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No. 343456

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STEPHEN KERR EUGSTER,

Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, *et al.*,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

In this case, Appellant Stephen Kerr Eugster (“Eugster”), a previously disciplined lawyer now facing additional charges of professional misconduct, presses an impermissible and groundless collateral attack against the Washington Supreme Court’s lawyer discipline system. This is one of several such filed attacks from Eugster, all of which have been dismissed. In each suit, Eugster has asserted claims seeking injunctive and/or monetary relief against Respondents the Washington State Bar Association (“WSBA”) and its named officials based entirely upon their administration of the lawyer discipline system. Here, Eugster asserts that the system violates procedural due process and has been applied to him in retaliation for one of his prior lawsuits against the WSBA.

The superior court correctly dismissed Eugster’s claims with prejudice. A lawyer subjected to discipline proceedings has the right and opportunity to raise legal challenges and objections within those proceedings, which are subject to ultimate review by the Washington Supreme Court. In contrast, the lawyer has no right to bring collateral lawsuits against the persons administering the system on behalf of the Supreme Court. Allowing such lawsuits—whether for injunctive relief or damages—would result in interference with discipline proceedings, waste

limited judicial resources on duplicative adjudication, and invite harassment against bar officials. Such attacks are rightly prohibited under Washington law, and this latest lawsuit from Eugster is no exception.

Eugster's particular claims in this lawsuit are also meritless in substance for a number of separate, independent reasons. His due process claim is meritless because it is hypothetical and non-justiciable, he has failed to identify any violation of due process, and the claim otherwise should have been asserted in prior proceedings and is thus barred by the doctrine of res judicata. His retaliation claim is equally meritless, because it is based on inconsistent allegations that preclude relief and because the claim is barred by the res judicata doctrine.

In sum, to whatever extent Eugster has objections to the lawyer discipline system in Washington, he must raise those objections within his own disciplinary proceedings, not as a collateral attack in superior court. And in any case, the particular objections he has raised in this lawsuit fail in substance as a matter of law. This Court should affirm.

II. COUNTERSTATEMENT OF ISSUES

A. Assignments of Error.

The WSBA assigns no error.

B. Issues Pertaining to Assignments of Error.

1. Whether the superior court correctly dismissed Eugster's due process challenge to the lawyer discipline system because the Washington Supreme Court has exclusive jurisdiction over lawyer discipline.

2. Whether the superior court correctly dismissed Eugster's retaliation claim for damages because the WSBA is immune from liability for that claim.

3. Whether the superior court's dismissal of Eugster's claims also should be affirmed on alternative grounds.

III. COUNTERSTATEMENT OF THE CASE

This lawsuit is one of many successive lawsuits that Eugster has brought against the WSBA and its officials since he was first disciplined for professional misconduct in 2009. These various disputes provide important context for Eugster's claims in this matter. The Court may take judicial notice of these other cases. *See, e.g., Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977) (noting that a court "may take judicial notice of matters of public record").

Initially, in 2005, the WSBA charged Eugster with multiple counts of lawyer misconduct. *See In re Eugster*, 166 Wn.2d 293, 307, 209 P.3d 435 (2009) ("*Eugster I*"). Among other issues, Eugster had filed a

guardianship petition without conducting an investigation, ignored his client's direction, and refused to acknowledge his client had discharged him. *Id.* at 317-18. A hearing officer found Eugster had violated numerous rules of professional conduct. *Id.* at 307. The WSBA Disciplinary Board recommended disbarment. *Id.* at 311. In 2009, five justices of the Washington Supreme Court decided to suspend Eugster for 18 months, while the remaining four justices agreed with the Disciplinary Board's conclusion that he should be disbarred. *Id.* at 327-28.

In the meantime, the WSBA was investigating another grievance it had received against Eugster based on other conduct. *See Eugster v. WSBA*, No. CV 09-357-SMM, 2010 WL 2926237, at *1 (E.D. Wash. July 23, 2010) ("*Eugster II*"), *aff'd*, 474 Fed. Appx. 624 (9th Cir. 2012). This investigation culminated in a letter from the WSBA to Eugster on December 21, 2009, warning Eugster "to more carefully analyze the law before filing lawsuits" but otherwise dismissing the matter. *Id.*

In January 2010, Eugster filed a complaint in the United States District Court for the Eastern District of Washington against the WSBA and its officers, alleging Washington's lawyer discipline system violated his due process rights. *See id.* at *2. The district court dismissed the complaint. *Id.* at *11. Specifically, the court determined that Eugster lacked standing to assert his claims and that his claims were "unripe"

because he did “not present concrete legal issues . . . but rather, abstractions.” *Id.* at *8 (internal quotations omitted). The court also determined that the WSBA was immune from suit. *Id.* at *9. On appeal, the Ninth Circuit affirmed the dismissal. 474 Fed. Appx. 624 (9th Cir. 2012).

