previous, unstated question. For instance, if I were to ask you "Have you stopped taking drugs yet?" my hidden supposition is that you *have* been taking drugs. Such a question cannot be answered with a simple yes or no answer. It is not a simple question but consists of several questions rolled into one. In this case the unstated question is, "Have you taken drugs in the past?" followed by, "If you have taken drugs in the past, have you stopped taking them now?" In cross-examination, a lawyer might ask a flustered witness, "Where did you hide the evidence?" or "when did you stop beating your wife?" The intelligent procedure when faced with such a question is to analyze its component parts. If one answers or discusses the prior, implicit question first, the explicit question may dissolve.

Complex questions appear in written argument frequently. A student might write, "Why is private development of resources so much more efficient than any public control?" The

rhetorical question leads directly into his next argument. However, an observant reader may disagree, recognizing the prior, implicit question remains unaddressed. That question is, of course, whether private development of resources really *is* more efficient in all cases, a point which the author is skipping entirely and merely assuming to be true without discussion.

To master logic more fully, become familiar with the tool of **Occam's Razor**.

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FILED

JUL - 3 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By ________

No. 34345-6-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STEPHEN KERR EUGSTER,

Appellant,

vs.

WASHINGTON STATE BAR ASSOCIATION, *ET AL.*

Respondents.

PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT UNDER WASH. CONSTITUTION ART. IV, SECTION 2(a) RAP 13.3(a), RAP 13.4(a)

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RAP 12.5 11

Other Authorities

Bernard C. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 386 (1931-1932) 14

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I. IDENTITY OF PETITIONER

Stephen Kerr Eugster asks the court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of parts of the decision of the Court of Appeals in *Eugster v. Wash. State Bar Ass'n* (Wash. App., 2017). Appendix 1 – 26. A Motion for Reconsideration of the Decision was filed within the time allowed by court rule. Appendix pages 27 – 35. The Order Denying Reconsideration was rendered on June 6, 2017. Appendix 43 – 44.

III. WASHINGTON CONST. ART. IV, § 2(A)

The Supreme Court, for purposes of this particular review, should be a temporary Supreme Court created for the purposes of this matter. The judges of the Supreme Court have a conflict of interest in this appeal. The appeal involves the unconstitutionality of the exercise of appellate jurisdiction. It is asserted the work of the Court of Appeals was finished when it decided the Superior Court had jurisdiction over Mr. Eugster's Civil Rights complaint against the Washington State Bar

Association defendants. At that point, the appellate jurisdiction the Court of Appeals came to an end. It did have jurisdiction to make any further decisions in the matter.

The Justices of the Supreme Court have a conflict of interest. The members of this Court are faced with the same jurisdictional concerns in the Court's "retention of jurisdiction" after its decision in *McCleary v. State*, 173 Wash. 2d 477, 269 P.3d 227, 262 (2012). The Justices of the Supreme Court are aware their authority under the constitution has been questioned as being in excess of its appellate jurisdiction. Wash. Const. art. IV, § 6.

In such circumstances, Wash. Const. art. IV, § 2(a) comes into play. It provides:

> When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.

Wash. Const. art. IV, § 2(a) is to be used when the court has a conflict. *Yelle v. Kramer*, 83 Wash. 2d 464, 465-66, 520 P.2d 927 (1974). It has also been used in *In Re Disciplinary*

Proceeding Against Sanders, 135 Wash. 2d 175, 955 P.2d 369 (1998), and in *In re Disciplinary Proc. Against Sanders*, 159 Wash. 2d 517, 145 P.3d 1208 (2006). In each case, it was pointed out that "Judge C. Kenneth Grosse [author of the opinion] and each member of the en banc court are serving as justices pro tempore of the Supreme Court pursuant to Washington Constitution Article IV, Section 2(a) and Discipline Rules for Judges 13." In *Yelle v. Kramer*, *supra*, the Court discussed why and how Section 2(a) applied in each case.

> In *Yelle* "[w] each member of the Washington State Supreme Court announced his disqualification because of a personal interest in the decision to be made in this case, it was submitted to a pro tempore Supreme Court composed of two retired Supreme Court justices and seven retired Superior Court judges.
>
> In 1962, amendment 38 was added to article 4 of our state constitution. It provides:
>
>> When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court . . . .
>
> Superior and Court of Appeals judges could not be designated to serve in the Supreme Court, for this

case involves the salary of every active judge of a court of record in the state; hence, they, too, were disqualified for personal interest.

How the personnel of the pro tempore Supreme Court was determined is not an issue. [1] [[1]]

---

[1] Footnote 1 provides:

In short, the pro tempore Supreme Court was selected as follows: the name of each retired judge of a court of record, not practicing law, was placed in a blank envelope; counsel in the case alternately drew from a large bowl nine envelopes which were numbered as drawn. A second group of nine was then drawn and numbered in the same manner. These constituted possible alternates.

The Clerk of the Supreme Court immediately contacted the judges seriatum whose names had been drawn. The first three declined to act for personal reasons; the next could not be reached within the time limit--he was traveling someplace in Europe; the next two agreed to serve; the seventh declined; the next two accepted.

The panel of nine was completed from the alternates in the same manner.

All nine justices of the Supreme Court then signed an order appointing the justices pro tempore thus selected.

The geographic distribution of justices is excellent. There is one justice pro tempore from eastern Washington, one from north central, two from northwestern Washington, two from Seattle, one from across Puget Sound, and two from the capital city.

Yelle v. Kramer, 83 Wn.2d at 465-66.

Thus, Wash. Const. art. IV, § 2(a) must be utilized for all purposes of the Petition for Discretionary Review. That is to say, it is to be used for purposes of consideration of the petition and, if review is granted, for purposes of the review.

IV. ISSUES PRESENTED FOR REVIEW

1. Once the Court of Appeals decided that the trial court had jurisdiction over Eugster's Civil Rights Action contesting the constitutionality of the Washington State Bar Association Washington Lawyer Discipline System, was the case on appeal was?

2. Assuming for the sake of argument, the court could take over the case from the trial court, did the court commit error? It would seem so, because in order to apply its res judicata conclusion (wrong as it was), the court had to have first decided the system was not unconstitutional as Eugster contended.

3. Does the court have authority to apply res judicata to a proceeding if the proceeding itself is yet to be decided by the

---

Yelle v. Kramer, 83 Wn.2d 464, 485 (1974).

trial court?

V. STATEMENT OF THE CASE

Mr. Eugster filed a civil rights action under 42 U.S.C. § 1983 in Spokane County Superior Court. The order of the court provided:

> Based on the foregoing conclusions, The Court hereby ORDERS that Defendants' Motion to Dismiss Complaint is GRANTED and that this action is dismissed with prejudice, with each party to bear its own attorneys fees and costs.

Appendix 38 at 41.

In paragraph 12 under the heading 'Conclusions of Law,' the court said, "Based on the foregoing, defendants are entitled to dismissal of Plaintiff's claims with prejudice under CR 12 (b)(1) and CR 12(b)(6). Dismissal with prejudice is appropriate because no further amendment to Plaintiff's complaint could cure the legal deficiencies upon which dismissal is based." *Id.*

Yet exercising jurisdiction, the court concluded that plaintiff could not recover damages against Defendants as a result of GR 12.3 – claiming quasi judicial immunity if the Supreme Court would have had immunity in performing the same functions. *Id.*

And in Conclusions of Law, paragraphs 4 through 11, the court generally concludes that the Washington State Supreme Court has exclusive jurisdiction over lawyer discipline. *Id.*

Obviously, there is a bit of an inconsistency in the court's thinking.

On appeal, Chief Justice George Fearing, writing for the Court, ruled that the Superior Court did in fact have jurisdiction over the Civil Rights action.

Chief Justice Fearing did not stop there; the court did not remand the case to the Superior Court. Instead, the opinion went into a long discussion concerning about the concept of res judicata. It reached the conclusion that because Mr. Eugster did not raise his constitutional claims in the disciplinary action against him which began in 2005, he was foreclosed from raising the constitutional claims in this proceeding.

Judge Fearing did not address the issue of whether the disciplinary system violated procedural due process of law as complained by Mr. Eugster in his complaint.

He did not address any due process claim which sought to establish that the disciplinary system itself, that the system

"qua" the system, violated procedural due process and thus the Fifth Amendment to the United States Constitution.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The primary reason why this Court under Wash. Const. art. IV, § 2(a) should accept review is this: the Court of Appeals went beyond its appellate jurisdiction in this case. After it decided the primary issue, whether the trial court had original jurisdiction over the Mr. Eugster's Civil Rights Action Complaint under 42 U.S.C. § 1983 and instead of remanding the case, the Court of Appeals exercised trial court original jurisdiction to hold that case should be dismissed.

The Court of Appeals did not have jurisdiction to make this decision because its appellate jurisdiction was over, and the jurisdiction of the trial court was once again active. This Court should rule that the Court of Appeals remand the case to the trial court.

Second, assuming the court disagrees with the foregoing, the Court of Appeals erroneously ruled that Mr. Eugster was prevented from bringing his Civil Rights Action because he should have done so in the WSBA Discipline System proceedings

brought against him circa 2005 – that he was barred from doing so under res judicata principles.

Third, further assuming for the purposes of argument, the Court of Appeals court could consider res judicata, it was error for the Court to do so because the main issue in the case, whether the WSBA Discipline System in and of itself, that is qua the System, violated Eugster's Fifth Amendment Right to procedural due process of law, was never decided.

A. Background.

The trial court dismissed the case because it concluded the court did not have jurisdiction. The WSBA said the Supreme Court had exclusive jurisdiction. Under the heading "Subject Matter Jurisdiction" at page 15, the Court discussed whether the Trial Court had subject matter jurisdiction. On page 26 the Court concluded "[t]herefore, we hold that the superior court possessed subject matter jurisdiction over Eugster's complaint or amended complaint." Decision at 14, App. 14.

At this point in the decision, the court took itself to the heading "Res Judicata" starting at page 18. In the Decision at page 25, the Court says, "[b]ecause we hold that res judicata

bars this suit we do not address the WSBA's other arguments of lack of justiciability, immunity, and failure to state a claim Decision." And then at Decision 26, App. 26, the Court says, "[o]n the ground of res judicata, we affirm the trial court's dismissal of Stephen Eugster's complaint."

B. Jurisdiction of the Court of Appeals.

The Court in this appeal does not have original jurisdiction in the case. It only has appellate jurisdiction.

Wash. Const. art. IV, § 30 (Court of Appeals) provides:

> (1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.
>
> (2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.
>
> (3) Review of Superior Court. <u>Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute</u>. . . . [Emphasis added.]

The statutes pertaining to the Court of Appeals are found in RCW Chapter 2.06. RCW 2.06.030 sets forth the jurisdiction of the Court of Appeals:

> Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all

> cases except [in certain cases - [this case is not excepted].

The Washington Supreme Court confronted the issue of what "appellate jurisdiction" means in *City of Seattle v. Hesler,* 98 Wash. 2d 73, 81-82, 653 P.2d 631 (1982):

> Appellate jurisdiction is defined in Black's Law Dictionary 126 (rev. 4th ed.1968) as
>
> > [t]he power and authority to take cognizance of a cause and proceed to its determination, not in its initial stages, but only after it has been finally decided by an inferior court, i.e., the power of review and determination on appeal, writ of error, certiorari, or other similar process.

C. The Court Exceeded its Appellate Jurisdiction.

Once the Court ruled that the Trial Court had subject matter jurisdiction, its appellate jurisdiction was over. The case was to be remanded. RAP 12.2 and RAP 12.5.

On remand, the Trial Court would proceed in the case; it would then address Defendants' Motion to Dismiss under "CR 12(b)," which was a part of the original jurisdiction of the Trial Court. Defendants' Motion to Dismiss Complaint, CP 40 – 43.

But the Court of Appeals did not remand the case.

Instead, it conducted an analysis under its "Res Judicata" heading. It discussed facts which were not facts in the proceeding; it discussed the application of the law to the facts. It concluded the Trial Court was right to dismiss the case.

Not only did the Court not have jurisdiction to do this, it has acted improperly.

The record on appeal includes the Motion to Dismiss based on CR 12(b). CP 40. When the Court held the Trial Court had subject matter jurisdiction, the case came back to the record before the Trial Court prior to its dismissal of the case based on the exclusive jurisdiction of the Supreme Court in attorney discipline matters. That record included the Motion to Dismiss. CP 40.

CR 12(b)(6) permits a trial court to dismiss a complaint when it fails to "state a claim upon which relief can be granted." *Nissen v. Pierce County*, 183 Wash. App. 581, 597, 333 P.3d 577 (2014), *aff'd*, 183 Wash. 2d. 863, 872, 357 P.3d 45 (2015).

Dismissal under CR 12(b)(6) is appropriate only if the trial court concludes beyond a reasonable doubt that on the face of the plaintiff's complaint, he or she cannot prove any set of

facts that would justify recovery. *J.S. v. Vill. Voice Media Holdings*, L.L.C., 184 Wash. 2d 95, 100, 359 P.3d 714 (2015) (internal quotations and citations omitted); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings*, Inc., 180 Wash. 2d 954, 962, 331 P.3d 29 (2014). The trial court is to take all facts alleged in the complaint as true and may consider hypothetical facts that support the plaintiff's claims. *FutureSelect*, 180 Wash. 2d at 962. If a plaintiff's claim remains legally insufficient even under hypothetical facts, dismissal under CR 12(b)(6) is appropriate. *FutureSelect*, 180 Wash. 2d at 963.

If the Court of Appeals had authority, assuming it had authority to proceed with the de novo review of CR 12(b)(6), it did not do so. Furthermore, Court of Appeals did not do so properly, it violated the standards applicable to a decision under CR 12(b)(6). It did not have the authority to do so, and had it done so correctly under CR 12(b), the issue of the jurisdiction of the Trial Court would have to be based on the constitutionality of the WSBA Discipline System. Which, of course is the issue in the case before the Trial Court.

One of our oldest dogmas is that if a court has no jurisdiction of the subject matter of an action its pretended judgment or decree is a nullity.

> Bernard C. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 386 (1931-1932).
>
> . . .
>
> "The dismissal of a suit for lack of jurisdiction is not res judicata."
>
> *Peacock v. Piper*, 81 Wash. 2d 731, 734, 504 P.2d 1124 (1973) citing *Williams v. Minnesota Mining & Mfg. Co.*, 14 F.R.D. 1, 8 (D.C.1953): ("The long-settled general rule is that a judgment of dismissal for want of jurisdiction is not res judicata as a final decision upon the merits, and consequently does not operate as a bar to a subsequent action before some appropriate tribunal.")

VII. CONCLUSION

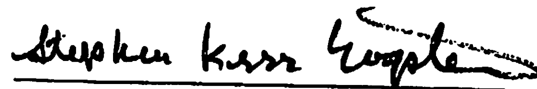
The Supreme Court, made up under Wash. Const. art. IV, § 2(a), should accept review of this case.

The court should conclude that Court of Appeals appellate jurisdiction does not allow the Court of Appeals' original jurisdiction to decide that Mr. Eugster was prevented from pursuing his Civil Rights Action because he, according to the court, should have presented it long ago in the discipline action against him going back to 2005.

Further, the decision is of no consequence because the claim that the WSBA Discipline System was unconstitutional had yet to be tried and determined. There can be no res judicata if the court does not have jurisdiction if the "**system itself**" is unconstitutional.

July 3, 2017.

Respectfully submitted,



Stephen K. Eugster, WSBA #2003
Attorney for Appellant, Pro se

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PROOF OF SERVICE

I hereby certify that on July 3, 2017, by previous agreement of counsel, I emailed, the foregoing document including its appendix (which follows this Proof of Service to counsel listed below at their respective e-mail addresses:

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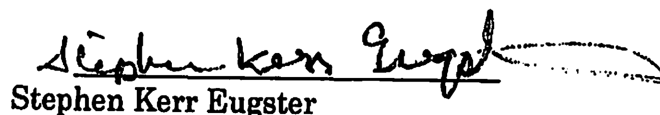

Stephen Kerr Eugster

APPENDIX

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STEPHEN KERR EUGSTER, Plaintiff, vs. SUPREME COURT OF THE STATE OF WASHINGTON; and JUSTICES MARY E. FAIRHURST, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, DEBRA L. STEPHENS, CHARLES K. WIGGINS, STEVEN C. GONZÁLEZ, SHERYL GORDON MCCLOUD, and MARY I. YU; Defendants, Mathew and Stephanie McCLEARY; Robert and Patty VENEMA; and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS; and STATE OF WASHINGTON Additional Defendants (Under CR 19).	No. 17-2-00334-34 COMPLAINT FOR DECLARATORY DETERMINATIONS, JUDGMENTS AND INJUNCTIONS (RCW Ch. 7.24)

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ABSTRACT

The school funding case of *McCleary v. State* , 173 Wash.2d 477, 269 P.3d 227 (2012) (*McCleary)* began in Superior Court for King County Washington on January 11, 2007. The case proceeded to a bench trial before Judge John P. Erlick. The trial commenced on August 31, 2009 and was concluded on November 25, 2009. Judge Erlick entered Findings Fact and Conclusions Law and decision on or about February 24, 2010.

The State of Washington appealed the decision. Direct Review by the Supreme Court was sought and granted. The case was decided by the Supreme Court on January 5, 2012.

The Supreme Court decision was based upon its determination of the meaning of Washington Constitution Art. IX, Section 1, "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."

By the time of the Supreme Court's decision, the Legislature had adopted Engrossed Substitute House Bill 2261 (2009) which "outlined a bold new system for state funding of basic education, and created the Quality Education Council to develop and implement it."[1]

In rendering its decision in *McCleary*, the Court said the "judiciary will retain jurisdiction." The court opined:

> We defer to the legislature's chosen means of discharging its article IX, section 1 duty, but the judiciary will retain jurisdiction over the case to help ensure progress in the State's plan to fully implement education reforms by 2018.

The Supreme Court under the Washington State Constitution exercised its appellate jurisdiction of the case pursuant to Wash. Const. Art. IV, Section 4. This section gives the Supreme Court original jurisdiction in some cases and appellate jurisdiction in other cases above a certain dollar amount. "The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting . . ."

