

**IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**LAURA FORD,**

**Plaintiff,**

vs.

**Case No.: 6:06-cv-3-Orl-31JGG**

**THE SUPREME COURT  
OF FLORIDA et al.**

**Defendants.**

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**MEMORANDUM OF LAW OF DEFENDANTS  
FBBE, HUNTER, RESSEL AND JANE DOE PROCTOR  
IN SUPPORT OF FBBE DEFENDANTS' MOTION TO DISMISS**

The Florida Board of Bar Examiners (“FBBE”); Eleanor Hunter, the FBBE’s current Executive Director (“Hunter”); Kathryn Ressel, the FBBE’s former Executive Director (Ressel); and Jane Doe Proctor (“Jane Doe”), an alleged agent of the FBBE (collectively, “FBBE Defendants”), submit this Memorandum of Law in Support of the FBBE Defendants’ Motion to Dismiss Plaintiff’s Complaint.<sup>1</sup>

**I. Plaintiff’s Claims and Factual Background**

This action arises out of the proceeding on Plaintiff Laura Ford’s application for admission to The Florida Bar. Plaintiff’s claims relate to her failure to pass the Florida Bar Examination. Plaintiff asserts claims under the Americans with Disabilities Act, 42 U.S.C. §12131 et seq. (“ADA”); the Rehabilitation Act, 29 U.S.C. §794; 42 U.S.C. §1983 & §1985;

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<sup>1</sup> The FBBE Defendants incorporate by reference any and all grounds and arguments for dismissal asserted by Defendants Florida Supreme Court and Barbara J. Pariente, Chief Justice of the Florida Supreme Court.

the Fifth and Fourteenth Amendments (due process); the “Separation of Powers Doctrine;” Article I, § 2 of the Florida Constitution and Florida common law. Plaintiff sues the individual defendants in both their official and personal capacities, and Plaintiff seeks over \$5,000,000 in damages. (Complaint, ¶123(c)). Plaintiff also requests that the Court enter an injunction requiring the Florida Supreme Court to admit Plaintiff to The Florida Bar.

#### **A. Background Relating to the Florida Bar Examination**

The FBBE is an arm of the Supreme Court of Florida created by the Court to handle matters relating to bar admissions. Rule 1-12, Fla. Bar. Admiss. Rules. The FBBE is charged with the responsibility of ensuring that each applicant for admission has met the requirements of the Court’s rules, including rules relating to education and technical competence. Rule 1-14.2, Fla. Bar. Admiss. Rules. Applicants for admission to The Florida Bar must successfully complete the Florida Bar Examination. Rule 4-13, Fla. Bar. Admiss. Rules. The “primary purpose of the bar examination is to ensure that all who are admitted to The Florida Bar have demonstrated minimum technical competence.” Rule 1-15.1, Fla. Bar. Admiss. Rules.

The Florida Bar Examination consists of the General Bar Examination and the Multistate Professional Responsibility Examination (MPRE). Rule 4-11, Fla. Bar. Admiss. Rules. The General Bar Examination consists of Parts A and B. Rule 4-20, Fla. Bar. Admiss. Rules. It is administered by the FBBE during the last Tuesday and Wednesday of February and July of each year. Rule 4-14, Fla. Bar. Admiss. Rules. Part A is developed by the FBBE and consists of a combination of three essay and 100 multiple choice questions.

Part A is administered on Tuesday. Part B is the Multistate Bar Examination (MBE) and is developed by the National Conference of Bar Examiners. Rule 4-23, Fla. Bar. Admiss. Rules. The MBE is administered on Wednesday. The MBE consists of 200 multiple-choice questions with 100 questions being given during the morning and afternoon sessions.

The third part of the bar examination is the MPRE. Rule 4-30, Fla. Bar. Admiss. Rules. It is developed and administered by the National Conference of Bar Examiners. The MPRE is offered three times each year at numerous locations throughout the country including eight different locations in Florida.