In September 2014, another grievance was filed against Eugster, within two weeks of his being retained on a matter. CP at 124. The WSBA immediately sent an acknowledgment of the grievance to Eugster. *Id.* In November 2014, the WSBA notified Eugster that it was conducting an investigation of the grievance. *Id.* Eugster was informed that the investigation had been assigned to Managing Disciplinary Counsel, who corresponded with Eugster regarding the investigation. *Id.*

In March 2015, Eugster filed another lawsuit against the WSBA and its officers, in the United States District Court for the Western District of Washington, this time complaining that the requirement to maintain bar membership and pay license fees in order to practice law in Washington violated his constitutional rights of association and speech. *Eugster v. WSBA*, No. C15-0375-JLR, 2015 WL 5175722, at *2 (W.D. Wash. Sept. 3, 2015) (“*Eugster III*”), *appeal filed*, No. 15-35743 (9th Cir. 2015). In support of these claims, which were brought under 42 U.S.C. § 1983, Eugster explained that he did “not wish to associate with the WSBA”

because of what he believed to be “significant problems” with the lawyer discipline system, including the “presumptions and deference given by the [Washington Supreme] Court to [] hearing officers and . . . the Disciplinary Board,” and an overall failure to provide “due process of law” CP at 67, 73-75.¹

In April 2015, Eugster received notice that the ongoing investigation of his conduct had been assigned to an investigator, who met with Eugster to discuss the matter. CP at 125-26. Eugster then received notice that the investigation had been assigned to Disciplinary Counsel. *Id.* Eugster proceeded to correspond with Disciplinary Counsel, providing materials and communications during the Spring and Summer of 2015. *See id.*

In early September 2015, the district court in *Eugster III* dismissed Eugster’s complaint. 2015 WL 5175722, at *1. Specifically, the district court determined that Eugster had “grossly misstate[d]” and “misconstrued” governing precedent, which authorized mandatory bar

¹ For the superior court’s convenience, Eugster’s prior complaint and related briefing from *Eugster III* were submitted into the record in this case. *See* CP at 65-82, 168-80. These documents are subject to judicial notice because the prior complaint is referenced in Eugster’s complaint in this case, *see* CP at 125, and because the documents are matters of public record, *see Jackson v. Quality Loan Service Corp.*, 186 Wn. App. 838, 844-45, 347 P.3d 487 (2015) (holding that judicial notice of documents attached to motion to dismiss was proper, without converting motion into one for summary judgment, because documents were referenced in complaint and for the additional reason that they were public documents).

membership and fees. *Id.* at *5. The district court also determined that the WSBA was immune from suit. *Id.* at *9. The district court provided Eugster with an opportunity to amend his complaint in the event he could identify any particular use of bar fees that he believed was unlawful. *See id.* at *7-8. Eugster opted not to amend the complaint, which was thus dismissed with prejudice. Eugster then appealed to the United States Court of Appeals for the Ninth Circuit. *See Eugster III*, No. 15-35743 (9th Cir. 2015). That appeal remains pending at this time.

In late September 2015, Eugster received a request from Disciplinary Counsel for more information, to which he responded. CP at 126. On November 5, 2015, Eugster was notified that Disciplinary Counsel would be recommending a formal hearing on the pending grievance against him. CP at 127.

Four days later, on November 9, 2015, Eugster filed this lawsuit in Spokane County Superior Court against the WSBA and its officials. *Eugster v. WSBA*, No. 15-2-04614-9 (Spokane Cnty. Super. Ct.) (“*Eugster IV*”). Eugster’s complaint alleged that various general aspects of the disciplinary system do not comport with procedural due process requirements. CP at 24-35. On that basis, Eugster sought to enjoin further application of the discipline system to him. CP at 37. Eugster also alleged that the WSBA had administered disciplinary proceedings against him in

retaliation for filing *Eugster III*. CP at 35-36. On that basis, Eugster sought a damages award. CP at 37.

The WSBA moved to dismiss the complaint on numerous grounds, including lack of jurisdiction, non-justiciability, immunity, failure to state a claim, and res judicata. CP at 44-62. Eugster then amended his complaint. *See* CP at 84-129. The amended complaint was substantially the same as Eugster's original complaint, except that it abandoned certain claims and incorporated some of Eugster's appellate briefing from *Eugster III* verbatim. *See* CP at 112-17, 127-28, 155. Eugster's subsequent briefing to the superior court failed to articulate how the amendments saved his claims from dismissal. *See* CP at 131-51, 155. The WSBA continued to move for dismissal on the same grounds. CP at 155.

On April 1, 2016, after hearing argument on the motion to dismiss, the superior court dismissed Eugster's claims with prejudice. *See* CP at 221-27. The superior court found that "exclusive jurisdiction over matters of lawyer discipline rests with the Washington Supreme Court," that Eugster "had the opportunity to raise his constitutional concerns with the Washington Supreme Court in his prior discipline case," and that Eugster "cannot recover damages" from the WSBA and its officials because they are immune from such claims pursuant to GR 12.3. CP at 225-26. The superior court thus dismissed Eugster's lawsuit with prejudice. CP at 227.

Eugster then appealed to this Court.

IV. STANDARD OF REVIEW

A superior court's ruling on a motion to dismiss is reviewed *de novo*. *Becker v. Comm'y Health Sys., Inc.*, 184 Wn.2d 252, 257, 359 P.3d 746 (2015). A complaint is properly dismissed under Washington State Superior Court Civil Rule ("CR") 12(b) if the court lacks jurisdiction "over the subject matter" or "over the person," or if the complaint fails "to state a claim upon which relief can be granted." CR 12(b)(1), (2), (6). A complaint fails to state a claim if, presuming "that the plaintiff's factual allegations are true," the plaintiff "can prove no set of facts that would justify recovery." *Trujillo v. Nw. Trustee Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015).