The Supreme Court issued its first "retention of jurisdiction" Order on July 18, 2012. In it Court said "[t]he court retained jurisdiction to monitor implementation of the reforms under

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[1] Washington Superintendent of Public Instruction, http://www.k12.wa.us/-QEC/-ESHB2261.aspx.

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ESHB 2261, and more generally, the State's compliance with its paramount duty."

Thus, began a series of hearings, orders, and orders of contempt.

On June 12, 2014, a unanimous Supreme Court entered an Order to Show Cause in *McCleary* which provided in part as follows:

> ORDERED
> That the State is hereby summoned to appear before the Supreme Court to address why the State should not be held in contempt for violation of this Court's order dated January 9, 2014, that directed the State to submit by April 30, 2014, a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year. The State should also address why, if it is found in contempt, any of the following forms of relief requested by the plaintiffs, Mathew and Stephanie McCleary, et al., should not be granted: 1 [The court did not take a position on any of following.]
>
> 1. Imposing monetary or other contempt sanctions;
> 2. Prohibiting expenditures on certain other matters until the Court's constitutional ruling is complied with;
> 3. Ordering the legislature to pass legislation to fund specific amounts or remedies;
> 4. Ordering the sale of State property to fund constitutional compliance;
> 5. Invalidating education funding cuts to the budget;
> 6. Prohibiting any funding of an unconstitutional education system; and
> 7. Any other appropriate relief.
>
> The State should also address the appropriate timing of any sanctions. The show cause hearing with oral argument by the parties shall be heard by the Washington Supreme Court on Wednesday, September 3, 2014, at 2:00 p.m. . . .

On August 13, 2015 the Court ordered: "Effective immediately, the State of Washington is assessed a remedial penalty of one hundred thousand dollars ($100,000) per day until it adopts a complete plan for complying with article IX, section 1 by the 2018 school year."

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As of January 28, 2017, the total owing by the State of Washington under the contempt order now totals $ 53.2 Million. ($100,000.00 times 532 the number of days between August 13, 2015 and January 28,2017.

Position of Plaintiff in the Case

Plaintiff asserts that the Supreme Court has been acting in excess of its jurisdiction since its decision in *McCleary,* and the orders entered by the Court are void, not just voidable, for the following reasons:

1. The Supreme Court did not and does not have the power to retain jurisdiction of *McCleary* after its appellate decision: that the Court jurisdiction was only revisory and that after the decision the Court should have remanded the case back to the King County Superior Court.
2. The orders are in violation of Separation of Powers because the Court's orders were a usurpation of legislative and executive power. The contempt orders were issued because the Court did not approve of what the Legislature had done from time to time; that is, the Court was in fact exercising Legislative power and Executive power.
3. The Court did not have any proper inherent power to issue the orders. The Court does not have inherent power to enforce decisions and orders if they are in excess of the Court's jurisdiction and/or its powers under Separation of Powers.

* * * * * * * *

**COMPLAINT FOR DECLARATORY DETERMINATIONS,
JUDGMENTS AND INJUNCTIONS**

Plaintiff, Stephen Kerr Eugster, alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, Stephen Kerr Eugster, is a resident of the City of Spokane, Spokane County, State of Washington.

2. Plaintiff is a taxpayer of and to the City of Spokane, Spokane County, and the State of

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Washington.

3. Defendant, Supreme Court of the State of Washington, is the court created by Wash. Const. Art. IV, Section 2 and Section 2a (a special supreme court if the current supreme court has partiality, bias, concerns or appearances).

4. Defendants, Justices Mary E. Fairhurst, Charles W. Johnson, Barbara A. Madsen, Susan Owens, Debra L. Stephens, Charles K. Wiggins, Steven C. González, Sheryl Gordon McCloud, and Mary I. Yu are the judges of the Supreme Court pursuant to Wash. Const. Art. IV, Section 3.

5. Defendant Justices, individually, are currently implementing and enforcing the unlawful conduct described herein.

6. Defendants Mathew and Stephanie McCLEARY, Robert and Patty VENEMA and NETWORK FOR EXCELLENCE IN WASHINGTON SCHOOLS, are the plaintiffs in *McCleary v. State*, 269 P.3d 227, 173 Wash.2d 477 (2012) (*McCleary*). These Defendants are necessary parties to this action under CR 19 (a).

7. Defendant State of Washington is the defendant in *McCleary* and a necessary party to this action.

8. Venue of the action is proper in Thurston County, Washington.

9. The court has authority under Washington Uniform Declaratory Judgments Act, RCW Ch. 7.24, to render declaratory judgments concerning important issues, which require decision and has authority to implement its declaratory judgments.

TAXPAYER STANDING OF PLAINTIFF

10. Plaintiff is a state of Washington taxpayer. He pays taxes to the City of Spokane,

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Spokane County, and the state of Washington.

11. Plaintiff asked the Attorney General of the State of Washington to take action in these matters. Appendix 1.

12. The Attorney General by Jeffrey T. Even, Deputy Solicitor General declined to take action. Appendix 7.

13. On January 25, 2017, Plaintiff Eugster sent a letter to Jeffrey Even, asking that the Attorney General take action regarding Eugster's concerns that the Supreme Court in is acting unconstitutionally regarding its "retained jurisdiction" in *McCleary*. Appendix 8.

14. On January 27, 2017, Plaintiff Eugster sent a letter to Attorney General Bob Ferguson. Appendix 18.

15. The Attorney General has declined, once again, to take action. Appendix 19 and Appendix 20.

STANDING OF PLAINTIFF AS AN OFFICER OF THE COURT

16. Plaintiff Eugster is a member of the bar of the Washington Supreme Court and a member of the Washington State Bar Association.

17. As a lawyer, Plaintiff, like all other lawyers in the state of Washington, is an "officer[] of the court."

18. Plaintiff is an officer of this court, the Thurston County Superior Court, and as an officer of the Washington State Supreme Court.

19. The preamble to the Washington Rules of Professional Conduct provides:

> PREAMBLE: A LAWYER'S RESPONSIBILITIES
> [1] A lawyer, as a member of the legal profession, is a representative of

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clients, an officer of the court and a public citizen having special responsibility for the quality of justice.

20. Because of his special responsibility, Plaintiff Eugster has standing. *Compare Wounded Knee Legal Defense/Offense Committee v. Federal Bureau of Investigation,* 507 F.2d 1281 (8th Cir. 1974); *Court of Appeals in Silver v. Queen's Hospital,* 518 F.2d 555 (1975); and *Keker v. Procunier,* 398 F. Supp. 756 (E.D. Cal., 1975).

21. Plaintiff, as an "officer of the court" has an affirmative duty to act to prevent unlawful conduct by justices of the Washington State Supreme Court as herein described.

22. Plaintiff's duty is of high importance in this case because it is of utmost public importance and consequence that the highest court of the state of Washington act within bounds of the Washington State Constitution jurisdictional limits and not violation of separation of powers, violation of inherent powers.

GENERAL FACTS

23. On January 5, 2012, the Supreme Court rendered its decision in *McCleary v. State* , 173 Wash. 2d 477, 269 P.3d 227 (2012).

a. The case began in Superior Court for King County when two families, the McClearys and the Venemas, on behalf of themselves and their children, filed a petition for declaratory judgment in the Superior Court for King County on January 11, 2007 .

b. The case "eventually proceeded to a "bench trial" before Judge John P. Erlick commencing on August 31, 2009 in Superior Court for King County Washington.

c. The case concluded on November 25, 2009.

d. Judge Erlick entered Findings Fact and Conclusions on or about February 24,

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2010.

e. His Decision was entered about the same time.

f. Defendant "The State of Washington" filed notice of appeal seeking direct review by the Supreme Court.

24. In rendering its decision in *McCleary*, the Court said the "judiciary will retain jurisdiction." The court opined:

> The State has failed to meet its duty under article IX, section 1 by consistently providing school districts with a level of resources that falls short of the actual costs of the basic education program. The legislature recently enacted sweeping reforms to remedy the deficiencies in the funding system, and it is currently making progress toward phasing in those reforms. <u>We defer to the legislature's chosen means of discharging its article IX, section 1 duty, but the judiciary will retain jurisdiction over the case to help ensure progress in the State's plan to fully implement education reforms by 2018</u>.

McCleary at 547 (emphasis added.)

25. At the end of the opinion, the Court asked the parties to provide briefing so as to help the Court develop "the preferred method for retaining jurisdiction."

26. The Court did not cite any authority for its "retention of jurisdiction." It did cite a "noted scholar."

> A noted scholar in the area of school-finance litigation has observed that success depends on "continued vigilance on the part of courts." James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1260 (2008). This court intends to remain vigilant in fulfilling the State's constitutional responsibility under article IX, section 1.

Id.

27. The Supreme Court issued its first retention of jurisdiction Order on July 18, 2012. In

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1 the Order the Court said:
2
3 [t]he court recognized the legislature's enactment of "a promising reform program in [Laws of 2009, ch. 548] ESHB 2261," id. at 543, designed to remedy the deficiencies in the prior funding system by 2018. The court retained jurisdiction "to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty."
7
8 a. The court retained jurisdiction "to monitor implementation of the reforms under ESHB 2261, and more generally, the State's compliance with its paramount duty." The court directed the parties to provide further briefing addressing the preferred method for retaining jurisdiction. Having considered the parties' arguments, and being fully advised in this matter, the court enters the following order:
12
13 28. The orders contained in the Order are as follows:
14
15 1. The State, through the Legislative Joint Select Committee on Article IX Litigation or through legal counsel, shall file periodic reports in this case summarizing its actions taken towards implementing the reforms initiated by Laws of 2009, ch. 548 (ESHB 2261) and achieving compliance with Washington Constitution article IX, section 1, as directed by this court in *McCleary v. State*, 173 Wash. 2d 477,269 P.3d 227 (2012).
19
20 2. The first report shall be filed no later than 60 days following entry of this order. Thereafter, reports shall be submitted (a) at the conclusion of each legislative session from 2013 through 2018 inclusive, within 60 days after the final biennial or supplemental operating budget is signed by the governor, and (b) at such other times as the court may order. After the filing of the initial report, subsequent reports should summarize legislative actions taken since the filing of the previous report.
25
26 3. A copy of each report shall be filed with the court and served on the respondents' counsel. The report shall be a public document and may be published on the legislature's web page. Within 30 days after receiving a copy of the report, the respondents may file and serve written comments addressing the adequacy of the State's implementation of reforms and its progress toward compliance with article IX, section 1.
30
31 4. In deference to ESHB 2261 and its implementation schedule, the court's review will focus on whether the actions taken by the legislature
32

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show real and measurable progress toward achieving full compliance with article IX, section 1 by 2018. While it is not realistic to measure the steps taken in each legislative session between 2012 and 2018 against full constitutional compliance, the State must demonstrate steady progress according to the schedule anticipated by the enactment of the program of reforms in ESHB 2261.

5. Upon reviewing the parties' submissions, the court will determine whether to request additional information, direct further fact-finding by the trial court or a special master, or take other appropriate steps. [Emphasis added.]

29. Thus, began a series of hearings, orders, and orders of contempt.

30. On June 12, 2014, a unanimous Supreme Court entered an Order to Show Cause which provided in part as follows:

> This matter came before the Court on its June 5, 2014, En Banc Conference for consideration of the legislature's 2014 Report to the Washington State Supreme Court by the Joint Select Committee on Article IX Litigation (corrected version) and the responses to the report. After consideration of the matter, the Court unanimously determined that a show cause hearing should be held. Now, therefore, it is
>
> ORDERED
>
> That the State is hereby summoned to appear before the Supreme Court to address why the State should not be held in contempt for violation of this Court's order dated January 9, 2014, that directed the State to submit by April 30, 2014, a complete plan for fully implementing its program of basic education for each school year between now and the 2017-18 school year. The State should also address why, if it is found in contempt, any of the following forms of relief requested by the plaintiffs, Mathew and Stephanie McCleary, et al., should not be granted: 1[2]
>
> 1. Imposing monetary or other contempt sanctions;

---

[2] [Footnote 1 - In listing the forms of possible relief identified by the plaintiffs, the Court takes no position on the appropriateness of any of the possible sanctions.]

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2. Prohibiting expenditures on certain other matters until the Court's constitutional ruling is complied with;
3. Ordering the legislature to pass legislation to fund specific amounts or remedies;
4. Ordering the sale of State property to fund constitutional compliance;
5. Invalidating education funding cuts to the budget;
6. Prohibiting any funding of an unconstitutional education system; and
7. Any other appropriate relief.

> The State should also address the appropriate timing of any sanctions. The show cause hearing with oral argument by the parties shall be heard by the Washington Supreme Court on Wednesday, September 3, 2014, at 2:00 p.m. . . .

31. This breathtaking listing of what the Court and Justices might do is in obvious excess of the authority of the Court under the Washington Constitution.

32. On August 13, 2015 the Court ordered:

> Effective immediately, the State of Washington is assessed a remedial penalty of one hundred thousand dollars ($100,000) per day until it adopts a complete plan for complying with article IX, section 1 by the 2018 school year.

33. As of January 28, 2017, the total owing by the State is $ 53.2 Million: $100,000.00 times 532 (days between August 13, 2015 and January 28,2017).

COUNT ONE

Declaratory Judgments Act RCW Ch. 7.24

34. The foregoing paragraphs and the following paragraphs in the Counts set out below are incorporated herein by this reference and are thus restated here.

35. This action is brought under and pursuant to the Washington Uniform Declaratory

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1 Judgments Act. RCW Ch. 7.24 (Declaratory Judgments Act).
2
3 36. RCW 7.24.020 (Rights and status under written instruments, statutes, ordinances)
4 provides:
5
6 A person interested under a deed, will, written contract or other writings
7 constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have
8 determined any question of construction or validity arising under the
9 instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.
10
11 37. RCW 7.24.050 (General powers not restricted by express enumeration) provides:
12
13 The enumeration in RCW 7.24.020 and 7.24.030 does not limit or restrict the exercise of the general powers conferred in RCW 7.24.010, in any
14 proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.
15
16 38. RCW 7.24.080 (Further relief.)
17
18 Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by
19 petition to a court having jurisdiction to grant the relief. When the
20 application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the
21 declaratory judgment or decree, to show cause why further relief should
22 not be granted forthwith.
23
24 39. RCW 7.24.090 (Determination of issues of fact) provides:
25
26 When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same
27 manner as issues of fact are tried and determined in other civil actions, in the court in which the proceeding is pending.
28
29 40. RCW 7.24.120 (Construction of chapter) provides:
30
31 This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status
32 and other legal relations; and is to be liberally construed and

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administered.

41. Plaintiff Eugster has standing under the Declaratory Judgments Act:

a. First, the interests for which he seeks protection are arguably within the zone of interests to be protected or regulated by Order in question.

b. Second, the challenged action will have caused the challenger an injury in fact, economic or otherwise, including damage.

42. A justiciable controversy between the Plaintiff and the Defendants: (1) There is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

43. Last, the Court can utilize its powers not only to settle disputes, but also has the power of judicial determinations of which will be final and conclusive.

44. Plaintiff is entitled to declaratory and permanent injunctive relief. RCW Ch. 7.24.

COUNT TWO

Standing of Officer of the Court

45. The foregoing paragraphs and the following paragraphs in the Counts set out below are incorporated herein by this reference and are thus restated here.

46. Plaintiff, besides being a state of Washington and subdivisions taxpayer, is an officer of the court.

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47. As an officer of the court, Plaintiff Eugster cannot turn his back on activities and actions by the Washington Supreme Court and the individual justices of the Court.

48. Plaintiff Eugster certainly cannot turn his back of the activities and actions of the Washington Supreme Court and the individual justices of the Court. Especially so, because they clearly violate the heart of the Washington State Constitution.

49. Plaintiff should be determined to have standing herein as an officer of the Court.

COUNT THREE

Supreme Court Jurisdiction is Limited to Appellate Jurisdiction

50. The foregoing paragraphs and the following paragraphs in the Counts set out below are incorporated herein by this reference and are thus restated here.

51. The jurisdiction of the Supreme Court in *McCleary* is limited to appellate jurisdiction.

52. The Washington Constitution Art. IV, Section 4 provides:

> ARTICLE IV SECTION 4 JURISDICTION. The supreme Court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars ($200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

53. In *Wesley v. Schneckloth*, 55 Wash. 2d 90, 93-94, 346 P.2d 658 (1959), the court said:

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> The word 'jurisdiction' is derived from the Latin 'juris' and 'dico.' It means 'I speak by the law.' 50 C.J.S. p. 1089.
>
> 'Jurisdiction does not relate to the rights of the parties, as between each other, but to the power of the court.' *People v. Sturtevant*, 1853, 9 N.Y. 263, 269, 59 Am.Dec. 536.
>
> A constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or has not jurisdiction. If it does not have jurisdiction, any judgment entered is void ab initio and is, in legal effect, no judgment at all. Jurisdiction should not be sustained upon the doctrine of estoppel, especially where personal liberties are involved.
>
> It is our considered opinion that lack of original jurisdiction to hear and determine a case meets the 'exceptional circumstance' rule, and that evidence of lack of jurisdiction may be received for the first time and considered in an application for writ of habeas corpus.

Id.

54. This section limits the power of the Supreme Court to appellate jurisdiction, revisory jurisdiction. Nothing more is permitted in the context of "appellate jurisdiction." The Supreme Court only has "appellate jurisdiction."

55. The Court's "retention of jurisdiction" in *McCleary* violates the Constitution and all orders rendered by the Court after the decision are in excess of its jurisdiction and therefore they are void. The Court had a duty to remand the case to the trial court.

56. Plaintiff is entitled to declaratory and permanent injunctive relief. RCW Ch. 7.24.

COUNT FOUR

Power Being Exercised Court Violates Separation of Powers

57. The foregoing paragraphs and the following paragraphs in the Counts set out below are incorporated herein by this reference and are thus restated here.

58. The orders rendered by the Court essentially called for legislation by the Legislature.

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59. If the Court did not like what the State came back to it with, it essentially vetoed the State's response.

60. The Court, time and time again, entered orders in violation of the Separation of Powers Doctrine embodied in the Constitution.

61. The Court and the Justices of the Court, Defendants all, do not have the power of appropriation under the Washington Constitution.