The passing score for parts A and B of the General Bar Examination is set forth in Rule 4-26.2 of the Rules. An applicant may elect to submit to the General Bar Examination by either an “overall method” or an “individual method.” Rule 4-25, Fla. Bar. Admiss. Rules. An applicant who submits to Parts A and B during the same administration of the General Bar Examination submits to the overall method, such that the scores for Parts A and B are combined. Rule 4-25.1, Fla. Bar. Admiss. Rules. The “individual method” is utilized if the applicant submits to only one part of the General Bar Examination. Rule 4-25.2, Fla. Bar. Admiss. Rules. Applicants who elect to submit to only one part of the General Bar Examination “may not combine a score attained on one part from one administration with a score on the other part from a different administration.” *Id.*

#### **B. Plaintiff’s Failure to Pass Bar Examinations**

Plaintiff alleges the following facts relating to her failure to obtain a passing score on the Florida Bar Examination: Plaintiff sat for the Florida Bar Examination in July 2001,

February 2002, July 2002 and February 2003. (Complaint, ¶¶ 28-60). Plaintiff failed Parts A and B of the July 2001 General Bar Examination. (Complaint, ¶ 28). Plaintiff then requested certain accommodations for the February 2002 Bar Examination.<sup>2</sup> Among other things, Plaintiff requested that she be allowed “one day of rest between the two testing days.” (Complaint, ¶ 29). Although the FBBE provided Plaintiff with certain of the accommodations that Plaintiff had requested (including “25% extra time”), the FBBE did not grant Plaintiff’s request for “one day of rest between the two testing days.” (Complaint, ¶¶ 30 & 33).<sup>3</sup> Plaintiff again failed Parts A and B of the February 2002 General Bar Examination. (Complaint, ¶ 34). Plaintiff alleges that she could have passed if she had been provided a day of rest between the two testing days. (Complaint, ¶ 35).

For the July 2002 General Bar Examination, Plaintiff continued to request one day of rest between testing days, along with other additional requests. (Complaint, ¶36). Although the FBBE provided some of the accommodations requested by Plaintiff, the FBBE denied Plaintiff’s requests for one day of rest between testing days, 10 minutes of rest after each hour and 33% extra time on essays. (Complaint, ¶¶36-42). This time, Plaintiff passed Part A of the General Bar Examination, but she failed Part B (MBE). (Complaint, ¶43).

For the February 2003 General Bar Examination, Plaintiff decided to take only Part B, because she had passed Part A in July 2002. Thus, Plaintiff had to pass Part B under the

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<sup>2</sup> Plaintiff alleges that she was involved in an automobile accident in 1989 in which she sustained “permanent and chronic physical injuries.” (Complaint, ¶ 21).

<sup>3</sup> Although not alleged with specificity in Plaintiff’s Complaint, the FBBE granted Plaintiff several accommodations for the February 2002 and subsequent bar examinations. These accommodations included “25% extra time.” (Complaint, ¶30).

“individual method.” Inasmuch as Plaintiff was only taking Part B, she only asked for the accommodations that the FBBE had agreed to provide her for the July 2002 General Bar Examination (Complaint, ¶45); and the FBBE agreed to provide these accommodations. (Complaint, ¶47). Plaintiff alleges, however, that she “lost nearly 9 minutes of exam time” at the February 2003 General Bar Examination due to some “confusion” with the proctor (Jane Doe Proctor) about Plaintiff’s right to circle her answers rather than filling in the bubbles. (Complaint, ¶¶51-60). Plaintiff failed Part B of the February 2003 Bar Examination. (Complaint, ¶61).

After receiving her score from the February 2003 General Bar Examination, Plaintiff requested the FBBE to grant her a waiver of Rules 4-25, 2-25.1 and 4-25.2 of the Rules Relating to Admissions to the Bar. Plaintiff asked that these rules be waived in her case and that the FBBE average her Part A score from the July 2002 Bar Examination with her Part B score from the February 2003 Bar Examination, so that she could receive a passing score on the General Bar Examination. (Complaint, ¶64). Plaintiff also requested that the FBBE grant her a waiver of Rule 4-18 of the Rules Relating to Admissions to the Bar, so as to reinstate her MPRE score because more than 25 months had passed since she had passed the MPRE. (Complaint, ¶64). The FBBE denied Plaintiff’s request. (Complaint, ¶¶65-66).