V. ARGUMENT

Eugster's various allegations in this case break down to two essential claims: a due process claim for injunctive relief and a retaliation claim for damages. *See* CP at 105-23 (due process claim); CP at 123-28 (retaliation claim). The sole issue presented in this appeal is whether the superior court was correct to dismiss these claims. *See* CP at 227.

Eugster's opening brief discusses only the particular grounds the superior court cited in support of its decision, namely, the Washington Supreme Court's exclusive jurisdiction over lawyer discipline and the

immunity of the WSBA and its officials from damages claims. *See* Br. of App. at 2; CP at 225-27. These were the “simplest and most direct” grounds for dismissal urged below to the superior court. CP at 222. But the WSBA also urged numerous additional independent grounds for dismissal below, including a lack of justiciability, failure to state a claim, and res judicata. *See* CP at 49-61. Any one of these grounds is sufficient to affirm the superior court’s order dismissing Eugster’s claims. *See Lubich v. Pac. Hwy. Transport*, 32 Wn.2d 457, 463, 202 P.2d 270 (1949) (noting appellate court may “affirm an order dismissing an action . . . upon any ground that [the] court deems sufficient and appropriate”); *see also Grasser v. Blakkolb*, 12 Wn. App. 529, 532, 530 P.2d 684 (1975) (noting that “the superior court’s order of dismissal . . . can be sustained upon any ground”).

As explained below, both of Eugster’s claims were properly dismissed with prejudice. The Washington Supreme Court has exclusive jurisdiction over due process challenges to lawyer discipline proceedings, and the persons administering the system are immune in that role from damages claims. In addition, both of the claims Eugster asserts here fail on the merits for numerous reasons. This Court should affirm the superior court based on its reasoning and on these additional alternative grounds.

A. Eugster’s Due Process Claim Was Properly Dismissed.

Eugster’s first claim is that Washington’s lawyer discipline system fails to provide procedural due process for disciplined lawyers. *See* CP at 105-23. At least four grounds support the superior court’s dismissal of this claim: lack of jurisdiction, non-justiciability, failure to state a claim, and *res judicata*. Any one of these reasons is sufficient to affirm the superior court.

1. The superior court properly determined that it lacked jurisdiction over Eugster’s due process claim.

The superior court properly dismissed Eugster’s due process challenge to the lawyer discipline system because the Washington Supreme Court has exclusive jurisdiction within the state judiciary over matters of lawyer discipline. *See* CP at 225-26. The Washington State Constitution assigns the “judicial power of the state” to the “supreme court” and to the other “inferior courts” that make up the judicial branch. Const. art. IV, § 1. As the highest court in the state, the Supreme Court has certain “inherent powers,” including the “promulgation of procedural rules . . . necessary to the operation of the courts.” *State v. Edwards*, 94 Wn.2d 208, 212, 616 P.2d 620 (1980).

The Supreme Court’s inherent authority over judicial matters includes the exclusive authority to regulate and discipline attorneys. *See Hahn v. Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263 (1980) (holding “the

disciplinary power rests exclusively” with the Supreme Court). Matters of attorney discipline are a distinct category of cases, “neither civil nor criminal,” “incident to the inherent power of the court to control its officers,” and “*sui generis*,” or one of a kind. *In re Simmons*, 65 Wn.2d 88, 94, 395 P.2d 1013 (1964); *see also In re Sherman*, 58 Wn.2d 1, 8, 363 P.2d 390 (1961) (noting that lawyer discipline proceedings are “special proceeding[s] . . . incident to the inherent power of the [Washington Supreme Court] to control its officers” and that “[d]ecisions in disciplinary matters are not precedents of any other class of cases”).

The Supreme Court’s exclusive jurisdiction over lawyer discipline has also been enshrined in Washington’s court rules. In particular, Rule 2.1 of the Rules for the Enforcement of Lawyer Conduct (“ELCs”) states that the “Washington Supreme Court has exclusive responsibility in the state to administer the lawyer discipline and disability system” Accordingly, Washington’s constitutional framework and its court rules both vest the Washington Supreme Court with exclusive authority over matters of lawyer discipline.

The Supreme Court has emphasized that its jurisdiction in this unique area is exclusive, and that the role of superior courts is necessarily limited to the powers granted in the ELCs. *See, e.g., In re Burtch*, 162 Wn.2d 873, 887, 175 P.3d 1070 (2008) (noting Supreme Court’s “plenary

authority” over “lawyer discipline”); *State ex rel. Schwab v. WSBA*, 80 Wn.2d 266, 269, 493 P.2d 1237 (1972) (lawyer discipline “exists under the aegis of one authority, the Supreme Court”); *see also In re Sanai*, 177 Wn.2d 743, 767-68, 302 P.3d 864 (2013) (reasoning that superior court’s authority in relation to lawyer discipline system is limited to powers expressly delegated in court rules); *Hahn*, 95 Wn.2d at 34 (noting “the Superior Court lacks authority to conduct disciplinary proceedings” and “as to matters which do not affect [the] proceedings [otherwise before a superior court], the disciplinary power rests exclusively in [the Washington Supreme Court]”).