62. This is another reason why its orders are void, especially its ongoing contempt order of $100,000 per day.

63. Plaintiff is entitled to declaratory and permanent injunctive relief. RCW Ch. 7.24.

64. The orders of the Court are void.

COUNT FOUR

Power Being Exercised Court Is in Excess of Any Inherent Power of the Court

65. The foregoing paragraphs and the following paragraphs in the Counts set out below are incorporated herein by this reference and are thus restated here.

66. The power exercised by the Court go beyond any inherent power the Court might claim it has.

67. Plaintiff is entitled to declaratory and permanent injunctive relief. RCW Ch. 7.24.

68. The orders of the court are void.

PRAYER FOR RELIEF

Plaintiff Eugster asks the court to do the following:

1. Declare that the Supreme Court and the Justices of the Court do not have the power

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to retain jurisdiction of *McCleary v. State*.

2. Declare that the Supreme Court and the Justices of the Court do not have the power under the Separation of Powers Doctrine embodied in the Washington State Constitution to retain jurisdiction of *McCleary v. State*.

3. The Court should grant such "further relief based on the judgments herein as necessary and/or proper to enforce its declaratory judgments and determinations."

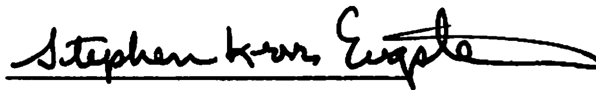
4. Award Plaintiff Eugster attorney's fees under equitable grounds, if any - protected funds.

5. Award Plaintiff Eugster his statutory attorneys fees and costs.

6. Award Plaintiff Eugster such further relief as is just and equitable.

January 31, 2017.

EUGSTER LAW OFFICE PSC



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Stephen Kerr Eugster
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September 19, 2016

Bob Ferguson
Attorney General
The State of Washington
1125 Washington St SE
Olympia, WA 98504-0100
judyg@atg.wa.gov

Re: Washington State Supreme Court, Separation of Powers

Dear Attorney General Ferguson:

My name is Stephen Kerr Eugster. I am a member of the Washington State Bar Association # 2003. I am admitted to the bar of the Washington State Supreme Court (Supreme Court).[1]

Along with my fellow members of the bar of the Supreme Court, I have special responsibilities:

> **A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.**

Rules of Professional Conduct, *Preamble: A Lawyer's Responsibilities* (emphasis added).

I have practiced law in the State of Washington since the fall of 1970. I am a graduate of the University of Washington School of Law, J.D. 1969, where I was

[1] I am proud of having been sworn into the bar of the Supreme Court at the United States Supreme Court in January 1970 by United States Supreme Court Associate Justice William O. Douglas, of Yakima, Washington.

on the Washington Law Review, and for a year, the Review's Managing Editor. I graduated with honors and as a member of the Order of the Coif.

I have appeared before the Washington Supreme Court and the Washington Court of Appeals in numerous cases.

My first cases before the Supreme Court involved the constitutionality of Initiative 276 *circa* 1973-74. Richard A. Derham, and I, of Davis, Wright, Todd, Riese & Jones, Seattle, represented William J. Fritz, a lobbyist, and others in several cases. *Fritz v. Gorton*, 83 Wash.2d 275, 517 P.2d 911 (1974) and *Bare v. Gorton*, 84 Wash.2d 380,526 P.2d 379, (1974) (Mrs. Mildred E. Bare was a school board member).

Since then, many my cases before the Supreme Court and the Court of Appeals have involved the meaning and application of the Washington State Constitution.

I am a taxpayer of State of Washington and have been so since 1966, the year of my residency in the state. For the last thirty-nine years, since my residence in Spokane County, I have paid sales taxes, use taxes, and property taxes, etc., to the State of Washington. I am paying such taxes now and will do so in the future.

Over the past several years I have been studying what we refer to today as the Washington School Funding Cases. I have expended much time and energy studying and considering *McCleary v. State*, 269 P.3d 227, 173 Wash.2d 477, 276 Ed. Law Rep. 1011 (Wash., 2012). I have followed the activities and actions of the Legislature and the Supreme Court concerning the "enforcement the *McCleary* decision."

A major concern of mine over the years since the *McCleary* decision is the question of whether the Justices of the Supreme Court have violated, or are presently violating, the basic constitutional premise of the Washington State Constitution – separation of powers.

> Our system of checks and balances incorporates the important concept of the separation of powers. *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wash.2d 494, 503, 506, 198 P.3d 1021 (2009). The doctrine "preserves the constitutional division between the three branches of government, ensuring that the activity of one does not threaten or invade the prerogatives of another." *State v. Elmore*, 154 Wash.App. 885, 905, 228 P.3d 760 (2010). The legislature violates separation of powers principles when it infringes on a judicial function. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wash.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987). The function of the judiciary is to say what the

law is, whereas the legislature's function is to set policy and draft and enact law. *Hale*, 165 Wash.2d at 506, 198 P.3d 1021. It is important to note that although the separate and coequal branches fill different roles, the branches "must remain partially intertwined to maintain an effective system of checks and balances. The art of good government requires cooperation and flexibility among the branches." *Id.* at 507, 198 P.3d 1021.

Hambleton v. State (In re Estate of Hambleton), 181 Wash.2d 802, ¶ 27, 335 P.3d 398 (Wash., 2014).

At first, I was sure the decision itself was a violation of separation of powers. The more I studied the matter, I came to respect what Justice Tom Chambers, deceased, said about the decision on his internet website. He said:

[1] In 2005, the legislature initiated a new study called Washington Learns. Washington Learns noted that "[t]oday, the K-12 education system is still financed by the thirty-year-old statutory formula of the Basic Education Act." *McCleary v. State*, 173 Wn.2d 477 (2012).

[2] The report found that, despite the shift to a performance-based system more than a decade earlier, "the funding model for K-12 education has not been updated to reflect the new expectations and has not addressed the question of how to use resources most effectively in order to improve student outcomes." Id. The report further surmised that "[s]table and significantly increased funding is required to support the evolving needs of our education system." Washington Learns concluded that the State was not meeting its duty to provide adequate funding in many areas. In response to Washington Learns, the legislature adopted ESHB 2261, a comprehensive approach to adopting reforms and to provide adequate funding for basic education. The plan was to phase in funding so that basic education would be fully funded by 2018.http://apps.leg.wa.gov/documents/billdocs/200910/Pdf/Bills/-Session%20Laws/House/2261-S.SL.pdf. But instead of funding the improvements the legislature had adopted to provide adequate funding of education in ESHB 2261, the legislature began reducing funding to schools.

[3] A group of school districts, individuals, and community members brought the *McCleary* lawsuit claiming the State was not fulfilling its constitutional mandate. The lawsuit proceeded to trial and, as in the 1978 case, the trial judge found that the State was not meeting its duty to adequately fund basic education. The Washington Supreme Court agreed and has given the State until 2018 to fully fund basic education. It is not the court's role to decide how to adequately fund basic education. But it is the court's role to interpret the state constitution. From a constitutional analysis point of view, this is not rocket science. It is fundamental that the legislature must first fund all constitutionally required functions before funding non-mandated

programs. The paramount duty clause means education must be the State's highest priority. The founders used the word "ample" which has reasonably been interpreted to mean the State must adequately fund education over all other state funded programs. Inasmuch as it was the legislature's plan to adequately fund basic education by adopting ESHB 2261, the court is using the legislature's own plan as a benchmark to measure progress. [Emphasis added.][2]

See ESHB 2261.

In essence, Justice Chambers did not believe the Court, in deciding *McCleary*, was violating the separation of powers doctrine -- was legislating, because the "court [was] using the legislature's own plan as a benchmark to measure progress." Id.

Over the past four years, the Supreme Court has tried to enforce its decision against the State.[3] During this time, Court never worked from a decision which was objectively quantified. The court did not say what would satisfy its desire to fund education adequately. The essence of the various contempt orders was that the Legislature was not doing what the Court wanted the State to do to; not any time did the Court issue a contempt order which was based on a specific, quantifiable object the State was to fulfill.

The Court wanted to have the legislature come up with legislation satisfying the unquantified demands of the Court. The Court was legislating in that it wanted the State to legislate. It held the power to determine whether the State's legislation was the legislation the Court wanted. The Court created in itself an **ultimate plenary power to veto** legislation of the State which did not fulfill the ever-shifting and unquantified desires of the Court.[4]

In my opinion, this was, and is, a violation of the separation of powers doctrine:

---

[2] http://tomchambers.com/the-states-duty-to-pay-for-education/.

[3] The State is the only defendant in the case. The Governor and the Legislature are not parties. The individual members of the Legislature are not parties.

[4] The state would be well on its way now to better school funding had private individuals with standing commenced a writ of mandamus action in a Supreme Court case naming the individual state legislators and the governor as party defendants -- individuals over whom the Court had jurisdiction over (personal jurisdiction). If such a case had been brought at the time *McCleary* was decided in December 1982, the Court would have quantified the amount of money needed to be appropriated by the Legislature and approved by the Governor to fund ESHB 2261 the legislation the Court determined would take care of the problem. (See discussion of Justice Tom Chambers view above.) This case would have been brought directly in the Supreme Court. The Court has original jurisdiction over mandamus cases against state officers. WASH. CONST. Art IV, Section 4. ("The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, . . . "). I presume members of the house of representatives, and senators are "state officers." *See* WASH. CONST. Art. II, Section 4, and Section 6.

the court is clearly legislating.

The actions by the justices of the court are unconstitutional.

By this letter, I request that you and your office take immediate steps to ensure that the Justices of the Supreme Court are not acting in violation of the separation of powers doctrine.

I make this request because I am a citizen of the state. I have taxpayer standing to litigate the issues if you do not. And, as a member of the bar of the Washington State Supreme Court, I am "an officer of the court and a public citizen, having special responsibility for the quality of justice." [Emphasis added.] [5]

Some may say "what is the point, the Supreme Court is going to make its own decision on the matters. The Supreme Court is going to make the decision; that is certain. But, as we know, in circumstances like this, qualified persons will be selected to act as justices of the Court in the cases.[6]

As you know, your response decision not to respond, or your failure to respond is a step which precedes my power to act in these matters on my own.[7]

Respectfully,

/s/ Stephen Kerr Eugster

Stephen Kerr Eugster

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[5] Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities [1].

[6] WASH. CONST. Art. IV, Section 2(a):

> TEMPORARY PERFORMANCE OF JUDICIAL DUTIES. When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.

See, e.g., In the Matter of the Disciplinary Proceeding Against Richard B. Sanders, Justice of the Supreme Court of the State of Washington, 135 Wash.2d 175, 955 P.2d 369 (1998).

[7] See *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wash.App. 105, 336 P.3d 632 (Wash. App., 2014); *State ex rel. Boyles v. Whatcom County Superior Court*, 694 P.2d 27, 103 Wn.2d 610 (Wash., 1985).

cc: Justices of the Washington Supreme Court, namely; Chief Justice Barbara A. Madsen, and Justices Charles W. Johnson, Susan Owens, Mary E. Fairhurst, Debra L. Stephens, Charles K. Wiggins, Steven C. González, Sheryl Gordon McCloud and Mary I. Yu,

Jay Inslee, Governor, and

Members of the Legislature

Eugster Law Office

SEP 29 2016

Received
2418 West Pacific Avenue
Spokane, Washington 99201-6422

Bob Ferguson

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

September 27, 2016

Stephen K. Eugster
Eugster Law Office
2418 West Pacific Ave
Spokane, WA 99201-6422

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Eugster:

I write in response to your letter of September 19, 2016. Your letter requests that our office "take immediate steps to ensure that the Justices of the Supreme Court are not acting in violation of the separation of powers doctrine" in the currently pending case of *McCleary v. State*, Washington Supreme Court No. 84362-7.

We consider commencing actions at the request of a taxpayer in appropriate situations. Commencing a new action regarding the court's rulings in an existing case clearly does not present such a situation. We therefore decline your request, except to the extent that we are already doing as you ask in *McCleary*. Given that the State is already a party to *McCleary* and has raised separation of powers arguments directly there, and given that you have appeared as amicus in that case to raise separation of powers arguments and other arguments, we fail to see the basis for or purpose of a separate lawsuit addressing the same issue. To the extent that your letter is offered as a prelude to asserting taxpayer standing, please understand that we do not agree that it is sufficient to do so under these circumstances.

I trust that this information will be helpful.

Sincerely,

JEFFREY T. EVEN
Deputy Solicitor General

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Stephen Kerr Eugster
eugster@eugsterlaw.com

[January 25, 2017]

Jeffrey T. Even
Deputy Solicitor General
Office of the Attorney General
PO Box 40100
Olympia WA 98504-0100
e-mail: jeff.even@atg.wa.gov

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Even:

You wrote to me in the fall regarding a lawsuit I proposed against the Washington Supreme Court regarding the *McCleary Case.*[1]

I would like to re-awaken my concern about *McCleary*. My additional study concerning the power the Supreme Court is exercising in the case has led me another issue.

In *McCleary*, Justice Stephens, in her majority opinion said:

> The court The State has failed to meet its duty under article IX, section 1 by consistently providing school districts with a level of resources that falls short of the actual costs of the basic education program. The legislature recently enacted sweeping reforms to remedy the deficiencies in the funding system, and it is currently making progress toward phasing in those reforms. We defer to the legislature's chosen means of discharging its article IX, section 1 duty, but the judiciary will retain jurisdiction over the case to help ensure progress in the State's plan to fully implement education reforms by 2018.

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[1] A copy of my letter to Attorney General Bob Ferguson dated September 19, 2016, and a copy of your letter to me of September 27, 2016 are enclosed.

programs. The paramount duty clause means education must be the State's highest priority. The founders used the word "ample" which has reasonably been interpreted to mean the State must adequately fund education over all other state funded programs. Inasmuch as it was the legislature's plan to adequately fund basic education by adopting ESHB 2261, the court is using the legislature's own plan as a benchmark to measure progress. [Emphasis added.][2]

See ESHB 2261.

In essence, Justice Chambers did not believe the Court, in deciding *McCleary*, was violating the separation of powers doctrine -- was legislating, because the "court [was] using the legislature's own plan as a benchmark to measure progress." Id.

Over the past four years, the Supreme Court has tried to enforce its decision against the State.[3] During this time, Court never worked from a decision which was objectively quantified. The court did not say what would satisfy its desire to fund education adequately. The essence of the various contempt orders was that the Legislature was not doing what the Court wanted the State to do to; not any time did the Court issue a contempt order which was based on a specific, quantifiable object the State was to fulfill.

The Court wanted to have the legislature come up with legislation satisfying the unquantified demands of the Court. The Court was legislating in that it wanted the State to legislate. It held the power to determine whether the State's legislation was the legislation the Court wanted. The Court created in itself an ultimate plenary power to veto legislation of the State which did not fulfill the ever-shifting and unquantified desires of the Court.[4]

In my opinion, this was, and is, a violation of the separation of powers doctrine:

[2] http://tomchambers.com/the-states-duty-to-pay-for-education/.

[3] The State is the only defendant in the case. The Governor and the Legislature are not parties. The individual members of the Legislature are not parties.

[4] The state would be well on its way now to better school funding had private individuals with standing commenced a writ of mandamus action in a Supreme Court case naming the individual state legislators and the governor as party defendants -- individuals over whom the Court had jurisdiction over (personal jurisdiction). If such a case had been brought at the time *McCleary* was decided in December 1982, the Court would have quantified the amount of money needed to be appropriated by the Legislature and approved by the Governor to fund ESHB 2261 the legislation the Court determined would take care of the problem. (See discussion of Justice Tom Chambers view above.) This case would have been brought directly in the Supreme Court. The Court has original jurisdiction over mandamus cases against state officers. WASH. CONST. Art IV, Section 4. ("The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, . . . "). I presume members of the house of representatives, and senators are "state officers." *See* WASH. CONST. Art. II, Section 4, and Section 6.

the court is clearly legislating.

The actions by the justices of the court are unconstitutional.

By this letter, I request that you and your office take immediate steps to ensure that the Justices of the Supreme Court are not acting in violation of the separation of powers doctrine.

I make this request because I am a citizen of the state. I have taxpayer standing to litigate the issues if you do not. And, as a member of the bar of the Washington State Supreme Court, I am "an officer of the court and a public citizen, having special responsibility for the quality of justice." [Emphasis added.] [5]

Some may say "what is the point, the Supreme Court is going to make its own decision on the matters. The Supreme Court is going to make the decision; that is certain. But, as we know, in circumstances like this, qualified persons will be selected to act as justices of the Court in the cases.[6]

As you know, your response decision not to respond, or your failure to respond is a step which precedes my power to act in these matters on my own.[7]

Respectfully,

/s/ Stephen Kerr Eugster

Stephen Kerr Eugster

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[5] Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities [1].

[6] WASH. CONST. Art. IV, Section 2(a):

> TEMPORARY PERFORMANCE OF JUDICIAL DUTIES. When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.

See, e.g., *In the Matter of the Disciplinary Proceeding Against Richard B. Sanders, Justice of the Supreme Court of the State of Washington*, 135 Wash.2d 175, 955 P.2d 369 (1998).

[7] See *Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wash.App. 105, 336 P.3d 632 (Wash. App., 2014); *State ex rel. Boyles v. Whatcom County Superior Court*, 694 P.2d 27, 103 Wn.2d 610 (Wash., 1985).

cc: Justices of the Washington Supreme Court, namely; Chief Justice Barbara A. Madsen, and Justices Charles W. Johnson, Susan Owens, Mary E. Fairhurst, Debra L. Stephens, Charles K. Wiggins, Steven C. González, Sheryl Gordon McCloud and Mary I. Yu,

Jay Inslee, Governor, and

Members of the Legislature

Eugster Law Office

SEP 29 2016

Received

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

September 27, 2016

Stephen K. Eugster
Eugster Law Office
2418 West Pacific Ave
Spokane, WA 99201-6422

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Eugster:

I write in response to your letter of September 19, 2016. Your letter requests that our office "take immediate steps to ensure that the Justices of the Supreme Court are not acting in violation of the separation of powers doctrine" in the currently pending case of *McCleary v. State*, Washington Supreme Court No. 84362-7.