### **C. Plaintiff’s Petition to Florida Supreme Court**

Plaintiff then filed a Petition with the Florida Supreme Court for review of all actions of the FBBE relating to her application for admission, including “a denial of reasonable accommodations, a denial of certification of ‘minimum competence’ as a qualification for

admission to the Florida Bar, and violations of Plaintiff's Florida and U.S. Constitutional rights, the Americans with Disabilities Act, as well as, violation of the Rules of the Florida Supreme Court Regulating Admissions to the Florida Bar." (Complaint, ¶67). On or about September 23, 2004, the Florida Supreme Court denied Plaintiff's Petition. (Complaint, ¶71). Plaintiff filed the instant civil action because the Florida Supreme Court denied her the relief she had requested. (Complaint, ¶72).

## II. Venue is Not Proper in the Middle District of Florida

Venue is governed by 28 U.S.C. § 1391(b). This statute provides that a civil action, wherein jurisdiction is not founded solely on diversity of citizenship, may be brought only in (1) "the judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred ...or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391(b).

Plaintiff's sole basis for laying venue in the Middle District of Florida is her conclusory allegation that "wrongful acts complained of occurred within this judicial district (Orange County)." (Complaint, ¶3). Plaintiff alleges no factual basis to support venue in the Middle District. Moreover, it is clear from Plaintiff's complaint that venue is only proper in the Northern District of Florida.<sup>4</sup>

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<sup>4</sup> Plaintiff does not, and cannot, allege that all of the defendants reside in the Middle District of Florida. In fact, the Defendants reside in the Northern District of Florida. See Fla. Bar Admiss. R. 1-27 ("The offices of the Board shall be maintained in Tallahassee, Florida."). Because Plaintiff has failed to allege any *facts* to show that venue is proper in the Middle District of Florida, it is unnecessary for the Defendants to submit any evidentiary matter in support of this motion to dismiss for improper venue. However, the FBBE Defendants nevertheless submit the affidavit of Eleanor Hunter (attached as Exhibit A) in support of the Defendants' Motion.

A substantial part of the alleged events or omissions giving rise to the claim occurred only in the Northern District of Florida. All of the decisions regarding Plaintiff's requests for accommodations and requests to average her Bar Examination scores were made in the Northern District of Florida. Under these and similar circumstances, the courts have consistently and uniformly held that venue is only proper in the Northern District of Florida. *See Hason v. Florida Board of Bar Examiners*, 05-61332-Civ-Middlebrooks/Johnson (S.D. Fla. Feb. 21, 2006) (venue of action against FBBE and its Executive Director based on decisions made at FBBE's headquarters in Tallahassee was proper only in the Northern District)(attached at Exhibit "B"); *Kirkpatrick v. Shaw*, 90-1302-Civ-T-3A98(B) (M.D. Fla. Mar. 29, 1991) (venue of action against FBBE's Executive Director and Chief Justice of Florida Supreme Court regarding handling of application for admission was proper only in Northern District) (attached at Exhibit "C"); *Blasi v. Florida Board of Bar Examiners*, 88-1983-Civ-T-17 (M.D. Fla. Dec. 29, 1988) (same) (attached at Exhibit "D"); *Rodriguez Diaz v. Florida Board of Bar Examiners*, 88-1279-Civ-Aronovitz (same) (S.D. Fla. Nov. 30, 1988) (attached at Exhibit "E").

As recently as February 21, 2006, United States District Judge Donald M. Middlebrooks, in the case of *Hason v. Florida Board of Bar Examiners, supra*, held that venue of an ADA action against the FBBE and its Executive Director was improper in the Southern District of Florida and thus ordered that venue be transferred to the Northern District. Judge Middlebrooks summarized the plaintiff's arguments in *Hason*:

Hason argues that venue is proper in the Southern District of Florida because he resided in Ft. Lauderdale at the time of his application and the

FBBE mailed his application and follow-up letters to him there. He also alleges that the FBBE conducted its investigative hearing in the Southern District, where it inquired about his history of mental illness and his suit against the FBOM. Finally, he alleges that at least some of the physicians or organizations that treated him are in the Southern District.