Eugster incorrectly argues that the lawyer discipline system lacks judicial authority because it “is not a ‘court’ as that term is used in the Washington Constitution.” Br. of App. at 19. Eugster’s argument ignores that the lawyer discipline system is operated as part of the Washington Supreme Court and pursuant to its plenary authority. *See* Title 2 ELC. The Supreme Court is merely “assisted” by the WSBA acting as its “agent.” *Hahn*, 95 Wn.2d at 34; *In re Sherman*, 58 Wn.2d at 8. In this role the WSBA remains subject to the Supreme Court’s oversight, direction, and control. *See, e.g.*, GR 12.1, 12.2; RCW 2.48.060. The lawyer discipline system thus remains within the Washington Supreme Court’s exclusive and vested jurisdiction.

Eugster incorrectly argues that the superior court has authority to proceed under Article IV, Section 6 of the Washington State Constitution. *See* Br. of App. at 15, 20. That constitutional provision specifies the cases in which superior courts have “original jurisdiction,” including “all cases and . . . proceedings in which jurisdiction shall not have been by law vested exclusively in some other court” Const. art. IV, § 6; *see also* RCW 2.08.010. Here, original jurisdiction over the lawyer discipline system—including challenges to the operation of that system—has been vested by law exclusively in the Supreme Court, under both the Washington Constitution and ELC 2.1. As the superior court correctly concluded, superior courts lack jurisdiction to adjudicate claims challenging the discipline system. *See* CP at 225-26.

Eugster cites no authority for his incorrect assertion that jurisdiction over the discipline system has not vested because “[v]esting by law means a legislative action.” Br. of App. at 22. Eugster ignores the clear authority of article IV, section 1 of the Constitution and ELC 2.1, which vests exclusive jurisdiction in the Washington Supreme Court. Additionally, the Legislature has expressly assigned power over lawyer “admission” and “disbarment” to the WSBA “subject to the approval of the supreme court,” or in other words, under the Supreme Court’s sole

jurisdiction. RCW 2.48.060. On all fronts, the Supreme Court's exclusive jurisdiction over matters of lawyer discipline has been vested by law.

Eugster also improperly seeks to circumvent the Supreme Court's exclusive jurisdiction by characterizing his claim as one for declaratory judgment and for a violation of 42 U.S.C. §1983, rather than as a challenge to the lawyer discipline system. *See* Br. of App. at 8-9. Eugster refuses to acknowledge, however, that these types of constitutional challenges can be and regularly are raised and adjudicated within the scope of the lawyer discipline system, with ultimate and independent review by the Supreme Court. *See, e.g., In re Smith*, 170 Wn.2d 721, 729, 246 P.3d 1224 (2011) (adjudicating facial due process challenge to ELC); *In re Blanchard*, 158 Wn.2d 317, 330-31, 144 P.3d 286 (2006) (adjudicating due process claim). Indeed, the ELCs broadly allow for objections and affirmative defenses to be raised and motions to be brought during such proceedings. *See, e.g.,* ELC 10.5(b)(2), 10.8, 10.16. By contrast, Eugster cites to no precedent or rule allowing for a collateral attack in superior court, regardless of whether or not that attack is framed as a declaratory judgment claim or a claim under 42 U.S.C. § 1983. Within the state judiciary, jurisdiction over all such challenges remains exclusively with the Supreme Court.

Eugster finally objects that being required to raise his procedural objections within the discipline system allows “the WSBA to be a judge in its own case,” violates the state constitutional prohibition against “special legislation,” and increases the “monopoly power” of the WSBA. *See* Br. of App. at 23-25. Each of these objections lacks any support and ignores that the WSBA is acting on behalf of the Supreme Court and under its oversight and control. *See, e.g., Hahn*, 95 Wn.2d at 34; *In re Sherman*, 58 Wn.2d at 8; GR 12.1, 12.2; RCW 2.48.060. Again, all disciplinary actions remain subject to the Supreme Court’s ultimate and independent review. *See* Title 12 ELC. Eugster misconceives that the Supreme Court exercises the jurisdiction at issue here, not the WSBA standing alone.

Consistent with this understanding of the exclusive jurisdiction of the Supreme Court, in other states where the highest court exercises plenary authority over the practice of law, lawsuits filed in superior courts challenging lawyer admissions and discipline systems have been rejected for lack of subject matter jurisdiction. *See, e.g., Smith v. Mullarkey*, 121 P.3d 890, 891-93 (Colo. 2005) (“[T]he Colorado Supreme Court[’s] jurisdiction to regulate and control the practice of law . . . is exclusive. . . . It is therefore evident that the district courts do not have jurisdiction over claims that question the constitutionality of the Bar admissions process.”); *Barnard v. Sutliff*, 846 P.2d 1229, 1237 (Utah 1992) (“Under the *Rules* . . .

the Bar and its committees are the first and exclusive forum for investigative actions of alleged unethical conduct by an attorney. Appeals . . . are to this court only. . . . Any challenge to the Bar's general procedures . . . should be brought only to this court.”); *Jacobs v. State Bar of Cal.*, 20 Cal.3d 191, 196-98 (1977) (“State Bar . . . [proceedings are] designed to provide an efficient method of protecting the public. . . . To allow attorneys to initiate superior court proceedings to circumvent or ‘shortcut’ this function . . . would tend to jeopardize the integrity of the process.”).