We consider commencing actions at the request of a taxpayer in appropriate situations. Commencing a new action regarding the court's rulings in an existing case clearly does not present such a situation. We therefore decline your request, except to the extent that we are already doing as you ask in *McCleary*. Given that the State is already a party to *McCleary* and has raised separation of powers arguments directly there, and given that you have appeared as amicus in that case to raise separation of powers arguments and other arguments, we fail to see the basis for or purpose of a separate lawsuit addressing the same issue. To the extent that your letter is offered as a prelude to asserting taxpayer standing, please understand that we do not agree that it is sufficient to do so under these circumstances.

I trust that this information will be helpful.

Sincerely,

JEFFREY T. EVEN
Deputy Solicitor General

EUGSTER LAW OFFICE PSC
2418 West Pacific Avenue
Spokane, Washington 99201-6422
(509) 624-5566 / Mobile (509) 990-9115

Stephen Kerr Eugster
eugster@eugsterlaw.com

January 27, 2017

Bob Ferguson
Office of the Attorney General
Washington State
PO Box 40100
Olympia WA 98504-0100

Re: **Proposed Lawsuit Against Washington Supreme Court Concerning *McCleary v. State*, 173 Wash.2d 477, 269 P.3d 227 (2012)**

Dear Attorney General Ferguson:

The day before yesterday, I mailed (and e-mailed) the enclosed letter to Jeffrey T. Even, Deputy Solicitor General.

I have dealt your office before concerning *McCleary v. State* and whether the Court was overstepping its bounds under the State Constitution. See my letter to your office on September 19, 2016, and Mr. Even's response of September ___, 2016 (in the enclosure).

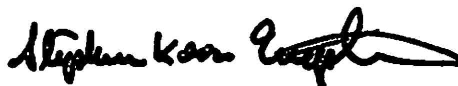
As I read the Washington State Constitution, the Court does not have jurisdiction to "retain jurisdiction" in the *McCleary* appeal. The only jurisdiction the court had in the case was appellate jurisdiction over the appeal of King County Superior Court Trial Judge John P. Erlick's Decision and Findings and Conclusions of February 24, 2010.

The situation must be decided and especially in a published opinion of the Supreme Court (in this case the "Supreme Court" of Wash. Const. Art. IV, Section 2a). This will prevent future unconstitutional overreaching by the Supreme Court.

I look forward to hearing from Mr. Even and, of course, you.

Sincerely,

EUGSTER LAW OFFICE PSC



Stephen Kerr Eugster

cc: Jeffrey Even

Eugster Law Office

JAN 30 2016

Received

Bob Ferguson

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

January 27, 2017

Stephen K. Eugster
Eugster Law Office
2418 West Pacific Ave
Spokane, WA 99201-6422

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Eugster:

I write in response to your letter of January 25, 2017. Your letter offers an argument regarding the jurisdiction of the Washington Supreme Court to retain jurisdiction in *McCleary v. State*, Washington Supreme Court No. 84362-7. You then ask whether this argument would change the view set forth in my letter to you of September 27, 2016.

It does not.

I trust that this information will be helpful.

Sincerely,

Jeff T. Even

JEFFREY T. EVEN
Deputy Solicitor General

Eugster Law Office

JAN 30 2016

Received

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

January 27, 2017

Stephen K. Eugster
Eugster Law Office
2418 West Pacific Ave
Spokane, WA 99201-6422

Re: Proposed Lawsuit Against Washington Supreme Court

Dear Mr. Eugster:

I write in response to your letter of January 27, 2017. Your letter references your earlier letter of January 25, 2017, to which I responded by letter dated January 27, 2017. As with our prior letters, and including your letter of September 19, 2017, to which I responded on September 27, 2017, your most recent letter argues that the Washington Supreme Court lacks jurisdiction to hear, or render decisions in, *McCleary v. State*, Washington Supreme Court No. 84362-7.

Your most recent letter seems to suggest that our office should take some unspecified action regarding your concerns. As I have explained in prior correspondence, we fail to see any merit in your position. Accordingly, as previously explained, we will not take any action regarding your correspondence. To the extent that any of your letters may be offered as a prelude to asserting taxpayer standing, please understand that we do not agree that any of your letters are sufficient to do so.

I trust that this information will be helpful.

Sincerely,

Jeffrey T. Even

JEFFREY T. EVEN
Deputy Solicitor General

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7 **Superior Court of the State of Washington**
8 **In and for the County of Spokane**
9

10 STEPHEN KERR EUGSTER,	)	
11 Plaintiff,	)	No. 15-2-04614-9
12 vs.	)	
13 WASHINGTON STATE BAR ASSOCIATION, a legislatively created Washington association (WSBA); and PAULA LITTLEWOOD, Executive Director, WSBA, in her official capacity;	)	AMENDED AND RESTATED COMPLAINT FOR DECLARATORY JUDGMENTS, INJUNCTION, AND DAMAGES (42 U.S.C. §1983)
16 and	)	
17 DOUGLAS J. ENDE, Director of the WSBA Office of Disciplinary Counsel, in his official capacity; FRANCESCA D'ANGELO, Disciplinary Counsel, WSBA Office of Disciplinary Counsel, in her official capacity,	)	
21 Defendants.	)	

22
23
24 Plaintiff, Stephen Kerr Eugster,[1] amends and restates his complaint herein,[2] and alleges:
25

26 [1] Sometimes referred to as "Eugster."
27 [2] CR 15(a): "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served is served. . . . "
28

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1 INTRODUCTION

2 This case concerns the civil rights of Plaintiff protected by 42 U.S.C. § 1983, the First and
3 Fifth Amendments to the United States Constitution, and Washington State Constitution Art. I,
4 Section 1 and Section 2. Plaintiff seeks declaratory judgments by the court declaring the WSBA
5 Washington Lawyer Discipline System unconstitutional because (1) the Discipline System does
6 not pass strict scrutiny and because (2) the Discipline System violates a lawyer's right to due
7 process of law.

8 Eugster seeks an injunction enjoining the Defendants or some of them, from application
9 of the WSBA Washington Lawyer Discipline System to him, and in furtherance of the court's
10 determinations that the Discipline System is unconstitutional.

11 As to the foregoing, Eugster does not seek damages, or monetary relief from Defendants
12 or any of them.

13 However, Plaintiff does seek damages from some or all of the Defendants for
14 compensatory or nominal damages under 42 U.S.C. § 1983 for injuries to Plaintiff as a result of
15 violations of Plaintiff's rights by Defendants or some of them under 42 U.S.C. § 1983
16 concerning the use by Defendants or some of them of the Discipline System to intimidate,
17 harass and retaliate against Plaintiff for bringing an action in United States District Court,
18 Western District of Washington in which Plaintiff asserts that under First and Fourteenth
19 Amendments and 42 U.S.C. § 1983 his fundamental right not to associate with the WSBA is
20 violated.

21 This complaint is made up of a number of claims, or counts, all incident to the foregoing
22 description of the Plaintiff's case:

23 *COUNT ONE, Declaratory Judgments.*

24

25 *COUNT TWO, WSBA Lawyer Discipline System Does Not Pass Strict Scrutiny.*

26 *COUNT THREE, WSBA Lawyer Discipline System Violates Eugster Rights Under 42*
27 *U.S.C. § 1983.*

28

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1 *COUNT FOUR, Injunction, Enjoin Defendants from use of WSBA Lawyer Discipline*
2 *System.*
3
4 *COUNT FIVE, Damages, Award Eugster Compensatory Damages for Defendants' Violation of Eugster's Rights under 42 U.S.C. § 1983.*
5
6 *COUNT SIX, Damages, Award Eugster Nominal Damages for Defendants' Violation of Eugster's Rights under 42 U.S.C. § 1983.*
7
8
9 **NATURE OF THE CLAIMS**
10
11 1. **Civil Rights Act.** Under 42 U.S.C. § 1983, every person who, under color of state law, subjects any citizen of the United States to the deprivation of "rights, privileges, or immunities secured by the Constitution and laws," shall be liable to the injured party.
12
13
14 2. **Declaratory Relief.** This civil rights action seeks declaratory relief and action in furtherance of declaratory relief to redress and prevent Defendants from deprivation of Plaintiff's rights of procedural due process of law under the Fifth and Fourteenth Amendments to the United States Constitution by practices and policies of Defendants acting under color of state law.
15
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18
19 3. **Injunctive Relief.** This civil rights action seeks injunctive relief to prevent Defendants from deprivation of Plaintiff's rights of procedural due process of law under the Fifth and Fourteenth Amendments to the United States Constitution by practices and policies of Defendants acting under color of state law.
20
21
22
23 4. **Civil Rights Act, Right of Petition.** This action seeks damages from Defendants for negligence as a result of Defendants use of the Washington Lawyer Discipline System as applied to Plaintiff as retaliation against Plaintiff for bringing an action in Federal Court to asserting that Plaintiff's compelled membership and that such actions violates Eugster's right of petition of the government for a redress of grievances under the First and Fourteenth Amendment Rights to the United States Constitution, and Washington State Constitution Art.
24
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I., Section 4.

5. **Damages.** This civil rights action seeks compensatory damages from Defendants as a result of Defendants use of the WSBA Washington Lawyer Discipline System in retaliation against Eugster for Plaintiff for bringing an action in Federal Court asserting that Plaintiff's compelled membership in the violates his rights under the First and Fourteenth Amendments to the United States Constitution, and Washington State Constitution Art. I., Section 3.

6. **Damages II.** This action seeks nominal damages from Defendants under 42 U.S. C. § 1983 a result of Defendants use of the Washington Lawyer Discipline System as applied to Plaintiff as retaliation against Plaintiff for bringing an action in Federal Court to asserting that Plaintiff's compelled membership in the violates his rights under the First and Fourteenth Amendments to the United States Constitution which violates Plaintiff's right to petition the government for a redress of grievances under the First and Fourteenth Amendment Rights to the United States Constitution and Washington State Constitution Art. I, Section 4

JURISDICTION AND VENUE

7. **Jurisdiction.** The court has jurisdiction over this action under 42 U.S.C. § 1983 because this is an action for deprivation of rights, privileges, and immunities secured by the United States Constitution. *See Robinson v. City of Seattle*, 119 Wn.2d 34, 57-63, 830 P.2d 318 (1992) (noting state courts have jurisdiction in actions brought under 42 U.S.C. § 1983).

8. **Washington Constitution.** The court has jurisdiction over this action under Wash. Const. Art. IV, Section 6 of the Washington State Constitution ("Superior courts and district courts have concurrent jurisdiction in cases in equity.")

9. The court has jurisdiction over this action under Wash. Const. Art. IV, Section 6 of the Washington State Constitution because "[t]he superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. . . .").

10. The court has jurisdiction under Wash. Const. Art. IV, Section 6 because the

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jurisdiction has not "been by law vested exclusively in some other court."

11. **RCW 2.08.010.** The court also has jurisdiction over this action pursuant to RCW 2.08.010 "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court" and under RCW 2.08.010 "and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court,. . . "

12. **Declaratory Judgments Act.** The court has jurisdiction over this action under the Uniform Declaratory Judgments Act. RCW Ch. 7.24.

13. **Further Relief.** The court has jurisdiction to grant further relief under RCW 7.24.080 which provides:

> Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. When the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

14. **Venue.** Venue is proper in this court under RCW 4.12.025 (1) and RCW 4.12.020 (3).

PARTIES

17. **Plaintiff, Stephen Kerr Eugster,** is a citizen of the United States and a resident of Spokane County, State of Washington.

a. Plaintiff was admitted to the bar of the Washington State Supreme Court in January 1970 when he took his attorney's oath before Justice William O. Douglas at the United States Supreme Court.

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1 b. As a member of the bar of the Washington State Supreme Court, Plaintiff
2 was "admitted by the Court to all of the privileges of an Attorney and Counselor at
3 Law in all the Courts this State." Certificate of Admission to the Bar of the
4 [Washington Supreme] Court of Stephen Kerr Eugster January 31st 1970, signed
5 William W. Lowry, Clerk.

6 c. Plaintiff is also a duly licensed attorney under the laws of the state of
7 Washington and, as required by RCW 2.48.170, is a member in good standing of the
8 Washington State Bar Association (WSBA).

9 15. **Defendant WSBA**, is an association created by the Washington State Bar Act, RCW
10 Ch. 2.48.

11 a. Defendant WSBA is headquartered in Seattle, Washington, and conducts
12 its business and operations including the WSBA Discipline System throughout the
13 State of Washington including Spokane County from its offices in Seattle.

14 b. Defendant WSBA is a "mandatory" or "integrated" bar association as
15 described in *Keller v. State Bar of California*, 496 U.S. 1, 5 (1990). That is, all
16 attorneys must join the WSBA and pay mandatory bar dues as a condition of
17 practicing law in the state of Washington.

18 c. Defendant WSBA is currently enforcing the unconstitutional practices and
19 policies complained of in this action.

20 d. Defendant WSBA is currently acting in violation of the unconstitutional
21 practices and policies complained of in this action.

22 e. Defendant WSBA is sued in its official capacity.

23 16. **Defendant Paula Littlewood**, is the Executive Director of the WSBA.

24 a. Defendant Littlewood is currently implementing and enforcing the
25 unconstitutional practices and policies complained of in this action.

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b. Defendant Littlewood is currently acting in violation of the unconstitutional practices and policies complained of in this action.

c. Defendant Littlewood is a lawyer and member of the WSBA, WSBA # 28726.

d. Defendant Littlewood is sued in her official capacity.

17. **Defendant Douglas Ende**, is the Chief Disciplinary WSBA Office of Discipline.

a. Defendant Ende is currently implementing and enforcing the unconstitutional practices and policies complained of in this action.

b. Defendant Ende is currently acting in violation of the unconstitutional practices and policies complained of in this action.

c. Defendant Ende is a lawyer and member of the WSBA, WSBA # 17141.

d. Defendant Ende is sued in his official capacity.

18. **Defendant Francesca D'Angelo**, is a Disciplinary Counsel of the WSBA Office of Disciplinary Counsel.

a. Defendant D'Angelo is currently implementing and enforcing the unconstitutional practices and policies complained of in this action.

b. Defendant D'Angelo is currently acting in violation of the unconstitutional practices and policies complained of in this action.

c. Defendant D'Angelo is a lawyer and member of the WSBA, WSBA # 22979.

d. Defendant D'Angelo is sued in her official capacity.

FACTUAL ALLEGATIONS

19. **The Image of the WSBA.** The regulation and discipline of Washington lawyers by the WSBA is to preserve and protect the image the public has of lawyers by allowing the WSBA

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1 to claim that it has the interests of the public as its primary interest.

2

3 20. That is to say, a major motivation of the WSBA, of the Defendants, is the image of the WSBA.

4

5 21. It is this concern for image, which causes the WSBA and other Defendants to pursue and operate the Discipline System.

6

7 22. **Disciplinary Authority.** Plaintiff, as a "lawyer admitted to practice in this jurisdiction

8 is subject to the disciplinary authority of this jurisdiction and these Rules for Enforcement of

9 Lawyer Conduct" (ELC). 1.2.

10 20. The term "**disciplinary authority**" is used and described in ELC 1.2:

11

12 Except as provided in RPC 8.5(c), any lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction and these Rules for

13 Enforcement of Lawyer Conduct, regardless of where the lawyer's conduct occurs. A

14 lawyer not admitted to practice in this jurisdiction is also subject to the disciplinary

15 authority of this jurisdiction and these rules if the lawyer provides or offers to provide

16 any legal services in this jurisdiction. Disciplinary authority exists regardless of the

17 lawyer's residency or authority to practice law in this state. A lawyer may be subject

18 to the disciplinary authority of both this jurisdiction and another jurisdiction for the

19 same conduct.

20 21. The WSBA is a single entity; a state created association.

21

22 22. "Because the Washington Constitution prohibits creation of corporations by special act, the committee proposed that the Bar Association be created as an agency of the state. The

23 proposed act would create "a complete integrated (i.e., mandatory membership) Bar which is

24 officially organized, self-governed and all inclusive." Robert D. Welden, History of the Washington

25 State Bar Association, WSBA Website – http://www.wsba.org/-About-WSBA/History. Robert D.

26 Welden is a former general counsel to the WSBA.

27

28

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23. The WSBA does not receive funds from the State of Washington or any branch of state government (including the Washington Supreme Court).

24. The WSBA generates revenue from compelled fees by the lawyers it compels to be members of the WSBA including Plaintiff.

25. The WSBA describes itself as follows:

> The WSBA both regulates lawyers under the authority of the Court and serves its members as a professional association — all without public funding. As a regulatory agency, the WSBA administers the bar admission process, including the bar exam; provides record-keeping and licensing functions; and administers the lawyer discipline system. As a professional association, the WSBA provides continuing legal education for attorneys, in addition to numerous other educational and member-service activities. http://www.wsba.org/About-WSBA.

WSBA Discipline System - Operates from within the Offices of the WSBA

26. The WSBA engages in these two functions described above from its offices in Seattle, Washington at 1325 Fourth Ave., Suite 600, Seattle, WA 98101-2539.

27. **The WSBA Office of Disciplinary Counsel** operates from within the offices of the WSBA in Downtown Seattle, King County, Washington.

28. The WSBA Washington Lawyer Discipline System may not even be physically separate from the WSBA.

29. It also may be the case that employees of the WSBA are shared with Discipline System.

30. The Washington Lawyer Discipline System persons, in sharing space and staff at the offices of the WSBA, are in constant contact with officers and employees of the WSBA who do not perform disciplinary functions.

31. The primary purpose of the **WSBA Executive Director** is to regulate and discipline

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member lawyers and others.

32. **WSBA Executive Director** has her offices and staff in the offices of the WSBA at 1325 Fourth Ave., Suite 600, Seattle, Washington.

33. **Hearings.** Discipline System Hearings by Hearing Officers take place in the Offices of the WSBA.

34. **Disciplinary Board** and the **Review Committees.** The Disciplinary Board conducts its hearings in the Offices of the WSBA. The Review Committees conduct meetings in the Offices of the WSBA.

35. The staffing and space for the Disciplinary Board and the Review Committees is provided by the WSBA at and within the Offices of the WSBA.

36. Staff supposedly relegated to the Washington Lawyer Discipline System mix on a daily basis or whenever both are present at the offices of the WSBA with other staff of the WSBA, its officers and the Board of Governors and its members.