(Order, Exhibit B, p. 3). Even though Mr. Hason alleged that the FBBE conducted a hearing and engaged in other activity in the Southern District, the Court concluded that these “allegations are insufficient” because Hason’s claims “arise from the decisions the FBBE made in its office in Tallahassee.” (Order, Exhibit B, p. 3). In the instant case, like *Hason*, the substantial events or omissions giving rise to the claim all occurred in the Northern District of Florida, either at the headquarters of the FBBE or the Florida Supreme Court.

In the *Hason* decision, Judge Middlebrooks relied on the decision of United States District Judge William J. Castagna in *Kirkpatrick v. Shaw*, *supra*, where an applicant for admission had sued the FBBE’s Executive Director in the Middle District of Florida. In that case, Judge Castagna held that venue was proper only in the Northern District even though the plaintiff had taken the Bar Examination in the Middle District of Florida, observing in his Order that “[a]ll the official decisions pertinent to this action are conducted by defendants in Tallahassee, Florida.” *Kirkpatrick v. Shaw*, at p. 3.

Venue of this action is, therefore, proper only in the Northern District of Florida. Thus, this action should be dismissed without prejudice, under Rule 12(b)(3) for improper venue. *See* 28 U.S.C. § 1406(a).<sup>5</sup>

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<sup>5</sup> Because venue is improper in the Middle District, it is unnecessary for the Defendants to request a transfer of venue “for the convenience of parties and witnesses” under 28 U.S.C. §1404(a). However, given that the officials and agents of the Defendants reside in the Northern District of Florida, venue should also be in the Northern District of Florida for this reason as well. Moreover, under Florida law, governmental defendants have a common law

### III. No Subject Matter Jurisdiction under *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine places limits on the subject matter jurisdiction of federal district courts and federal courts of appeals relating to claims arising out of State judicial decision-making, including those relating to a State's bar admission proceedings. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Rooker*, *supra*, the United States Supreme Court held that the lower federal courts lack subject matter jurisdiction to review final judgments of state courts. In *Feldman*, *supra*, the Court held that the doctrine applied to decisions relating to applications for admission to the Bar of a State.<sup>6</sup> Moreover, the doctrine also applies to decisions of committees or boards, acting under the direct supervision and control of the State's highest court, in connection with applications for admission to the Bar of a State. See *Dale v. Moore*, 121 F.3d 624, 627 (11<sup>th</sup> Cir. 1997) (affirming dismissal of bar applicant's claim against Florida Board of Bar Examiners under *Rooker-Feldman* doctrine); *McCready v. Michigan State Bar Standing Committee on Character and Fitness*, 926 F.Supp. 618 (W.D. Mich 1995), aff'd, 100 F.3d 957 (6<sup>th</sup> Cir. 1996).

The Plaintiff's complaint in the instant case arises directly out of her application for

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"home venue privilege" to be sued only in the county where they maintain their principal headquarters. *Jacksonville Elec. Auth. v. Clay County Util. Auth.*, 802 So.2d 1190, 1192 (Fla. 1st DCA 2002) (citing *Fla. Pub. Serv. Comm'n v. Triple "A" Enters., Inc.*, 387 So.2d 940, 942 (Fla.1980)). This would present another valid basis to transfer the action.