The same holds true in Washington. Were it otherwise, any disgruntled lawyer could bring collateral attacks in superior court against the WSBA and its officials in response to being subjected to the discipline process. Allowing such actions would interfere with that process, result in duplicative adjudication, and invite undue harassment. In light of the Supreme Court's exclusive jurisdiction, the superior court properly dismissed Eugster's due process claim for lack of subject matter jurisdiction.

2. Eugster's due process claim is not justiciable.

In addition to lack of jurisdiction, this Court also should affirm dismissal of Eugster's due process claim because it is non-justiciable, both because Eugster lacks standing and because the claim is not ripe. As the

Ninth Circuit recognized in a similar case filed by Eugster, he lacks standing to bring a generalized challenge to the lawyer discipline system, and any viable claim he might have would require factual development to become ripe for adjudication. *See Eugster II*, 474 Fed. Appx. at 625.

Neither requirement has been satisfied here.

As to standing, a plaintiff must allege “an immediate, concrete, and specific injury to him or herself,” rather than a generalized claim of harm. *Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992) (“If the injury is merely conjectural or hypothetical, there can be no standing.”). In this case, Eugster has asserted a generalized due process claim based on the structure of the disciplinary system (which claim is baseless as discussed below). *See CP* at 105-23. He has thus failed to allege any specific injury sufficient to satisfy standing requirements and this Court may affirm the superior court on that basis as well.

As to ripeness, a case must be “developed sufficiently” for a court to adjudicate. *Asarco Inc. v. Dep’t of Ecology*, 145 Wn.2d 750, 759, 43 P.3d 471 (2002) (internal quotations omitted). A claim that is merely speculative or hypothetical is not subject to adjudication. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973); *see also To–Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001) (noting that to be justiciable claim must be “an actual, present and

existing dispute . . . as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement” and must involve interests that are “direct and substantial, rather than potential, theoretical, abstract or academic” (internal quotations omitted).

Here, Eugster complains only about the lawyer discipline system in the abstract, without alleging any particular deprivation of due process that he has suffered or is likely to suffer. Eugster objects, for example, that “[t]here are vast differences among hearing officers” within the discipline system. CP at 107. But his disciplinary proceeding has not yet been assigned to a hearing officer. Eugster also complains about the rules and systemic framework of the lawyer discipline system. CP at 105-09. But he fails to explain how these aspects of the system will be relevant to his specific case, and he again fails to allege a specific injury that he is likely to suffer as a result. In sum, Eugster’s due process claim is generalized and hypothetical, and thus, is not justiciable.

3. Eugster has failed to state a valid due process claim.

Dismissal of Eugster’s due process claim also should be affirmed because his amended complaint fails to state an actual violation of due process. Instead, Eugster’s general allegations about Washington’s lawyer discipline system only confirm that the system includes numerous robust procedural protections. These include a grievance process, formal

hearings and appellate review, and ultimate review and oversight by the Supreme Court. *See* CP at 93-95. Within the process, lawyers are given notice and afforded the opportunity to respond, to develop facts, to raise arguments, affirmative defenses, objections, and motions, to be represented by counsel, and to obtain the Supreme Court's review. *See, e.g.*, ELC 10.5, 10.8, 10.10, 10.11, 10.12, 10.13, 11.9, 11.14, 12.1, 12.3, 12.6. These robust procedures satisfy due process requirements as a matter of law. *See, e.g., Blanchard*, 158 Wn.2d at 330-31 ("An attorney has a due process right to be notified of clear and specific charges and to be afforded an opportunity to anticipate, prepare, and present a defense. . . . Mr. Blanchard's due process rights were not violated.").

Eugster's amended complaint presents various criticisms regarding specific aspects of the system, but these criticisms are meritless, contrary to governing precedent, and do not reflect any violation of due process. For instance, Eugster makes various generalized accusations of bias and incompetence against the hearing officers who preside over formal lawyer disciplinary hearings. *See* CP at 107-08. But the Supreme Court always retains the "ultimate responsibility" for determining discipline, and that Court individually reviews underlying proceedings for bias or legal error as appropriate. *In re Lynch*, 114 Wn.2d 598, 608-09, 789 P.2d 752 (1990) (dismissing objection that Disciplinary Board was biased in part because

its “recommendations are only advisory”); *see also Blanchard*, 158 Wn.2d at 331 (“Mr. Blanchard has not been prejudiced . . . because he was able to appeal the decision to this court, and we are reviewing his case pursuant to our plenary authority.”); ELC 10.2(b) (allowing hearing officer to be removed for good cause). There is no allegation of bias or incompetence regarding the Washington Supreme Court.