Functional Parts of the WSBA Washington Lawyer Discipline System

37. In the paragraphs which follow, the functional parts of the Discipline System will be described.

38. **Grievance Procedure.** Under ELC[3] 5.1 (a) "Any person or entity may file a grievance against a lawyer who is subject to the disciplinary authority of this jurisdiction." That is to say, if you are member of the WSBA, any person can file a grievance against you.

39. And the grievant is not limited in what he or she can grieve.

40. **Investigation.** Under ELC 5.3 (a) "[d]isciplinary counsel must review and may investigate any alleged or apparent misconduct by a lawyer and any alleged or apparent incapacity of a lawyer to practice law, whether disciplinary counsel learns of the misconduct by

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[3] Rules for Enforcement of Lawyer Conduct, http://www.courts.wa.gov/court_rules-/?fa=court_rules.list&group=ga&set=ELC.

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grievance or otherwise. If there is no grievant, disciplinary counsel may open a grievance in the name of the Office of Disciplinary Counsel."

41. The WSBA takes the position that its investigation either as the recipient of a grievance or a grievance filed by disciplinary counsel is not limited to "any alleged or apparent misconduct of a lawyer."

42. **Report to A Review Committee.** Disciplinary counsel must report to a Review Committee (ELC 2.4) the results of investigations except those dismissed or diverted. The report may include a recommendation that the committee order a hearing or issue an advisory letter or admonition. ELC 5.7 (d).

a. The members of the Review Committees are members of the Disciplinary Board (ELC 2.3) and represent the Disciplinary Board. ELC 2.4 (b).

43. **Hearing.** If the matter against a lawyer is ordered to hearing, a hearing officer for the hearing of the case against the accused lawyer is selected by the Chief Hearing Officer.

44. **Hearing Officer Hearing** regarding the complaint against the lawyer will take place.

45. **Post Hearing.** The hearing officer will complete the case by entering into the case record Findings of Fact, Conclusions of Law and Recommendation as to discipline of the lawyer.

46. **Disciplinary Board.** The lawyer has a right to appeal the decision of the Hearing Officer to the Disciplinary Board. ELC 11.2 (b).

47. **Disciplinary Board Decision.** ELC 11.12 (d) provides:

> (d) Action by Board. On review, the Board may adopt, modify, or reverse the findings, conclusions, or recommendation of the hearing officer. The Board may also direct that the hearing officer or panel hold an additional hearing on any issue, on its own motion, or on either party's request.

48. **Disciplinary Board not bound by Hearing Officer Decision.** The Disciplinary Board is not bound by the decision of the Hearing Officer. It has the power to come up with its own

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1 decision.

2

3 49. **Washington State Supreme Court.** Appeal to the Washington State Supreme Court. The accused lawyer has a right to appeal to the Washington Supreme Court. ELC 12.3.

4

5 **The WSBA Controls the Selection of WSBA Lawyers Who Perform Functions of the System**

6

7 50. **WSBA Board of Governors.** The Board of Governors has overall authority regarding the Discipline System. ELC 2.2 (a) provides:

8

9 (a) Function. The Board of Governors of the Association:

10 (1) through the Executive Director, provides administrative and managerial support
11 to enable the Office of Disciplinary Counsel, the Disciplinary Board, review
12 committees, and other Association staff and appointees to perform the functions
13 specified by these rules;

14

15 (2) makes appointments, removes those appointed, and fills vacancies as provided
16 in these rules; and (3) performs other functions and takes other actions provided in
17 these rules, delegated by the Supreme Court, or necessary and proper to carry out its duties.

18

19 51. **WSBA Executive Director.** The WSBA Board of Governors is empowered with the selection of the WSBA Executive Director.

20

21 a. The Executive Director serves at the pleasure of the Board of the Board of Governors.

22

23 b. The Executive Director has hire/fire authority over all WSBA staff,
24 including the Chief Disciplinary Counsel, Disciplinary Counsel, counsel (from
25 Disciplinary Counsel), to the Disciplinary Board, and other disciplinary staff.

26 c. The Executive Director evaluates the performance of WSBA staff and sets
27 their salaries.

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Office of Disciplinary Counsel

52. **Office of Disciplinary Counsel.** The WSBA, through its control of the Executive Director, has control over the Office of Disciplinary Counsel.

53. Disciplinary counsel acts as counsel on all matters under these rules, and performs other duties as required by these rules or the Chief Disciplinary Counsel.

54. **Chief Disciplinary Counsel.** ELC 2.8 (b) provides:

> (b) **Appointment.** The Executive Director of the Association, under the direction of the Board of Governors, employs a suitable member of the Association as Chief Disciplinary Counsel, and in consultation with the Chief Disciplinary Counsel, selects and employs suitable members of the association as disciplinary counsel, in a number to be determined by the executive director. Special disciplinary counsel may be appointed by the Executive Director whenever necessary to conduct an individual investigation or proceeding.

55. Chief Disciplinary Counsel is the **Director of the Office of Disciplinary Counsel.**

56. Defendant Douglas Ende is the WSBA Chief Disciplinary Counsel. As such he "acts as counsel on the Association's behalf on all matters under these rules (ELC rules), and performs other duties as required by these rules, the Executive Director, or the Board of Governors." ELC 2.8(a).

57. **Chief Hearing Officer.** The appointment of Chief Hearing Officer is governed by ELC 2.8 (b):

> (b) Appointment. The Executive Director of the Association, under the direction of the Board of Governors, employs a suitable member of the Association as Chief Disciplinary Counsel, and in consultation with the Chief Disciplinary Counsel, selects and employs suitable members of the association as disciplinary counsel, in a number to be determined by the executive director. Special disciplinary counsel may be

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appointed by the Executive Director whenever necessary to conduct an individual investigation or proceeding.

58. **Additional Disciplinary Counsel.** The Executive Director under the direction of the Board of Governors "and in consultation with the Chief Disciplinary Counsel, selects and employs suitable members of the association as disciplinary counsel, in a number to be determined by the executive director. ELC 2.8(b).

59. **Special Disciplinary Counsel.** ELC 2.8.

a. **Appointment of Special Disciplinary Counsel.** The Executive Director also has the power to appoint special disciplinary counsel "whenever necessary to conduct an individual investigation or proceeding." ELC 2.8(b).

60. **Adjunct Disciplinary Counsel.** ELC 2.9.

a. **Function.** "Adjunct disciplinary counsel performs the functions set forth in these rules as directed by disciplinary counsel. ELC 2.9 (a).

b. **Appointment and Term of Office.** The Board of Governors upon recommendation of the Chief Disciplinary Counsel appoints adjunct disciplinary counsel. ELC 2.9 (b) provides:

The Board of Governors, upon the recommendation of the Chief Disciplinary Counsel, appoints adjunct disciplinary counsel from among the active members of the Association, who have been active or judicial Association members for at least seven years and have no record of disciplinary action as defined in these rules. Each adjunct disciplinary counsel is appointed for a five year term on a staggered basis and may be reappointed.

61. **Additional Disciplinary Counsel.** "The Executive Director of the Association, under the direction of the Board of Governors, and in consultation with the Chief Disciplinary Counsel, selects and employs suitable members of the association as disciplinary counsel, in a

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number to be determined by the executive director." ELC 2.8 (b).

62. **Special Disciplinary Counsel.** "Special disciplinary counsel may be appointed by the Executive Director whenever necessary to conduct an individual investigation or proceeding." ELC 2.8(b).

63. **Adjunct Disciplinary Counsel.** ELC 2.9.

a. **Function.** Adjunct disciplinary counsel performs the functions set forth in these rules as directed by disciplinary counsel. ELC 2.9 (a).

b. **Appointment and Term of Office.** "The Board of Governors, upon the recommendation of the Chief Disciplinary Counsel, appoints adjunct disciplinary counsel from among the active members of the Association, who have been active or judicial Association members for at least seven years and have no record of disciplinary action as defined in these rules. "ELC 2.9 (b).

64. **Removal of Appointees.** The power to appoint is also the power to remove. ELC 2.10 provides:

The power granted by these rules to any person, committee, or board to make any appointment includes the power to remove the person appointed whenever that person appears unwilling or unable to perform his or her duties, or for any other cause, and to fill the resulting vacancy.

65. **Disciplinary Selection Panel.**

a. **Function.** ELC 2.2 (e) Disciplinary Selection Panel. "The Disciplinary Selection Panel makes recommendations to the Board of Governors for appointment, reappointment, and removal of Disciplinary Board members, hearing officers, chief hearing officer, and Conflicts Review Officers."

b. **Appointment.** "The Panel is appointed by the Supreme Court, upon the recommendation of the Board of Governors, shall include a Board of Governors

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member who serves as its chair, and should include, without limitation, one or more former Chairs of the Disciplinary Board, one or more current or former hearing officers, and one or more former nonlawyer members of the Disciplinary Board." ELC 2.2 (e).

Hearing Officers

66. **Hearing Officers.** Hearing officers for the WSBA Disciplinary Process are selected under ELC 2.5.

67. **Function of Hearing Officers.** " Function. A hearing officer to whom a case has been assigned for hearing conducts the hearing and performs other functions as provided under these rules.

68. **Appointment.** "The panel the Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints hearing officers to the hearing officer list. The list should include as many lawyers as necessary to carry out the provisions of these rules effectively and efficiently." ELC 2.2 (e).

69. **Hearing Officer List.** The hearing officer selection panel makes recommendations to the Board of Governors for appointment, reappointment, and removal of hearing officers. The panel is appointed by the Board of Governors and includes, but is not limited to, a Board of Governors member who serves as its chair, one or more former Chairs of the Disciplinary Board, and one or more former nonlawyer members of the Disciplinary Board.

70. **Payment.** Hearing Officers serve without pay, except for the Chief Hearing Officer.

71. **Hearing Officers and the provisions of ELC 2.5.** ELC 2.5 provides:

(a) Function. A hearing officer to whom a case has been assigned for hearing conducts the hearing and performs other functions as provided under these rules.

(b) Qualifications. A hearing officer must be an active member of the Association, have been an active or judicial member of the Association for at least seven years,

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have no record of public discipline, and have experience as an adjudicator or as an advocate in contested adjudicative hearings.

(c) Appointment. The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints hearing officers to the hearing officer list. The list should include as many lawyers as necessary to carry out the provisions of these rules effectively and efficiently.

(d) Terms of Appointment. Appointment to the hearing officer list is for an initial period of two years, followed by periods of four years. Reappointment is in the discretion of the Supreme Court upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel. A hearing officer may continue to act in any matter assigned before his or her term expires. On the recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, the Supreme Court may remove a person from the list of hearing officers.

Chief Hearing Officer

72. **Chief Hearing Officer Appointment**. The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel appoints a chief hearing officer for a renewable term of two years person recommended by the Board of Governors appointed by the Board of Governors. ELC 2.5(f).

Disciplinary Board ELC 2.3

73. **ELC 2.3** pertains to the Disciplinary Board.

(a) Function. The Board performs the functions provided under these rules, delegated by the Supreme Court, or necessary and proper to carry out its duties.

(b) Membership.

(1) Composition. The Board consists of not fewer than four nonlawyer members,

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appointed by the Court, and not fewer than ten lawyers, appointed by the Court, upon the recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel.

(2) Qualifications. A lawyer Board member must be an Active member of the Association, have been an Active or Judicial member of the Association for at least five years, and have no record of public discipline.

74. **Make up of the Disciplinary Board.** The Disciplinary Board is made up of fourteen members, ten lawyers appointed by the Board of Governors and four non-lawyers appointed by the Supreme Court. Two of the lawyers serve as chair and vice-chair, respectively, of the Disciplinary Board; the other twelve members break into four Review Committees, each consisting of two lawyers and one non-lawyer. ELC 2.3 (b)(1).

75. On review, the Board may adopt, modify, or reverse the findings, conclusions, or recommendation of the hearing officer or panel.

76. The Board instead comes up with its own findings and conclusions so as to sustain the recommendation or decision of the hearing officer.

77. The Review Board and Disciplinary Counsel breach what procedural protections there are within the context of the Washington Lawyer Discipline System Rules by using the Disciplinary Board to correct the work and decisions of the Hearing Officers and so as to ensure that the Supreme Court has a record which will sustain appellate review.

78. The Disciplinary Board is assisted by WSBA staff (independent from the staff that supports the Office of Disciplinary Counsel), including Assistant General Counsel.

79. Such Assistant General Counsel also "serves as Counsel to the Disciplinary Board and a Clerk to the Disciplinary Board."

80. The Disciplinary Board is supposed to serve as an appellate court in the lawyer disciplinary system, hearing appeals of hearing officer decisions, reviewing all hearing officer

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recommendations for suspension or disbarment, and approving or disapproving proposed stipulations to resolve disciplinary proceedings by suspension or disbarment.

81. This conduct lacks impartiality.

82. The impartiality of the conduct is compounded by the fact that the Disciplinary Board is a participant in each decision to prosecute an attorney.

83. If the Disciplinary Board determines a lawyer is to be suspended or disbarred, the determination is automatically reviewed by the Washington Supreme Court; the Court may also, in its discretion, accept review of other actions of the Disciplinary Board.

84. Washington Lawyer Discipline System " 'actions' include both disciplinary 'sanctions' (which result in a permanent public disciplinary record) and admonitions (which result in a temporary public disciplinary record generally retained for only five years)."

85. Disciplinary sanctions are, in order of increasing severity, reprimands, suspensions, and disbarments.

86. **Persons Appointed to WSBA Discipline System Positions.** The WSBA controls the selection of people who are selected to the various positions in the Washington Lawyer Discipline System. See the spreadsheet below:

Person or Group	Authority to Appoint	
Board of Governors (BOG)	WSBA Members	
Executive Director	BOG	

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Disciplinary Selection Panel	Recommendation of the Board of Governors	The Panel is appointed by the Supreme Court, upon the recommendation of the Board of Governors, shall include a Board of Governors member who serves as its chair, and should include, without limitation, one or more former Chairs of the Disciplinary Board, one or more current or former hearing officers, and one or more former nonlawyer members of the Disciplinary Board.
Chief Disciplinary Counsel ELC 2.8 (b)	Executive Director	"under the direction of the Board of Governors"
Disciplinary Counsel	Executive Director	in consultation with the Chief Disciplinary Counsel, selects and employs suitable members of the association as disciplinary counsel, in a number to be determined by the executive director. Special disciplinary counsel may be appointed by the Executive Director whenever necessary to conduct an individual investigation or proceeding

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Special Disciplinary Counsel	Executive Director	
Chief Hearing Officer ELC 2.5 (e)(1)	Recommendation of the Board of Governors	The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel appoints a chief hearing officer for a renewable term of two years.
Hearing Officers ELC 2.5	Recommendation of the Board of Governors	The Supreme Court, upon recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel, appoints hearing officers to the hearing officer list. The list should include as many lawyers as necessary to carry out the provisions of these rules effectively and efficiently.
Disciplinary Board	Recommendation of the Board of Governors	appointed by the Court, upon the recommendation of the Board of Governors in consultation with the Disciplinary Selection Panel. (2) Qualifications. A lawyer Board member must be an Active member

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Review Committees	Chair of Disciplinary Board	The Chair appoints three or more review committees of three members each from among the Board members. Each review committee consists of two lawyers and one nonlawyer. The Chair may reassign members among the several committees on an interim or permanent basis. The Chair does not serve on a review committee.

87. In light of the above and in light of other factual statements made in this complaint, there can be no question that the WSBA Washington Discipline System violates procedural due process of law.

88. In addition, Discipline System in several of its discrete aspects violated procedural due process Discrete Violations of procedural due process.

89. **Prosecutorial Discretion.** Prosecutorial discretion is only exercised in relation to a grievance filed by a private party. "Any person or entity may file a grievance against a lawyer who is subject to the disciplinary authority of this jurisdiction. ELC 5.1 (a).

90. Under ELC 5.3 (a) "[d]isciplinary counsel must review and may investigate any alleged or apparent misconduct by a lawyer and any alleged or apparent incapacity of a lawyer to practice law, whether disciplinary counsel learns of the misconduct by grievance or otherwise. If there is no grievant, disciplinary counsel may open a grievance in the name of the Office of Disciplinary Counsel."

91. ELC 5.3 (a) limits the scope of discipline counsel investigation.

92. Discipline Counsel does not limit itself to the grievance but at times uses the grievance as an excuse to monitor the conduct of a respondent so as to find a violation beyond

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1 that described or related to the perimeters of the grievance.

2

3 93. **Disciplinary Counsel and the Review Committees.** ELC 5.7 (c) and (d) provide:

4 (c) Report in Other Cases. Disciplinary counsel must report to a review committee

5 the results of investigations except those dismissed or diverted. The report may

6 include a recommendation that the committee order a hearing or issue an advisory

7 letter or admonition.

8 (d) Authority on Review. In reviewing grievances under this rule, a review

9 committee may:

10 (1) dismiss the grievance;

11

12 (2) affirm the dismissal;

13 (3) dismiss the grievance and issue an advisory letter under rule 5.8;

14 (4) issue an admonition under rule 13.5;

15

16 (5) order a hearing on the alleged misconduct; or

17 (6) order further investigation as may appear appropriate.

18 94. Review Committees decide whether a matter is to go to hearing. Thus, the Review

19 Committees and their members are part of the prosecution.

20 95. Not only are committee members part of the prosecution, they are members of the

21 Disciplinary Board. The work the Disciplinary Board is thus tainted.

22

23 96. This unfairness is made worse by the fact that the Disciplinary Board is allowed to amend or rewrite findings of fact, conclusions of law and hearing officer recommendation.

24

25 97. This amending and or rewriting is assisted by a Disciplinary Counsel. ELC

26 98. **Three Review Committees.** Three are several review committees. The members of

27 each review committee are members of the Disciplinary Board. As a result each member of the

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Disciplinary Board is inclined to support the prosecution decisions of other Disciplinary Board members.

99. **Hearing Officers.** There are vast differences among hearing officers as to competence, experience, judicial temperament, etc. For example, individuals on the hearing officer list may have vast litigation and experience whereas other individuals have no more experience that of a lawyer working in a county prosecuting attorney's office doing nothing much more that child support enforcement.