<sup>6</sup> In *Feldman*, *supra*, the plaintiffs sought waivers of a District of Columbia bar admissions rule requiring applicants to have degrees from accredited law schools. The waivers having been denied, the applicants sued in federal district court, alleging violation of their constitutional rights. The Court held that the denial of the waivers in the bar admission proceeding was a judicial action even though admissions proceedings may not involve the full panoply of procedures normally found in court adjudications. *Id.* at 477-79, 480-82.

admission to the Florida Bar and decisions regarding Plaintiff's Florida Bar Examination. The Plaintiff expressly alleges that she presented all of these matters to the Florida Supreme Court, and that the Florida Supreme Court made a final decision regarding her complaints that form the basis of this action. Accordingly, Plaintiff Ford is, in effect, seeking federal district court review of the final decision of the Florida Supreme Court relating to her application for admission to the Florida Bar, contrary to the *Rooker-Feldman* doctrine. Plaintiff's action is thus barred by the *Rooker-Feldman* doctrine.<sup>7</sup>

**IV. Plaintiff's Action is barred for Lack of Standing or by the *Younger* Abstention Doctrine.**

It is unclear from the complaint whether Plaintiff alleges that she has a pending application for admission. To the extent Plaintiff were to allege that she does *not* have a pending application for admission, she lacks standing and her claims for injunctive relief are not ripe. However, if the Plaintiff were to allege that she does have a pending application for admission, her action would be barred by the *Younger* abstention doctrine.

**A. Lack of Standing or Ripeness**

To establish the "irreducible minimum" for constitutional standing, the plaintiff must allege and prove that: "(1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is

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<sup>7</sup> Plaintiff cannot avoid the effect of the *Rooker-Feldman* doctrine by arguing that she is merely seeking to challenge the facial validity of a rule of general applicability promulgated in a nonjudicial proceeding, rather than seeking review of a judicial decision regarding her application. See *Dale v. Moore*, 121 F.3d at 626-27 (*Rooker-Feldman* doctrine barred applicant's federal claim because the "claim [was] inextricably intertwined with the state's judicial proceedings relating to his bar admission."); *Johnson v. State of Kansas*, 888 F. Supp. 1073, 1079 (D. Ka. 1995), *aff'd*, 81 F.3d 172 (10<sup>th</sup> Cir. 1996), cited with approval by the Eleventh Circuit in *Dale v. Moore*, 121 F.3d 624, 627 (11<sup>th</sup> Cir. 1997).

fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Dillard v. Baldwin County Com'rs*, 225 F.3d 1271, 1275 (11<sup>th</sup> Cir. 2000); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Moreover, federal courts “should not speculate concerning the existence of standing or piece together support for the plaintiff.” *Stoddard v. Supreme Court et. al.*, No. 03-11662, at page 12 (11<sup>th</sup> Cir. October 24, 2003) (per curiam) (copy attached at Exhibit “F”).

The ripeness inquiry requires a determination of “(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration.” *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11<sup>th</sup> Cir. 1997) (“whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision making by the court”) (citations omitted). The ripeness doctrine “prevents courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Stoddard v. Supreme Court et. al.*, *supra*, at page 12 (copy attached at Exhibit “F”). Thus, “claims are less likely to be considered fit for adjudication when they require speculation about contingent future events.” *Id.*

Plaintiff has failed to allege facts to demonstrate that she has standing to make any claim for injunctive relief or to show that any such claim is ripe for disposition. *See Stoddard v. Supreme Court et. al.*, No. 03-11662 (11<sup>th</sup> Cir. October 24, 2003) (affirming dismissal of action for declaratory relief against Florida Supreme Court, FBBE and FBBE's

Executive Director, for lack of standing where plaintiff's previously-filed application for admission had been inactivated and was thus being held in abeyance) ("As [plaintiff] has no bar application pending, ... any injury to him requiring equitable relief is conjectural and hypothetical, not actual and imminent. We can only speculate as to whether he will resubmit his application and the final outcome. This matter is therefore not ripe and [plaintiff] does not have standing to pursue this action.") (copy attached at Exhibit "F").