For the same reason, Eugster’s complaints about the overlapping roles of WSBA employees and alleged conflicts of interest are equally meritless. *See Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1435-36 (9th Cir. 1995) (“So long as the judges hearing the [lawyer] misconduct charges are not biased . . . there is no legitimate cause for concern over the composition and partiality of the [initial disciplinary committee].”). Again, the WSBA acts on behalf of the Supreme Court and remains subject to its independent oversight and review.

Eugster’s amended complaint also alleges that lawyers are denied a “fair hearing” because the Washington Supreme Court “has deferred to others” within the system, such as hearing officers and the Disciplinary Board. CP at 109. To the contrary, the Supreme Court repeatedly has clarified that it exercises independent judgment in each case. *See, e.g., Blanchard*, 158 Wn.2d at 330 (“[W]hile we do not lightly depart from the Board’s recommendation, we are not bound by it.” (internal marks

omitted)). Indeed, in Eugster’s own case, the Supreme Court deviated from a unanimous recommendation of disbarment to instead impose a suspension of 18 months. *Eugster I*, 166 Wn.2d at 299. It now strains credulity for Eugster to suggest that the Supreme Court blindly defers to other actors within the system.

Finally, Eugster’s due process claim fails because his due process challenge to the lawyer discipline system is facial rather than as applied. Eugster repeatedly has clarified that he is attacking the “Discipline System, in and of itself,” rather than its specific application to him. Br. of App. at 1 (emphasis in original). Such a “facial challenge” must be “rejected if there are any circumstances where the [challenged law] can constitutionally be applied.” *Lummi Indian Nation v. State*, 170 Wn.2d 247, 267, 241 P.3d 1220 (2010) (internal quotations omitted). The Washington Supreme Court already has determined on multiple occasions that the lawyer discipline system can be applied consistent with due process. *See, e.g., In re Jackson*, 180 Wn.2d 201, 221-23, 322 P.3d 795 (2014) (rejecting due process claim); *In re Smith*, 170 Wn.2d at 729 (same); *In re Blanchard*, 158 Wn.2d at 330-31 (same); *In re Lynch*, 114 Wn.2d at 608-09 (same). Thus, Eugster’s due process challenge fails as a matter of law.

4. Eugster’s due process claim is barred by res judicata.

This Court also should affirm the dismissal of Eugster’s due process claim because it should have been asserted in prior proceedings and is now barred by res judicata. Under the doctrine of res judicata, litigating two separate suits based on the same subject matter, sometimes called “claim splitting,” is prohibited. *Ensley v. Pitcher*, 152 Wn. App. 891, 898-99, 222 P.3d 99 (2009) (internal quotations omitted). This “puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.” *Id.* at 899 (internal quotations omitted). Eugster’s due process claim in this lawsuit is substantively related both to the claims he brought against the WSBA and its officers in *Eugster III*, 2015 WL 5175722, and to his prior disciplinary proceedings culminating in *Eugster I*, 166 Wn.2d 293. Eugster is thus precluded from raising the claim here.

The “threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit.” *Ensley*, 152 Wn. App. at 899. For this purpose, “[d]ismissal of an action ‘with prejudice’ is a final judgment on the merits of a controversy.” *Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wn. App. 222, 228 n.11, 308 P.3d 681 (2013). In *Eugster III*, the court dismissed Eugster’s complaint against the WSBA and its officers with prejudice. *See* 2015 WL 5175722, at *1. And in

Eugster I, the Washington Supreme Court imposed final discipline upon Eugster for his professional misconduct. *See* 166 Wn.2d at 327-28. In each case, the threshold requirement of a final judgment is met.

When there is a prior final judgment on the merits, *res judicata* precludes a matter from being “relitigated, or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.” *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 329, 941 P.2d 1108 (1997). There is “no simple all-inclusive test” for determining whether specific claims should have been asserted in a prior proceeding. *Id.* at 330. “Instead, it is necessary to consider a variety of factors,” including, for example, “whether the present and prior proceedings arise out of the same facts,” and whether “there were valid reasons” not to assert the claims earlier. *Id.* A claim “should have been raised and decided earlier if,” for example, “it is merely an alternate theory of recovery, or an alternate remedy.” *Id.*

Eugster’s due process claim should have been brought, if at all, in *Eugster III*. In that prior lawsuit, Eugster challenged mandatory membership in the WSBA, in part based on his objections to the lawyer discipline system—the very same objections he raises here. *Compare* CP at 105-23 (amended complaint), *with* CP at 73-75 (*Eugster III* complaint). Under the circumstances, Eugster’s present claim “could have been raised,

and in the exercise of reasonable diligence should have been raised, in the prior proceeding.” *Kelly-Hansen*, 87 Wn. App. at 329.

Eugster’s due process claim also could and should have been raised even earlier, in *Eugster I*. In that case, Eugster faced disciplinary proceedings governed by the very same rules and procedures that Eugster challenges in this lawsuit. *See* 166 Wn.2d at 307-312. As the superior court below recognized, Eugster had the opportunity in those proceedings to raise his current due process objections. *See* CP at 226. Accordingly, Eugster’s due process claim should have been raised in his prior disciplinary proceedings.

In sum, because Eugster’s due process claim arises out of the same facts as his prior cases, because he has no valid reason for failing to assert the claim in those prior suits, and because his claim simply represents an alternative theory and remedy in his continuing assault against Washington’s lawyer discipline system, Eugster’s due process claim is barred under the doctrine of res judicata.