100. Hearing officers are inadequately trained to act as fair and impartial hearing officers.

101. Not all hearing officers understand the trial process and the rules of evidence.

102. Hearing officers allow hearsay testimony and do not understand the rules of evidence as to hearsay testimony.

103. Hearing officers do not understand that accused attorneys have a right to confront witnesses.

104. Hearing officers engage in improper conduct during hearings subjecting themselves to threats by disciplinary counsel that counsel might seek a new hearing and a new hearing officer. Hearing officers overcome such threats by ruling in favor of the WSBA and disciplinary counsel.

105. Hearing officers do not understand the meaning of standards of proof and how they are to be applied.

106. Hearing officers do not know how to prepare proper Findings of Fact and Conclusions of Law with respect of their decisions.

107. Hearing officers impose penalties such as restitution even though the WSBA and its disciplinary counsel have not sought such penalties.

108. Hearing officers rely on the Disciplinary Board to correct their mistakes and

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shortcomings.

109. Hearing officers are supervised by a Chief Hearing Officer, who assigns cases to the hearing officers, provides training for the hearing officers, and monitors their performance. An Assistant General Counsel provides staff support to the Hearing Officer Panel.

110. Hearing officers may seek the advice of the Chief Hearing Officer regarding cases before a hearing officer.

111. Hearing officers are allowed to serve in violation of the Washington Canons of Judicial Conduct.

112. The Washington Lawyer Discipline System does not require hearing officers to comply with the Washington Code of Judicial Conduct when in fact the Code does apply by a reading of its own terms and the provisions of ELC 2.6(c).

113. Hearing officer conduct and decisions are sometimes reviewed by the Chief Hearing Officer. Because the hearing officer was selected by the Chief Hearing Officer there is a conflict of interest, appearance of fairness, disqualification rules.

114. Hearing officers have no experience or knowledge if any as to what combinations of fact and law precipitate conclusions of law at to ethical violations.

115. **Standard of Proof.** Under the circumstances of the Washington Lawyer Discipline System, the standard of proof should be at least "clear and convincing evidence" the standard applied in physician discipline. *Bang D. Nguyen v. Dep't of Health*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001); *Hardee v. DSHS,* 172 Wn.2d 1, 9 256 P.3d 339 (2011).

116. **Expert Witnesses.** Under *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992), it was held that that whether an attorney's conduct violated the rules of professional conduct is a question of law. Thus, no expert testimony need be allowed. Thus, the question of whether in law, an accused lawyer's conduct violated a rule of professional conduct in is the hands of the WSBA discipline counsel prosecuting the case, the hearing officer, and a Review Committee.

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117. **Due Process Vagueness.** The Rules of Professional Conduct violate procedural due process because in many instances they do not define what is permitted and not permitted. The Discipline System does not concern itself with this problem of notice for incomprehensible explanation that violations may be found because the duty of the system is to "'protect the public and to preserve confidence in the legal system.'"

118. Washington Supreme Court has imposed certain rules and practices regarding the appeals of discipline cases against lawyers which, in essence, direct the attorney discipline decisions of the Supreme Court.

119. The court gives great weight to the hearing officer's evaluation of the credibility and veracity of witnesses. Yet, the Disciplinary Board has the power to amend, and, from time to time does amend, hearing officer findings.

120. Nevertheless, "we give considerable weight to the hearing officer's findings of fact." *Discipline Marshall*, 160 Wn.2d 317, 329-30, 157 P.3d 859 (2007).

121. Disciplinary Board. The court defers to the experience and perspective of the Disciplinary Board.

122. In essence, decisions of the court in Discipline Actions, are in effect decided in advance because of what has happened before the hearing officer and what has happened before the Disciplinary Board.

123. **Sanctions.** Sanctions in attorney discipline matters are determined by the court provided in the American Bar Association's Standards for Imposing Lawyer Sanctions (1991 & Supp. 1992). *Discipline of Hall*, 180 Wn.2d 821, 834, 329 P.3d 870 (2014). Again, the court has deferred to others for the decision the court should make, is required to make. Again, a fair hearing is denied.

COUNT ONE

Declaratory Judgments

Uniform Declaratory Judgments Act (UDJA)

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1 124. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
2 herein by reference as though fully set forth.
3
4 125. The Uniform Declaratory Judgments Act (UDJA), RCW Ch. 7.24, grants Eugster the right to seek declaratory judgments in these proceedings as to the matters raised by the facts
5 in these proceedings.
6
7 126. RCW 7.24.010
8
9 Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be
10 claimed. An action or proceeding shall not be open to objection on the ground that
11 a declaratory judgment or decree is prayed for. The declaration may be either
12 affirmative or negative in form and effect; and such declarations shall have the
13 force and effect of a final judgment or decree.
14 127. RCW 7.24.020(a) provides:
15 A person . . . whose rights, status or other legal relations are affected by a statute,
16 municipal ordinance, contract or franchise, may have determined any question of
17 construction or validity arising under the instrument, statute, ordinance, contract
18 or franchise and obtain a declaration of rights, status or other legal relations
19 thereunder.
20 128. RCW 7.24.050 provides:
21 The enumeration in RCW 7.24.020 and 7.24.030 does not limit or restrict the
22 exercise of the general powers conferred in RCW 7.24.010, in any proceeding
23 where declaratory relief is sought, in which a judgment or decree will terminate the
24 controversy or remove an uncertainty.
25 129. **UDJA Justiciable Controversy Requirement.**
26
27 a. In order to have a justiciable controversy under the UDJA, the following
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elements are required:"(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties have genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."Id. at 411 (quoting Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)).

b. "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." Id. Specifically, the "direct, substantial interest" element "encompasses the doctrine of standing." Id. at 414.

130. **UDJA Standing Requirement**. Under the UDJA standing requirement, a party must (1) be within the zone of interests protected or regulated by a statute, and (2) have suffered an injury in fact.

131. To put it most succinctly, "[t]he doctrine of standing requires that a claimant must have a personal stake in the outcome of a case in order to bring suit." *Kleven v. City of Des Moines*, 111 Wn. App. 284, 290, 44 P.3d 887 (2002); *Nelson v. Appleway Chevrolet, Inc.*, 157 P.3d 847, 160 Wn.2d 173 (2007).

132. **Eugster has standing to seek declaratory judgments.**

a. Eugster is within the zones of interest protected by the constitutional rights which are the grounds for this complaint.

b. Eugster has a personal outcome in the case and the issues presented in the case.

c. Eugster has suffered injuries in fact economic or otherwise as a result of Defendants actions in violation of Eugster's constitutional rights. Such injuries as set forth below in the Count Five.

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133. There are true and ripe conflicts between Plaintiff and Defendants as to the matters
2 set forth in this proceeding including the facts and the law applicable to the circumstances of
3 the case.
4
134. The court should render declaratory judgments concerning the essential matters
5 set forth in these proceedings.
6
135. In addition, the court should take further action as necessary to enforce its
7 decisions and bring them to fruition. RCW 7.24.080.
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COUNT TWO
11
WSBA Discipline System Does Not Pass Strict Scrutiny

12
136. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
13 herein by reference as though fully set forth.
14
137. **Strict Scrutiny.** "The words 'strict judicial scrutiny' appear nowhere in the U.S.
15 Constitution. Neither is there any textual basis, nor any foundation in the Constitution's
16 original understanding, for the modem test under which legislation will be upheld against
17 constitutional challenge only if 'necessary' or 'narrowly tailored' to promote a 'compelling'
18 governmental interest. Nonetheless, strict scrutiny-a judicially crafted formula for
19 implementing constitutional values -ranks among the most important doctrinal elements in
20 constitutional law." Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268
21 (2007).
22
138. The exacting scrutiny test (similar to strict scrutiny) was described not long ago in
23 *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277 (2012), and *In re Petition for a Rule*
24 *Change*, 286 Neb. 1018, 841 N.W.2d 167, 177 (Neb. 2013) as follows:[4]
25
We made it clear that compulsory subsidies for private speech are subject to
26
27
[4] The quoted paragraph is broken into parts for purposes of this discussion.
28

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exacting First Amendment scrutiny and cannot be sustained unless two criteria are met.

First, there must be a comprehensive regulatory scheme involving a "mandated association" among those who are required to pay the subsidy. . . . Such situations are exceedingly rare because, as we have stated elsewhere, mandatory associations are permissible only when they serve a "compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms." . . .

Second, even in the rare case where a mandatory association can be justified, compulsory fees can be levied only insofar as they are a "necessary incident" of the "larger regulatory purpose which justified the required association."

139. The strict or exacting scrutiny test can be rephrased as follows:

(1) There must be a "comprehensive regulatory scheme."

(2) The comprehensive scheme must involve a "mandated association" among those required to be a focus of the "comprehensive regulatory scheme."

(3) The comprehensive scheme must serve a compelling state interest.

(4) The compelling state interest cannot be achieved through means significantly less restrictive of fundamental rights.

140. **Strict Scrutiny.** Compelled participation of a lawyer in an integrated bar disciplinary system fails to meet the test of strict scrutiny - exacting scrutiny.

141. **Fundamental Right**. Eugster, like all Washington lawyers, has a fundamental right to a discipline system which will not infringe on Eugster's procedural due process rights.

142. **A Mandatory Regulatory Scheme.** What if the regulatory scheme does not exist? The infringement will not pass muster. Here, there is a mandatory regulatory scheme which is

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primarily set out in the Washington Rules for the Enforcement of Lawyer Conduct (E.C.).

143. One would presume that the regulatory scheme would be a proper scheme. For instance, that the scheme would apply to all Washington lawyers. It does not. Only certain categories of lawyers are regularly subject to discipline.

144. The scheme cannot be said to be a "regulatory scheme" because such a scheme would have to regulate all Washington lawyers. There many reasons why it cannot be said that the Discipline System regulates all Washington lawyers.

145. The WSBA discipline system is not focused on discipline of the whole of its membership, on the whole of the lawyers who practice law in the state of Washington. The scheme is focused on a very few, about 2,000 lawyers out of a 33,000 bar association membership.

a. The avowed purpose of the integrated bar was to force every lawyer into the membership of the bar, charge dues to the lawyers, and to operate a system of discipline to get rid of the "bad guys."[5]

b. The WSBA has about 35,000 members, 24,000 or so are active.[6] In 2013, the WSBA conducted 8,331 Consumer Affairs Phone Calls and Interviews. It received 2,229 New Disciplinary Grievances (written). Former clients, clients and Opposing clients made up 27%, 25% and 22% respectively, of the total of grievances filed in the year. Thus, clients in general, one way or the other, were responsible for 74% of the bar's discipline grievance activities. The bar itself was

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[5] *Integrated Bar Forecast in Nation; Ransom, Head of American Bar Association, Says Lawyers Will Be Forced to Join. Movement Held Gaining,* New York Times, October 24, 1935:

> William L. Ransom, president of the American Bar Association, forecast in a speech here yesterday, that all lawyers would be compelled eventually by the Legislature or the ruling court in each State, to become members of their State bar association, "whether they liked it or not."

[6] http://www.wsba.org/About-WSBA.

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responsible for 8%. Year 2013 Statistical Summary.[7]

c. These facts tell a sad story, a troublesome story. The facts show that a small percentage of lawyers are subject to grievances and of that percentage, 74% have some sort of "one-on-one" relationship with a grievant. Thousands of lawyers each year escape the discipline system because they do not have that intimate relationship with their clients and their clients' antagonists.

d. Thus, the lawyers who are subjected to discipline are those who have direct contact with clients. They are the "county seat lawyers" of the past. The practice areas of grievances for 2013 were: Criminal Law 30%, Family Law 20%, Torts 11%, and Estates/Probates/Wills 5% – 66%.

e. The lawyers practicing in these areas are often single or small firm practitioners. Thus, it can be concluded that of the 35,000 WSBA lawyers, only 1,560 (2,229 times 0.74) were subjected to a grievance by a person who had contact with a lawyer. And, in the end result, then only 95 lawyers were disciplined.

f. What must be concluded from this is that if there are 35,000 lawyers and only 1,560 were subject to grievances by clients– current, former and opposing clients, one must wonder just how free from unethical behavior the 33,000 lawyers are.

146. **The Infringement Must Serve a Compelling State Interest.** Here, there is no reason why the WSBA should be tasked with the "regulation of the [Washington] legal profession." There is no necessity that the WSBA provide this function. Many states without integrated bar associations have effective operative attorney discipline systems.

a. Many states with integrated bar associations have independent lawyer

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[7] 2013 Statistical Summary, http://www.wsba.org/~/media/-Files/LicensingLawyer%20Conduct/Discipline/2013%20Statistical%20Summary%20UPDATED.ashx.

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regulatory systems. The Lawyer Discipline System in Washington could be an independant bar court arrangement like that of the state of California.

b. Even some of the integrated bar associations do not perform the state's function of "regulation of the legal profession." The Washington Supreme Court, like the California Supreme Court,[8] can establish an independent bar court. California also has an integrated bar.[9]

c. The state of Washington has comprehensive discipline schemes for other professions. RCW Chs. 18.04 - 18.380. There is no reason why lawyers should be given "their own" association for the purpose of discipline.

d. The regulatory scheme serves a state interest but it also serves the interests of the bar association. The scheme is not a compelling state interest because it is not necessary to have the bar operate the scheme. It can just as well be operated by some other state device which "regulates the legal profession." Over 19 states operate their own lawyer regulatory schemes.[10] Indeed, in approximately nine integrated bar association states, the regulatory system is independent of the integrated bar association.[11]

147. Infringement Can Be Achieved Through Means Significantly Less Restrictive of Associational Freedoms. Regarding this element of strict scrutiny, the question is this – is it possible to serve the purposes of regulation of the legal profession and improvement of the quality of legal services without infringing on a lawyer's first amendment right of speech and association as much as the WSBA Washington Lawyer Discipline System infringes? Of course it is. Forcing Washington lawyer to submit to a discipline system which violates a lawyers fundamental rights is unnecessary."

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[8] California Bar Court, http://www.statebarcourt.ca.gov/.

[9] http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx.

[10] *Directory of Lawyer Disciplinary Agencies, supra* at note 11.

[11] *Id.*

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148. The state of Washington can regulate lawyers just as it regulates other professions.

149. The Washington Supreme Court can set up a truly independent discipline system similar to many other states in the United States.

COUNT THREE

Declaratory Judgment

WSBA Lawyer Discipline System Violates Eugster Rights Under 42 U.S.C. § 1983

150. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them herein by reference as though fully set forth.

Due Process

151. The Fifth and Fourteenth Amendment to the United States Constitution provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law."

152. The Supreme Court has interpreted [this] . . .clause[] of the Constitution as giving rise to a couple of doctrines, substantive due process and procedural due process.

a. Substantive due process concerns whether the government has an adequate reason for taking away a person's life, liberty or property.

b. Procedural due process, which is my focus, concerns whether the government has followed adequate procedures in taking away a person's life, liberty or property.

153. **Procedural Due Process.** The essence of Procedural Due Process is found in the history of law and the history of the well known maxim that "no person can be a judge in his own case." John V. Orth, DUE PROCESS OF LAW: A BRIEF HISTORY 2-32 (2003).

154. The Fifth and Fourteenth Amendment to the United States Constitution provides

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that "no State shall ... deprive any person of life, liberty, or property, without due process of law."

155. The Supreme Court has interpreted [this] . . .clause[] of the Constitution as giving rise to a couple of doctrines, substantive due process and procedural due process.

156. Substantive due process concerns whether the government has an adequate reason for taking away a person's life, liberty or property.

157. Procedural due process, which is my focus, concerns whether the government has followed adequate procedures in taking away a person's life, liberty or property.

158. Procedural Due Process is defined in the following ways:

> The phrase "procedural due process" refers to the aspects of the Due Process Clause that apply to the procedure of arresting and trying persons who have been accused of crimes and to any other government action that deprives an individual of life, liberty, or property. Procedural due process limits the exercise of power by the state and federal governments by requiring that they follow certain procedures in criminal and civil matters. In cases where an individual has claimed a violation of due process rights, courts must determine whether a citizen is being deprived of "life, liberty, or property," and what procedural protections are "due" to that individual. http://legal-dictionary.thefreedictionary.com/Due+Process+of+Law.

159. **The System Violates Procedural Due Process.** The WSBA Washington Lawyer Discipline System violates Procedural Due Process.

a. The Discipline System overall, in and of itself, is a violation of procedural due process.

b. The WSBA controls all aspects of the Discipline System.

c. Any one selected to perform a function in the WSBA Washington Lawyer Discipline System must be a member in good standing of the WSBA.

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d. The positions include a great deal of latitude in the exercise of authority. This latitude is not restrained, for the most part is discretionary.

e. WSBA controls the individuals selected to perform the functions of the System. The bar association has the power to choose every person. This power is found in the power to directly appoint persons to offices. This power is also found in the power to control the pool of people from which the Supreme Court makes selection of persons to hold offices. That is to say, the power of the Supreme Court to appoint is constrained by the power of the WSBA Board of Governors which recommends appointments to the Supreme Court in consultation of the Disciplinary Panel, involved in the system has its selection of people in every position.

f. **WSBA Conflicts** .The WSBA has conflicts of interest in matters of lawyer discipline including suspension and disbarment of the lawyer together with costs and sometimes restitution.

g. The WSBA has a conflict of interest with respect of its functions and with respect of its actions against Plaintiff. RPC 1.7.

h. The WSBA has a conflict of interest with respect of the Plaintiff - on the one hand it has an obligation to advance the interests of member lawyers and on the other the obligation to regulate including suspension and disbarment of its members.

160. As shown by the facts of this case as related above, the Washington Lawyer Discipline System does not provide a neutral, impartial discipline system.

a. There are those whom the WSBA selects directly. And there are who are put on lists and then selected by the Supreme Court, but, the Supreme Court does not have control who is selected to go onto the group from which the court makes its selections. Everyone who is selected is vetted by the WSBA

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b. Defendants in their individual capacities are responsible for the WSBA Washington Lawyer Discipline System, and acting under the color of state law violate the constitutional rights of Plaintiff in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

161. As shown by the facts of this case as related above, the Washington Lawyer Discipline System does not provide adequate procedures for the deprivation of Plaintiff's right to practice law which Defendants acting in their official capacities seek to impose on Plaintiff.

a. There are those whom the WSBA selects directly. And there are who are put on lists and then selected by the Supreme Court, but, the supreme court does not have control who is selected to go onto the group from which the court makes its selections. Everyone who is selected is vetted by the WSBA

b. Defendants in their individual capacities are responsible for the WSBA Washington Lawyer Discipline System, and acting under the color of state law violate the constitutional rights of Plaintiff in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

162. As a result of Defendants conduct, Plaintiff has been injured in the past and will be injured in the future.

163. The Fifth and Fourteenth Amendment to the United States Constitution provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law."