### **B. *Younger* Abstention Doctrine**

For the reasons stated above, if Plaintiff does *not* have a pending application for admission to the Florida Bar, then Plaintiff lacks standing to seek injunctive relief, and her claims are not ripe. Moreover, to the extent that Plaintiff is continuing to seek admission to The Florida Bar on her application, then this action is subject to dismissal based on the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). "Under *Younger v. Harris* and its progeny, federal district courts *must refrain* from enjoining pending state court proceedings except under special circumstances." *Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 124 F.3d 1258, 1261 (11<sup>th</sup> Cir. 1997) (citations omitted) (emphasis added), *cert. denied*, 523 U.S. 1047 (1998). Moreover, "the principles of *Younger* apply to declaratory judgments that would effectively enjoin state proceedings." *Id.*

In *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1982), a bar Ethics Committee investigated an attorney, made a finding of probable cause, and then served a formal statement of charges on the attorney. Instead of filing an answer to the disciplinary complaint, the attorney filed suit in federal district court, alleging that the New

Jersey Bar's disciplinary rules violated his First Amendment free speech rights and "were facially vague and overbroad." *Id.* at 428-29. The district court dismissed the complaint based on the *Younger* abstention doctrine, but the court of appeals reversed. *Id.* In holding that dismissal of the federal district court action was proper, the Supreme Court in *Middlesex County* set out three factors to guide the application of the *Younger* abstention doctrine:

[F]irst, do state bar disciplinary proceedings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

*Id.* at 432 (emphasis in original).

The Court in *Middlesex* answered each of these questions in the affirmative; and Florida courts have reached the same conclusion regarding the Bar admission process in Florida. See *Lawrence v. Schwiep et al.*, Case No. 4:05cv14-RH/WCS (Oct. 7, 2005) (Hinkle, J.) (dismissing Bar applicant's action against Chair and Executive Director of FBBE based on *Younger* abstention doctrine) (copy attached at Exhibit "G"). See also *Edwards v. Illinois Bd. of Admissions to the Bar*, 2000 WL 343333 (N.D. Ill 2000) (dismissing action relating to pending application for admission to Illinois Bar, based on *Younger* abstention doctrine), *aff'd on other grounds*, 261 F.3d 723 (7<sup>th</sup> Cir. 2001) (affirming dismissal, based on *Rooker-Feldman* doctrine rather than abstention doctrine, because proceeding on application for admission had reached a final decision during pendency of appeal).

#### **V. Plaintiff's Claims are Barred by the Eleventh Amendment.**

Even if Plaintiff's claims were otherwise properly before the court, all of Plaintiff's

claims against the FBBE and Hunter, Ressel and Jane Doe in their official capacities, whether for damages or retrospective injunctive relief, would be barred by the Eleventh Amendment.

The FBBE is an official arm of the Supreme Court of Florida. Fla. Bar Admiss. R. 1-12; *In re Board of Florida Bar Examiners*, 353 So.2d 98 (Fla. 1977). It is “well-settled that Eleventh Amendment immunity bars suits brought in federal court when the State itself is sued and when an ‘arm of the State’ is sued.” *Manders v. Lee*, 338 F.3d 1304, 1308-09 (11<sup>th</sup> Cir. 2003) (citation omitted), *cert. denied*, 72 U.S.L.W. 3310 (U.S. Jan. 12, 2004). Additionally, “state officials sued in their official capacity are also protected by the amendment.” *Harbert Intern., Inc. v. James*, 157 F.3d 1271, 1277 (11<sup>th</sup> Cir. 1998). Thus, the Eleventh Amendment applies to the claims against the FBBE and its officers or agents in their official capacities. *See Diaz v. Moore*, 861 F. Supp. 1041, 1049 (N.D. Fla. 1994) (holding that Eleventh Amendment applied to bar claims against the Board as an entity and the Board’s Executive Director).<sup>8</sup>

#### **VI. Individual FBBE Defendants are Entitled to Absolute (Judicial) Immunity from any Claim for Damages.**

Judges are “absolutely immune from civil liability under section 1983 for acts performed in their judicial capacity, provided such acts are not done in the ‘clear absence