B. Eugster’s Retaliation Claim Was Properly Dismissed.

Eugster’s second claim in this case is that the WSBA has brought disciplinary proceedings against him in retaliation for his filing *Eugster III*, for which Eugster seeks an award of damages. The superior court correctly dismissed Eugster’s claim with prejudice. *See* CP at 226-27.

This Court should affirm that dismissal for three independent reasons: immunity, failure to state a claim, and res judicata. Any one of these reasons is sufficient to affirm the superior court.

1. The WSBA and its officials are immune from Eugster's retaliation claim.

The superior court properly determined that Eugster's retaliation claim should be dismissed because the WSBA and its officials are immune from liability for such a claim. *See* CP at 225, 226-27. In particular, Eugster is barred from suing the WSBA and its officials for damages based on their operation and administration of Washington's lawyer discipline system on behalf of the Washington Supreme Court. The WSBA and its officials are afforded multiple forms of immunity, each of which precludes Eugster's claim here.

First, the WSBA and its officials have quasi-judicial immunity under state law in their administration of the lawyer discipline system. *See* GR 12.3 (providing that the WSBA and its officers, employees, and others, when "acting on behalf of the Supreme Court under . . . the [ELCs] . . . enjoy quasi-judicial immunity if the Supreme Court would have immunity in performing the same functions"). Quasi-judicial immunity "protects those who perform judicial-like functions" from suit and is an "absolute" form of immunity. *Kelley v. Pierce County*, 179 Wn. App.

566, 573, 319 P.3d 74 (2014). This absolute immunity “prevents recovery even for malicious or corrupt actions” to ensure that judicial functions can be performed “without fear of personal lawsuits.” *Lallas v. Skagit County*, 167 Wn.2d 861, 864, 225 P.3d 910 (2009). Application of such immunity depends on whether the defendant’s challenged conduct was part of the performance of a judicial function. *See Kelley*, 179 Wn. App. at 576-77.

Eugster’s retaliation claim is based entirely on the judicial function of the WSBA and its officials, undertaken in the course of administering the lawyer discipline system on behalf of the Washington Supreme Court. *See CP* at 123-28. Eugster does not allege that the WSBA or its officials took any action that does not qualify as the performance of a judicial function. To the contrary, Eugster complains about the initiation and administration of lawyer disciplinary proceedings, which are classic judicial functions. *See, e.g., In re Sherman*, 58 Wn.2d 1, 8, 363 P.2d 390 (1961) (noting that lawyer discipline proceedings are “special proceeding[s] . . . incident to the inherent power of the [Washington Supreme Court] to control its officers”); *cf. Kelley*, 179 Wn. App. at 576, 578 (noting that guardians ad litem are entitled to quasi-judicial immunity in “performing the [their] function to investigate facts and to report facts . . . to the court”). Thus, the WSBA and its employees enjoy quasi-judicial immunity from suit in this case.

Additionally, sovereign immunity protects the WSBA and its officials from suit. The sovereign immunity doctrine “prohibits suits against unconsenting states in state court.” *Harrell v. Wash. State ex rel. Dep’t of Soc. Health Servs.*, 170 Wn. App. 386, 405, 285 P.3d 159 (2012). The doctrine extends to lawsuits “against state . . . instrumentalities,” because “such suits are, in effect, suits against the state regardless of whether it is named a party to the action.” *Hontz v. State*, 105 Wn.2d 302, 309, 714 P.2d 1176 (1986); *Rains v. State*, 100 Wn.2d 660, 666-67, 674 P.2d 165 (1983). Likewise, lawsuits “against state officials in their official capacities” are “treated as suits against the state” for sovereign immunity purposes. *Harrell*, 170 Wn. App. at 405.

The operation of the discipline system is classic governmental activity, not the sort of private and potentially tortious conduct for which the state has waived its sovereign immunity. *See, e.g., Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 252-54, 407 P.2d 440 (1965). As such, the WSBA and its officials—whom Eugster has sued here solely in their official capacities, *see* CP at 84—enjoy sovereign immunity from Eugster’s retaliation claim.

Finally, the WSBA and its officials are immune from liability under 42 U.S.C. § 1983. In particular, the WSBA and its officials do not qualify as “persons” who can be held liable for damages under that statute.

See Buechler v. Wenatchee Valley College, 174 Wn. App. 141, 155, 298 P.3d 110 (2013) (“A state agency or individual acting in his or her official capacity is not a ‘person’ for purposes of § 1983.”).

In sum, the WSBA and its employees are immune from Eugster’s retaliation claim for damages. Were it otherwise, any disgruntled lawyer could bring damages claims against bar officials in response to being disciplined. That would invite undue harassment of such officials and prevent the proper administration of the system. Eugster’s retaliation claim was properly dismissed on this basis.

2. Eugster has failed to state a valid retaliation claim.

In addition to immunity, this Court also may affirm the dismissal of Eugster’s retaliation claim on the basis that the amended complaint fails to state a valid claim of retaliation. In fact, Eugster’s own allegations affirmatively contradict his baseless conclusion that the WSBA’s recent investigation against him was commenced in retaliation for his filing *Eugster III*, 2015 WL 5175722. The amended complaint also fails to address causation, a key element of any such claim. For each of these reasons, the superior court was correct to dismiss the claim.