164. The Supreme Court has interpreted [this] . . .clause[] of the Constitution as giving rise to a couple of doctrines, substantive due process and procedural due process.

165. Substantive due process concerns whether the government has an adequate reason for taking away a person's life, liberty or property.

166. As shown by the facts of this case as related above, the Washington Lawyer Discipline System does not provide the degree of procedural due process necessary in

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situations like the Discipline System impose on Plaintiff

167. The system should be independent, it should be impartial, it should also appear impartial. But instead the system is controlled in every aspect by the WSBA.

a. There are those whom the WSBA selects directly. And there are who are put on lists and then selected by the Supreme Court, but, the supreme court does not have control who is selected to go onto the group from which the court makes its selections. Everyone who is selected is vetted by the WSBA

b. Defendants in their individual capacities are responsible for the WSBA Washington Lawyer Discipline System, and acting under the color of state law violate the constitutional rights of Plaintiff in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

168. As a result of Defendants conduct, Plaintiff has been injured in the past and will be injured in the future.

169. There are a number of discrete aspects of the system and how the system is applied which fail to meet the requirements of due process.

170. These discrete aspects include but are not limited to those set out in the following paragraphs.

171. **Procedural Due Process.** The essence of Procedural Due Process is found in the history of law and the history of the well known maxim that "no person can be a judge in his own case."

172. The WSBA Washington Lawyer Discipline System is in violation of Plaintiff's rights of Procedural Due Process of Law under the Fifth and Fourteenth Amendments to the United States Constitution.

173. The WSBA Washington Lawyer Discipline System is in violation of Plaintiff's rights of Procedural Due Process under the Washington Constitution Art. I, Section 3.

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1 **174. The System Violates Procedural Due Process.** The WSBA Washington Lawyer
2 Discipline System violates Procedural Due Process.

3 a. The Discipline System overall, in and of itself, is a violation of procedural
4 due process.

5 b. The WSBA controls all aspects of the Discipline System. This violates
6 Eugster's right t procedural due process.

7 c. Any one selected to perform a function in the WSBA Washington Lawyer
8 Discipline System must be a member in good standing of the WSBA.

9 d. The positions include a great deal of latitude in the exercise of authority.
10 This latitude is not restrained, for the most part is discretionary.

11 e. WSBA controls the individuals selected to perform the functions of the
12 System. The bar association has the power to choose every person. This power is
13 found in the power to directly appoint persons to offices. This power is also found
14 in the power to control the pool of people from which the Supreme Court makes
15 selection of persons to hold offices. That is to say, the power of the Supreme Court
16 to appoint is constrained by the power of the BOG which recommends
17 appointments to the Supreme Court in consultation of the Disciplinary Panel,
18 involved in the system has its selection of people in every position.

19 f. **WSBA Conflicts** .The WSBA has conflicts of interest in matters of lawyer
20 discipline including suspension and disbarment of the lawyer together with costs
21 and sometimes restitution.

22 g. The WSBA has a conflict of interest with respect of its functions and with
23 respect of its actions against Plaintiff. RPC 1.7.

24 h. The WSBA has a conflict of interest with respect of the Plaintiff - on the
25 one hand it has an obligation to advance the interests of member lawyers and on
26 the other the obligation to regulate including suspension and disbarment of its
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28

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1 members.

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3 175. Plaintiff asks the court to make decisions regarding the facts and the law and determine and declare that Plaintiff's constitutional rights are being violated.

4

5

6 **COUNT FOUR**

7 **<u>Injunction</u>**

That Defendants Be Enjoined from Using the WSBA Lawyer Discipline System

8

9 176. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them

10 herein by reference as though fully set forth.

11 177. Using the authority of 42 U.S.C. § 1983 and RCW 7.24.080 the court can and should

12 issue restraining orders against all Defendants including the WSBA.

13

14

15 **COUNT FIVE**

<u>Damages</u>

16 **Award Eugster Compensatory Damages for**

17 **Defendants Violation of Eugster's Rights under 42 U.S.C. § 1983**

18

178. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them

19 herein by reference as though fully set forth.

20

179. Compensatory damages "are intended to redress the concrete loss that the plaintiff

21 has suffered by reason of the defendant's wrongful conduct."

22

180. "Disbarment, designed to protect the public, is a punishment or penalty imposed

23 on the lawyer. He is accordingly entitled to procedural due process . . . ." *In re Ruffalo,* 390 U.S.

24 544, 550 (1968), *modified on other grounds*, 392 U.S. 919 (1968); *In re Kramer*, 193 F.3d 1131,

25 1132 (9th Cir. 1999).

26

27 181. Plaintiff has a First Amendment right to petition the court in *Eugster v. WSBA et al.*

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1 182. Plaintiffs right to petition is guaranteed by the First Amendment to the United
2 States Constitution, which specifically prohibits Congress from abridging "the right of the
3 people...to petition the Government for a redress of grievances."
4
5 183. First Amendment right to petition is a "fundamental right" under the First, Fifth and Fourteenth Amendments to the United States Constitution.
6
7 184. Plaintiff's First Amendment rights are being violated by Defendants efforts to retaliate against Plaintiff because he brought *Eugster v. WSBA et al.*
8
9 **Verdelle G. O'Neill**

10 185. Plaintiff, on September 11, 2014, was retained by Verdelle G. O'Neill, a resident of
11 Spokane Valley, Washington.

12 186. On September 23, 2014, Cheryl Rampley, a niece-in-law of Verdelle G. O'Neill, filed
13 a grievance with the WSBA against Plaintiff.
14
15 187. WSBA prepared an "Acknowledgment that We Have Received a Grievance" on September 29, 2014.
16
17 188. Plaintiff received the C. Rampley grievance along with the "Acknowledgment that We Have Received a Grievance" from the WSBA on October 1, 2014.
18
19 189. On October 27, 2014. Plaintiff responded to the grievance.

20 190. On November 21, 2014, Plaintiff received a letter dated November 18, 2014 from
21 Kevin Bank, Managing Disciplinary Counsel, that he had "been assigned to complete this
22 investigation."

23 191. That same day, November 21, 2014, Plaintiff received a copy of Ms. Rampley's
24 response to Plaintiff's response of October 27, 2014.

25 192. Plaintiff responded to the Rampley response on November 23, 2014.
26
27 193. By letter dated December 18, 2014, Kevin Bank, Managing Disciplinary Counsel, forwarded correspondence dated December 8, 2014 from Ms. Rampley.
28

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194. On December 25, 2014, Plaintiff responded to the Rampley correspondence of December 8, 2014.

195. The Defendants complaints about Eugster's conduct related to matters which all related to the materials previously furnished to the WSBA and materials provided to the WSBA in Eugster's letter of December 25, 2015.

196. In addition, Eugster in his letter of December 25, 2015, asked Kevin Bank to tell him what he was doing wrong so that matters could be corrected.

197. On March 12, 2015, Plaintiff commenced an action in United States District Court for the Western District of Washington against WSBA and various officers and the justices of the Washington Supreme Court, Cause No. 2:15-cv-00375-JLR. (*Eugster v. WSBA*).

198. The subject of the action is the constitutionality of the Integrated Bar, the WSBA, under the First and Fourteenth Amendments to the United States Constitution or, stated another way, whether Eugster's fundamental right not to associate was being violated by his compelled membership in the WSBA and the Eugster's freedom of speech rights were being violated by his compelled dues to the WSBA.

199. The complaint and summons in *Eugster v. WSBA* were immediately sent to Defendants in the action.

200. Defendants accepted service and lawyers appeared for the various defendants on or about April 2, 2015.

201. WSBA Discipline Counsel who are Defendants in this action were and are aware of *Eugster v. WSBA*.

202. The WSBA Executive Director, Paula Littlewood, was aware of the commencement of the case.

203. Shortly after the filing of the complaint, on April 3, 2015, Vanessa Norman, an investigator for the WSBA, informed Plaintiff that she had been assigned to investigate the

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complaint.

204. Plaintiff recalls meeting with Ms. Norman at his office on or about April 13, 2015.

205. By letter dated April 21, 2015, Francesca D'Angelo, Disciplinary Counsel, advised Plaintiff that she had been assigned to complete the investigation.

206. On April 22, 2015, Plaintiff, via email, provided materials concerning Plaintiff's representation of Verdelle g. O'Neill.

207. On July 22, 2015, Plaintiff responded to a letter dated July 14, 2015 from Ms. D'Angelo requesting more information regarding Plaintiff's services to Mrs. O'Neill.

208. On September 25, 2015, Plaintiff responded to a letter dated September 22, 2015 requesting further information from Plaintiff.

209. By letter dated October 20, 2015 from Ms. D'Angelo asked for more information.

210. Plaintiff answered the letter by his letter dated October 22, 2015.

211. Plaintiff provided Kevin Bank with considerable material concerning Plaintiff's efforts for Mrs. O'Neill on December 25, 2014.

212. It was not until after the filing Plaintiff's complaint against the WSBA, its officers and the justices of the Washington Supreme Court in March 2015 that Plaintiff was told by Vanessa Norman that an investigation had been started against Plaintiff.

213. Plaintiff believes that the investigation launched when Ms. Norman advised of the investigation was the beginning of a process by which the WSBA acted in retaliation of Plaintiff for having brought *Eugster v. WSBA* in March, 2015.

214. The WSBA's change of heart regarding the grievance by Ms. Rampley only came about as a result of the complaint by Plaintiff in *Eugster v. WSBA*.

215. Verdelle G. O'Neill died in Spokane, Washington on August 18, 2015.

216. The actions of the WSBA regarding the Rampley grievance have caused Plaintiff

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1 injury.

2

217. On November 5, 2015 , by letter dated November 3, 2015, Plaintiff was notified by
3
Defendant D'Angelo that she was going to ask a Review Committee to order the matter
4
(Rampley grievance) to hearing.

5

218. The bar letter of Defendant D'Angelo to the Review Committee includes false
6
statements as to Plaintiff's conduct and fails to inform the Review Committee of conflicting
7
material statements.

8

219. Defendant D'Angelo has asked the Review Committee to order the matter to
9
hearing asserting various RPC violations by Eugster. The violations all had to do with matters
10
which the WSBA and Kevin Bank knew about as a result of Eugster's grievance responses
11
provided before December 25, 2014, as a result of materials sent that day which also coved the
12
time before December 25, 2104.

13

220. Defendant D'Angelo's claims of ethics violations by Eugster relate to matters the
14
WSBA and Defendant D'Angelo were aware of by the time of Eugster's response to Kevin Bank
15
on December 25, 2014.

16

17 221. As a result of Defendants conduct, Plaintiff suffered injury and damages including
18 pain and suffering and emotional distress."

19 222. Plaintiff is entitled to compensatory damages.

20

21

22 **COUNT SIX**

Damages

23 **Award Eugster Nominal Damages for**

Defendants' Violation of Eugster's Rights under 42 U.S.C. § 1983

24

25 223. Plaintiff restates and re-alleges the preceding paragraphs and incorporates them
26 herein by reference as though fully set forth.

27 224. Nominal damages, as the term implies, are in name only and customarily are

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1 defined as a mere token or "trifling." Although the amount of damages awarded is not limited
2 to one dollar, the nature of the award compels that the amount be minimal.. Nominal damages
3 serve one other function, to clarify the identity of the prevailing party for the purposes of
4 awarding attorney's fees and costs in appropriate cases.

5 225. Eugster has been injured and has had his fundamental rights violated by
6 Defendants acting under color of state law in violation of 42 U.S.C. § 1983, he should be
7 awarded at least nominal damages.

8

9 **REQUEST FOR RELIEF**

10

WHEREFORE, Plaintiff, respectfully seeks the following relief:

11

12 1. **Declaratory Judgment.** Entry of judgment declaring that the WSBA Washington
13 Lawyer Discipline System is unconstitutional, in violation of Plaintiff's rights, privileges, and/or
14 immunities secured to him by the Fifth and Fourteenth Amendment and under 42 U.S.C. §
15 1983;

16 2. **Declaratory Judgment.** Entry of judgment declaring that the WSBA Washington
17 Lawyer Discipline System is unconstitutional, in violation of Plaintiff's rights, privileges, and/or
18 immunities secured to him by Washington Constitution Art. I, Section 3.

19 3. **Declaratory Judgments: Further Relief.** This should grant such "further relief based
20 on the judgments herein as necessary and/or proper to enforce its declaratory judgments and
21 determinations;

22 4. **Injunctions.** Entry of preliminary and permanent injunctions against Defendants
23 prohibiting the use of the WSBA Washington Lawyer Discipline System against Plaintiff;

24 5. **Monetary Damages.** Award damages against Defendants jointly and severally in the
25 sum to be determined by these proceedings for injuries suffered by Plaintiff;

26

6. **Costs and Fees.** Award Plaintiff Eugster his costs, expenses, and attorneys' fees in

27

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accordance with law, including 42 U.S.C. § 1988;

7. **Punitive Damages.** Award Plaintiff Punitive Damages against Defendants and each of them as allowed by under 42 U.S.C. § 1983; and,

8. **Just and Equitable Concerns.** Award Plaintiff such further relief as is just and equitable.

February 3, 2016.

Respectfully submitted,

EUGSTER LAW OFFICE PSC

Stephen K. Eugster

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PROOF OF SERVICE

I hereby certify that on February 3, 2016, I emailed the foregoing document to the attorneys for the Defendants in these proceedings at their email addresses below.

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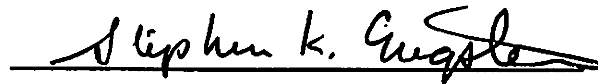
February 3, 2016.



Stephen K. Eugster, WSBA # 2003

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Hon Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

ROBERT E. CARUSO and SANDRA L. FERGUSON,

Plaintiffs,

vs

WASHINGTON STATE BAR ASSOCIATION 1933, a legislatively created Washington association, State Bar Act (WSBA 1933); WASHINGTON STATE BAR ASSOCIATION after September 30, 2016 (WSBA 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, *et al.*,

Defendants.

No. 2:17-cv-00003-RSM

RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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1
I. PRELIMINARY STATEMENT

2 WSBA Defendants' primary argument concerns Plaintiffs' counsel, Stephen
3 Kerr Eugster. Their argument begins in the first paragraph of the Introduction to
4 their Motion to Dismiss.
5
6 **Introduction, First Paragraph**:

7 In this lawsuit, a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct continues his meritless
8 crusade against Washington's bar system. Within the past two years alone, Plaintiffs' counsel Stephen K. Eugster ("Eugster")[' has filed four prior
9 pro se lawsuits against Defendant the Washington State Bar Association
10 ("WSBA") and its officials; each such lawsuit was meritless and dismissed at the pleadings stage.This lawsuit is no different, even though this time
11 Eugster has enlisted two other disciplined lawyers as named plaintiffs, in the effort to obtain yet another round of judicial review of his frivolous
12 arguments. [Footnotes omitted].

13 Motion to Dismiss 1.
14
15 Their argument is given significant attention the Motion to Dismiss. The
16 discussion of the argument and facts alleged regarding the argument proceeds from
17 page 1 to page 9 of the 24 page Motion to Dismiss, Dkt # 16. After a rather
18 desultory discussion of other arguments, WSBA Defendants restate the argument in
19 the Conclusion to the Motion to Dismiss. They say:

20 This case is one in a long line of frivolous attempts by Plaintiffs'
21 counsel to upend Washington's bar system, including the Washington Supreme Court's disciplinary system. Enlisting other lawyers to serve
22 as named plaintiffs does not change the outcome. As with counsel's

23
24 [1] BA, 1966, University of Denver; JD, 1969, University of Washington School of Law; Washington Law Review1967-69, Member and Managing Editor 1968-69; Order of the Coif; Safeco
25 Scholar 1967-68, 1968-69; Member Washington State Bar Association since 1970. Delcaration of Stephen Kerr Eugster, April 6, 2017.

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> prior suits, the claims presented are meritless and should be dismissed with prejudice.

Motion to Dismiss 24.

The argument is extraordinarily improper. Doubly so because of who is making it, the WSBA Defendants and their three lawyers at Pacifica Law Group, Seattle. The individual WSBA Defendants are state of Washington lawyers, members of the bar of the Washington Supreme Court.

The argument is unethical and contrary to justice, equity, and law. Moreover, it based on false facts. With the argument, WSBA Defendants and their lawyers are engaging in conduct, which is antithetical to purposes of the organization and the ethical responsibilities of Washington lawyers. Further concerns about the argument and each one of WSBA Defendants' other assertions, will be discussed below starting at page 5.

II. STATEMENT OF UNDISPUTED FACTS

Plaintiffs have included a Statement of Undisputed Fact in their Motion for Summary Judgment and Memorandum in Support, Dkt # 8, 6-11, in their Motion for Preliminary Injunction, Dkt # 15, 4-7, and Declaration of Stephen Kerr Eugster, Dkt # 9 all pages, including its Appendix. WSBA Defendants have not controverted the facts stated.

The WSBA was created in 1933 by the Bar Act. Wash. Sess. 1933, c 94. It is an integrated bar association having the main characteristics of integrated bar associations in other states: It is limited to lawyers who are admitted to the bar of

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the Supreme Court. The lawyers are compelled to be members of and pay dues to the WSBA in order practice law in Washington. The lawyers are regulated and disciplined by the Association.

On September 30, 2016, the Bylaws of the WSBA 1933 were amended. The amended bylaws took effect on January 1, 2017 ("New WSBA 2017" or "WSBA 2017").

The New WSBA 2017 is not an integrated bar association. It is a purported integrated association of licensed legal professionals. Bylaws Article III (A) (1) "a. Lawyers admitted to the Bar and licensed to practice law pursuant to APR 3 and APR 5; b. Limited License Legal Technicians; and c. Limited Practice Officers." Id.