First, the allegations in Eugster’s amended complaint are inconsistent with and fatally undermine his claim of retaliation. This claim is based on an alleged “belie[f] that the [WSBA’s] investigation

[was] launched . . . in retaliation” for Eugster filing *Eugster III*. CP at 126. But at the same time, Eugster alleges that the WSBA notified him that its “investigation” had begun in November 2014, CP at 124 (quoting letter), while *Eugster III* was not filed until March 2015, CP at 125. Eugster “has therefore pleaded himself out of court,” because he has conceded that the WSBA already was formally investigating his conduct well before he filed his lawsuit. *Dunlap v. Sundberg*, 55 Wash. 609, 614, 104 P. 830 (1909) (holding that factual concession in complaint demonstrated failure to state a claim).

Second, Eugster’s amended complaint fails to address causation, a necessary element of any claim based on retaliation. *See Berge*, 88 Wn.2d at 762-64 (noting complaint “must contain either direct allegations of every material point necessary to sustain a recovery” or “allegations from which an inference fairly may be drawn that evidence on these material points will be introduced” (internal quotations omitted)); *Trujillo*, 183 Wn.2d at 839-41 & n.14 (dismissing claims for profiteering and intentional infliction of emotional distress that lacked any allegations regarding key elements).

To show retaliation, Eugster would need to demonstrate that his lawsuit not only substantially motivated the WSBA’s investigation, but also that the same investigation would not have been conducted otherwise.

See, e.g., Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 24, 974 P.2d 847 (1999) (noting that retaliation claim requires that public actor “would not have made the same [] decision” otherwise). Eugster nowhere suggests that the WSBA’s investigation, which was in response to a specific grievance filed against him, would not have been conducted otherwise. Lacking any allegations regarding this key element, Eugster’s retaliation claim fails. *See Trujillo*, 183 Wn.2d at 839-41 & n.14.

3. Eugster’s retaliation claim is barred by res judicata.

The dismissal of Eugster’s retaliation claim also may be affirmed on the basis that he was obligated to raise the claim in his prior lawsuit against the WSBA, *Eugster III*. *See* 2015 WL 5175722. As explained above, the res judicata doctrine prohibits a party from litigating a claim that “could have been raised, and in the exercise of reasonable diligence should have been raised,” in a prior proceeding. *Kelly-Hansen*, 87 Wn. App. at 329.

Eugster objects that the WSBA’s recent investigation was a form of retaliation against him for filing *Eugster III*. Months after that case was filed and long after the investigation had continued to develop, Eugster was specifically afforded an opportunity to amend his complaint in that case. *See* 2015 WL 5175722, at *7-8. Rather than amend his complaint to assert his claim of retaliation in the very proceedings at issue, Eugster

abandoned the lawsuit, leaving the case to be dismissed with prejudice.

As such, his claim of retaliation is now barred by the res judicata doctrine.

C. The Complaint Was Properly Dismissed With Prejudice.

For each and all of the reasons discussed above, Eugster's claims were properly dismissed with prejudice. *See* CP at 226-27. The decision to dismiss "with prejudice and without leave to amend" is discretionary. *Green v. Holm*, 28 Wn. App. 135, 140, 622 P.2d 869 (1981). Dismissal with prejudice is appropriate when "amendment would be futile," including when the plaintiff cannot "identify any additional facts that might support [his] claims." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 730, 189 P.3d 168 (2008).

Here, dismissal was warranted based on exclusive jurisdiction, immunity, lack of justiciability, and res judicata—grounds that cannot be remedied by amendment and which warrant dismissal with prejudice. *See, e.g., Ent v. Wash. State Crim. Justice Training Comm'n*, 174 Wn. App. 615, 618, 301 P.3d 468 (2013) (affirming dismissal with prejudice based on immunity); *Ensley*, 152 Wn. App. at 894 (remanding for dismissal with prejudice based on res judicata). Also, because Eugster's allegations are so facially deficient on the merits, dismissal with prejudice was warranted for Eugster's failure to state a claim. *See, e.g., Green*, 28 Wn. App. at 140 (affirming dismissal with prejudice for failure to state a claim).

VI. CONCLUSION

The superior court correctly dismissed Eugster's collateral attack against the Washington Supreme Court's lawyer discipline system. Simply put, Eugster's claims were asserted in the wrong forum and against defendants who are immune. Moreover, Eugster's particular claims are lacking factual development, are without substantial basis, and are untimely. For any and all of these reasons, this Court should affirm the superior court's dismissal of Eugster's claims with prejudice.

RESPECTFULLY SUBMITTED this 18th day of July, 2016.

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CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 18th day of July, 2016 I caused to be served a true copy of the foregoing document upon:

Stephen Kerr Eugster
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Appellant

- via facsimile
- via overnight courier
- via first-class U.S. mail
- via email service agreement
- via electronic court filing
- via hand delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of July, 2016.


Dawn M. Taylor

2016 JUL 18 PM 4:14
STATE OF WASHINGTON
COUNTY OF SPOKANE