III. ISSUES PRESENTED

1. Whether the New WSBA 2017 violates Plaintiffs' rights under the First and Fourteenth Amendments to freedom of non-association and speech and expression.

2. Whether the New WSBA 2017 is, or can be, the disciplinary authority of the Rules for Enforcement of Lawyer Conduct.

3. Whether the discipline system sought to be used by the New WSBA 2017 violates Plaintiffs' rights of procedural due process of law under the Fifth and Fourteenth Amendments.

IV. STANDARDS OF REVIEW

A. Motion to Dismiss.

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1 "The general rule for 12(b)(6) motions is that allegations of material fact
2 made in the complaint should be taken as true and construed in the light most
3 favorable to the plaintiff. *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d
4 661, 663 (9th Cir.2000). A complaint should not be dismissed unless it appears
5 beyond doubt that the plaintiff cannot prove any set of facts that would entitle him
6 or her to relief. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th
7 Cir.2000)." *Nursing Home Pension v. Oracle Corp.*, 380 F.3d 1226, 1229 (9th Cir.,
8 2004).
9
10 **B. Motion for Summary Judgment.**
11
12 "In a federal court, summary judgment is required under Fed. R. Civ. P.
13 56(c) when the evidence, viewed in the light most favorable to the nonmoving party,
14 shows that there is no genuine issue as to any material fact. *See Tarin v. County of*
15 *Los Angeles*, 123 F.3d 1259, 1263 (9th Cir. 1997). The moving party bears the initial
16 burden of establishing the absence of a genuine issue of material fact. *See Celotex*
17 *Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). That burden may be met by ' `showing'
18 -that is, pointing out to the district court -that there is an absence of evidence to
19 support the nonmoving party's case.' *Id.* at 325. Once the moving party has met its
20 initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings
21 and identify facts which show a genuine issue for trial. *See id.* at 323-24; *Anderson*
22 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)." *Fairbank v. Wunderman Cato*, 212
23 F.3d 528, 552 (9th Cir., 2000).
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V. ARGUMENT IN RESPONSE AND REPLY

A. WSBA Defendants Attack on Plaintiffs' Counsel

1. Response to Defendants' Statements about Plaintiffs' Lawyer

WSBA Defendants make a number of derogatory and false statements about Plaintiffs' lawyer. They say he is "a disgruntled lawyer who has been disciplined on multiple occasions for professional misconduct." This is false, in fact the opposite is true. Declaration of Stephen Kerr Eugster dated April 6, 2017. (Eugster Declaration.)

Eugster is not engaging in a "meritless crusade against Washington's bar system."

WSBA Defendants say, "[t]his 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." But, the facts, the truth, establish this case is not the same as Eugster's pro se actions. This case is not about the constitutionality of the WSBA 1933. It is about the constitutionality of the New WSBA 2017.

It is not about the WSBA Washington Lawyer Discipline System of the WSBA 1933; it is about some sort of discipline system for the New WSBA 2017 which has yet to be created. The New WSBA 2017, is not the WSBA referred to in the Washington Rules for Enforcement of Lawyer Conduct. That WSBA is the WSBA of the Bar Act (WSBA 1933). It is about the constitutionality of the New

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1 WSBA 2017 being in possession of the power discipline of lawyers.

2 WSBA Defendants say, "Eugster has enlisted two other disciplined lawyers
3 as named plaintiffs, in the effort to obtain yet another round of judicial review of his
4 frivolous arguments." Counsel has not "enlisted" the Plaintiffs. These statements
5 are false. Eugster Declaration.
6
7 2. Rules of Professional Conduct.

8 The WSBA Defendants' argument and false factual assertions violate the
9 Washington Rules of Professional Conduct, RPC. Defendants and their counsel
10 violate several RPC rules:
11

a. RPC 3.1 Meritorious Claims and Contentions
12

13 ("A lawyer shall not . . . defend a proceeding, or assert or controvert an issue
14 therein, unless there is a basis in law and fact for doing so that is not frivolous,
15 which includes a good faith argument for an extension, modification or reversal of
16 existing law."); There is no "basis in law or fact" for what WSBA Defendants and
17 their lawyers are doing in making the argument regarding Plaintiffs' lawyer. And,
18 the argument is frivolous and it is irrelevant.
19

b. RPC 3.3 Candor Toward the Tribunal
20

21 ("(a) A lawyer shall not knowingly: (1) make a false statement of fact or
22 law to a tribunal or fail to correct a false statement of material fact or law
23 previously made to the tribunal by the lawyer.") (" (3) fail to disclose to the tribunal
24 legal authority in the controlling jurisdiction known to the lawyer to be directly
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adverse to the position of the client and not disclosed by the opposing party;") The WSBA Defendants and their lawyers are making "false statement[s] of material fact" in support of their argument against Plaintiffs' lawyer. Presumably, they are aware of the Rules of Professional Conduct which they are violating.

c. RPC 3.5 Impartiality and Decorum of the Tribunal

("A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law.") The argument against Plaintiffs' lawyer is a bold attempt to influence the judge in this case. The argument is an ad hominem argument which is not a proper part of reason or logic. Such arguments are intent on having the judge join with the WSBA Defendants and their lawyer in their personal opinions of the Plaintiffs's lawyer. Furthermore, such arguments are an invitation to the court to have the judge taint the argument and character of the Plaintiffs by reason of the lawyer they have hired to defend them.

d. RPC 3.4 Fairness to Opposing Party

("A lawyer shall not: (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.") WSBA Defendants and their lawyers violate RPC 3.4 because the facts as to Plaintiffs' lawyer they assert are not relevant and are not supported by admissible

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evidence. Furthermore, they violate RPC 3.4 because they are stating, "personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant." In fact, it is this – their opinion of justness of Plaintiffs' cause and their lawyer – with which they seek to impress the court.

2. The Eugster Cases.

WSBA Defendants attempt to conflate Eugster's personal efforts with this case. They do this so as to claim "[a]s with counsel's prior suits, the claims presented are meritless and should be dismissed with prejudice." Dkt # 16, Motion at 25.

WSBA Defendants and their lawyers tell the court it "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.')."

Next and "quite out of the blue" they say, "[t]he Court also may consider the decisions made in each case as persuasive authority." They are trying to say the court can look to the Eugster Cases as "persuasive authority" that Plaintiffs' action must be dismissed. But, as will be shown, the cases are irrelevant and completely apposite.

***a. In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293 (2009) ("Eugster I")**

Defendants want the court to know of Eugster's previous discipline. Their purpose is to gain favor with the court as to their ideas of Eugster's character. They

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1 imply; Eugster is a bad man and Plaintiffs's are too because they have retained him
2 to represent them.
3
4 In 2004-5, the WSBA 1933 began a disciplinary action against Eugster. At
5 this time, Eugster had been practicing law in Washington since the fall of 1970. In
6 his 33 years of active practice of law, Eugster had never had a discipline action
7 brought against him. Eugster had never been involved WSBA Washington Lawyer
8 Discipline System. Not only had he not experienced it, he had the impression the
9 System was fair and that the representatives of the system would be fair. Eugster
10 learned otherwise from his six-year first-hand experience of the System
11
12 b. ***Eugster v. Washington State Bar Association*, No. CV 09-357-SMM (Dist. Court, ED Wash. 2010) (Eugster II).**
13
14 At page 23 of their Motion to Dismiss, WSBA Defendants use this case in this
15 way:
16
17 > 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.
18
19 But the (9th Circuit did not say that case should be dismissed because the
20 claims about the system were too abstract. The case was dismissed because the
21 injury claimed was not imminent.
22 This case is discussed in greater detail in the Eugster Declaration of April 6,
23 2017. *See* Case II, *Eugster v. Washington State Bar Association*, No. CV 09-357-
24 SMM (Dist. Court, ED Wash. 2010), *affirmed* (9th Cir. 2012).
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c. *Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015) ("Eugster III"), affirmed, 9th Circuit Court of Appeals, Petition for Writ of Certiorari in process.

WSBA Defendants say this about 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.

Dkt # 16, Motion 4.

Within days of filing and serving the action, Case III, WSBA disciplinary counsel reactivated an investigation of a false grievance against Eugster that had been filed on September 23, 2014. Eugster began doing legal and other work for Verdelle G. O'Neill on September 11, 2014. Within a few days, Cheryl Rampley, a niece of Mrs. O'Neill's deceased husband, began making claims about Eugster, which were false.

Eugster provided extensive information and documents to Kevin Banks, WSBA disciplinary counsel assigned to the grievance. On December 25, 2014, Eugster provided more information. To Eugster, it looked as though the grievance would be dismissed. However, apparently prompted by the action Eugster filed against the WSBA on March 12, 2015, Francesca D'Angelo, a WSBA disciplinary counsel, informed Eugster that the grievance would be investigated, and that she was taking over from Mr. Banks.

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1 The bar investigator talked with Eugster and others commencing the first
2 part of April 2015. Eugster was asked for more information, and he promptly
3 complied. Id. On August 18, 2015, Eugster's client Verdelle G. O'Neill died. Id. at
4 49. In November 2015, Ms. D'Angelo indicated that she was going to seek to have
5 the grievance filed against Eugster be ordered to hearing by the Review Committee
6 of the WSBA Disciplinary Board. Id. Eugster, believed that under 9th Circuit case
7 authority and his experience that he might not have standing at that time to
8 commence an action against the Bar Association contesting the constitutionality of
9 the WSBA discipline system in Federal Court.
10
11
12 **d. Eugster v. WSBA, No. 15-2-04614-9, Superior Court of the State of Washington for Spokane County. Case IV**

13 Eugster brought an action in the Superior Court for the state of Washington in
14 Spokane County. Eugster v. WSBA, No. 15-2-04614-9, Superior Court of the State of
15 Washington for Spokane County. Case IV. Eugster contended that the Superior Court had
16 original jurisdiction over the civil rights action by virtue of prior Washington case law and
17 by Washington State Constitution Art. IV, § 6 which provides that the superior court has
18 original jurisdiction in equity and law. Wash. Const. Art IV, § 6:
19

20 > Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law . . . . The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.
21
22

23 The superior court refused to exercise its jurisdiction under the constitution and
24 dismissed the case with prejudice. The court "reasoned" the Washington Supreme Court
25 and the Washington Discipline System "had exclusive authority" over Eugster's Civil
26

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Rights Action. Conclusions and Order Granting Defendants' Motion to Dismiss.

e. ***Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711, at *2 (E.D. Wash. June 29, 2016) ("Eugster V"), on appeal, 9th Circuit.**

The trial court wrongfully dismissed the case on the basis of res judicata using the Order of Dismissal in Case IV. This was error because the Order was not an order on the merits of the case, it was an order saying the Superior Court did not have jurisdiction. Declaration of Eugster, April 6, 2017.

B. Forced Membership In and Dues to the New WSBA 2017

WSBA Defendants say there is no new WSBA 2017: that the WSBA is the same today as it was before January 1, 2017. Next they say *Lathrop v. Donohue*, 367 U.S. 820 (1961), approves of the New WSBA 2017.

WSBA Defendants ignore the facts about the character or nature of the New WSBA of 2017. The WSBA was created in 1933 by the Bar Act. The WSBA, as an integrated association created by the Bar Act, operated until January 1, 2017.

Defendants assert the New WSBA 2017 is permitted under *Lathrop v. Donohue*. The *Lathrop Case* and the cases Defendants have cited have no application to constitutionality of the New WSBA 2017.

Another point, the new WSBA came into being, not by any action on the part of the Supreme Court, but by action of the WSBA 1933 Board of Governors. The authority of the state has not be passed on to the WSBA by the state legislature or the Supreme Court.

C. The New WSBA 2017 Is Not the Disciplinary Authority under the Rules for Enforcement of Lawyer Conduct

The New WSBA 2017 has no authority under the Rules for Enforcement of Lawyer

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Conduct. The ELC authority is that of the WSBA 1933. ELC 2.2 (a)(1), last amended on September 1, 2015, provides that the ELC is under the control of the "Association." Under the ELC, Association "means the Washington State Bar Association." ELC 1.3 (a). At the time of the last amendment to the ELC and these rules, the "WSBA" was the WSBA of the Bar Act, WSBA 1933. This is so because the rules have not been changed. They have no application to the new WSBA 2017.

There is another reason why the new WSBA 2017 is not the disciplinary authority for lawyers. Integrated bar associations like that of WSBA 1933 and the integrated association in Lathrop have specific characteristics.

The state's delegation of the power to discipline lawyers was delegated as a critical aspect of the integrated bar. Bar Act c. 94,

D. WSBA 1933 Washington Attorney Discipline System Violates Procedural Due Process of Law

Of this claim, WSBA Defendants and counsel say "Plaintiffs' third claim is that the Washington Supreme Court's lawyer discipline system fails to provide adequate procedures to satisfy due process requirements." Dkt # 16, Motion at 15. Plaintiffs do not say this. They do say that system violates procedural due process of law because the system does not provide for or allow a fair hearing.

Plaintiffs also say there are numerous discrete aspects of the system which violation procedural due process.

But all the procedures in the world will provide no protection if the entire system is biased. Further, the conduct of WSBA Defendants and their attorneys in these proceedings in making and their primary argument and then relying on it in their

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conclusion is evidence of the lack of awareness and respect for truth and justice.

E. *Younger* Doctrine Has No Application

WSBA Defendants say the Court should dismiss the this case on the basis of the *Younger* abstention doctrine. Defendants make two arguments. First, that there was an ongoing WSBA proceeding against Eugster when this case was filed on December 22, 2015. Second, they argue that Eugster's "objections may be litigated in his disciplinary proceeding." Appellee's Brief at 19. There is no basis for either of these arguments.

The *Younger* abstention doctrine is described as follows: "*Younger* abstention is appropriate only when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *Readylink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir., 2014) (citations omitted).

Defendants' "ongoing" proceedings argument fails completely because there were no ongoing proceedings filed against Eugster when this case was filed. Additionally, there were no "ongoing" proceedings filed when Eugster's Amended and Restated Complaint was filed on March 3, 2016.

Each element must be satisfied and the date for determining whether *Younger* applies "is the date the federal action is filed." *Gilbertson v. Albright*, 381 F.3d 965, 969 n. 4 (9th Cir. 2004)

The ongoing state proceedings requirement is not met. This rule is tested at the time the action is brought. A proceeding is not ongoing, if was not going on at the time of the filing. Further, there is no authority which indicates that a court can claim its

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jurisdiction is lost because the state started a proceeding after the filing. In this regard, no proceeding had been commenced against Eugster at the time of the filing. Indeed, the proceeding began when a Formal Complaint was served on Eugster. The Formal Complaint was not filed until June 16, 2016.

Defendants contend that because an investigation was taking place at the time the complaint herein was filed, the "ongoing" proceeding requirement was met. However, an investigation is not a proceeding. This was addressed in *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811 (7th Cir., 2014). There, the court said:

> The possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough to trigger *Younger* abstention; a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun. *See Steffel v. Thompson*, 415 U.S. 452, 454, 472, 94 S. Ct. 1209, 39 L. Ed.2d 505 (1974) (*Younger* does not prevent federal declaratory relief "when a state prosecution has been threatened, but is not pending").

Id. at 817.

Second, contrary to what WSBA Defendants and there lawyers say, that the constitutional claims " litigated in his disciplinary proceeding" Eugster is not allowed to raise his federal challenges in the Discipline Proceeding against him. As the records in the WSBA discipline action show, Eugster was not able to raise his Civil Rights claims in the discipline proceeding. Declaration of Eugster at 10. Plaintiffs will have the same problem.

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

Are the Defendants saying the system is obviously questionable and plaintiffs should therefore have brought that up in a disciplinary proceeding? Unless they mean this, their assertion is meaningless.

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1 The plaintiffs would not have known there was anything wrong with the system
2 without first learning from experience. Declaration of Eugster at 5.
3 **G. Plaintiffs' Due Process Objections Are Ripe**
4 "In sum, Plaintiffs' objections to the discipline system are too vague and abstract to
5 be adjudicated." This is absurd.
6
7 "This Court should dismiss Plaintiffs' Fifth Claim for Relief because it is not
8 ripe, *as in previous related cases. See Eugster II, 2010 WL 2926237, at *8 (rejecting*
9 *prior challenge as too abstract), aff'd, 474 Fed. App'x at 625.*" This is not true.
10 **H. The New WSBA 2017 Is Not Immune from Suit**
11 "Although sovereign immunity bars money damages and other retrospective
12 relief against a state or instrumentality of a state, it does not bar claims seeking
13
14 prospective injunctive relief against state officials to remedy a state's ongoing
15 violation of federal law." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents,* 824 F.3d 858,
16 865 (9th Cir., 2016) (citations omitted).
17 "The *Young* doctrine allows individuals to pursue claims against a state for
18 prospective equitable relief, including any measures ancillary to that relief." *Id.*
19 Citing *Green v. Mansour* , 474 U.S. 64, 68 (1985) ("*Young* also held that the
20
21 Eleventh Amendment does not prevent federal courts from granting prospective
22 injunctive relief to prevent a continuing violation of federal law" (citations omitted).
23 Finally, even if, the new WSBA 2017 is said to be protected by the Eleventh
24 Amendment, the remaining Defendants are not so immune. They are state actors
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under the provisions of the Civil Rights Act, 42 U.S.C. § 1983.

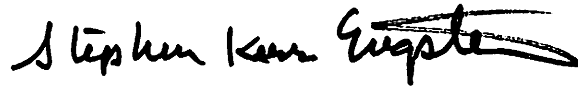
II. CONCLUSION

The court should deny Defendants' Motion to Dismiss and grant Plaintiffs' Motion for Summary Judgment. Or at least, the court should issue the Preliminary Injunction sought by Plaintiffs.

April 6, 2017

Respectfully submitted,

EUGSTER LAW OFFICE PSC



Stephen Kerr Eugster, WSBA # 2003

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court Western District of Washington trial court CM/ECF system on date below. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the trial court CM/ECF system.

I further certify that on the date below, by previous agreement of counsel, I emailed, the foregoing document, including its appendix to counsel listed below at their respective e-mail addresses:

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Superior Court Case Number:	15-2-04614-9

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