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<sup>8</sup> There has been no waiver or proper Congressional abrogation of Eleventh Amendment immunity with respect to Plaintiff’s claims. *See Quern v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979) (no proper Congressional abrogation regarding § 1983); *Zabriskie v. Court Admin.*, 2006 WL 231528 (11<sup>th</sup> Cir. Feb. 1, 2006) (in action alleging violation of right of access to courts, Eleventh Circuit held that the Eleventh Amendment barred the action); *Miller v. King*, 384 F.3d 1248 (11<sup>th</sup> Cir. 2004) (Eleventh Circuit holds, subsequent to the Supreme Court’s decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), that Eleventh Amendment barred ADA Title II claim by prison inmate who alleged disability discrimination in violation of Eighth Amendment).

of all jurisdiction.” *Roland v. E.W. Phillips*, 19 F.3d 552 (11<sup>th</sup> Cir. 1994) (citation omitted). The doctrine of judicial immunity is well established as an essential way of protecting the independence of judges and other decision-makers whose decisions may have adverse effects on certain individuals. *Forrester v. White*, 484 U.S. 219 (1988). Judicial immunity has therefore long been part of federal and Florida law. *See Roland v. E.W. Phillips*, 19 F.3d 552 (11<sup>th</sup> Cir. 1994); *Office of the State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So. 2d 1097 (Fla. 1993)(“[A] strict guarantee of judicial immunity is necessary to preserve the effectiveness and impartiality of judicial and quasi-judicial offices.”); *Johnson v. Harris*, 645 So. 2d 96 (Fla. 5th DCA 1994)(affirming trial court's granting of motion to dismiss, with prejudice, action against judge and judge's assistant based on absolute judicial immunity), *rev. denied*, 659 So. 2d 271 (Fla. 1995); *Rivello v. Cooper City*, 322 So. 2d 602 (Fla. 4th DCA 1975)(affirming motion to dismiss, with prejudice, action against judge for failure to place probationer on supervised probation based on judicial immunity). Thus, acts performed within the scope of judicial capacity and within the jurisdiction of the actor will not support a claim for damages. *See Berry v. State*, 400 So. 2d 80 (Fla. 4th DCA 1981), *rev. denied*, 411 So. 2d 380 (Fla. 1981).

Florida's constitutional scheme, court rules and court decisions all provide that the doctrine of judicial immunity necessarily extends to actions taken during the process of admitting attorneys to the practice of law in this state. *See* Art. V, § 15, Fla. Const. (Supreme Court of Florida “shall have *exclusive jurisdiction* to regulate the admission of persons to the practice of law . . . .”) (emphasis added); Fla. Bar Admiss. R. 1-11

(“admission of attorneys to the practice of the profession of law *is a judicial function*”) (emphasis added). *See also Florida Board of Bar Examiners v. Applicant*, 443 So. 2d 71, 74 (Fla. 1983); *Florida Board of Bar Examiners v. G.W.L.*, 364 So. 2d 454, 455 n.1 (Fla. 1978); *In re Florida Board of Bar Examiners*, 353 So. 2d 98, 100 (Fla. 1977).

“Nonjudicial officers are encompassed by a judge’s absolute immunity when their official duties ‘have an integral relationship with the judicial process.’” *Roland v. E.W. Phillips*, 19 F.3d 552, 555 (11<sup>th</sup> Cir. 1994). The FBBE, and its staff, in all of their conduct related to Plaintiff’s application for admission, carried out duties imposed on the FBBE by the Supreme Court of Florida. *See Fla. Bar Admiss. R. 1-12* (Florida Supreme Court created the Board as an agency of the Court for the express purpose of regulating the admission of applicants to The Florida Bar); *Dale v. Moore*, 121 F.3d 624, 627 (11<sup>th</sup> Cir. 1997) (referring to FBBE’s character and fitness investigatory process and determination as “judicial inquiry”); *Marin v. Hazelton*, 916 F.2d 716 (9<sup>th</sup> Cir. 1990) (Table, Text in Westlaw 1990 WL 157128) (“Determining whether a particular individual is suited to be a member of the bar is *inherently* a judicial function ... .”), *cert. denied*, 502 U.S. 888 (1991) (emphasis added). The FBBE must be allowed to evaluate, investigate, consider and make decisions with regard to applicants to The Bar, free and independent of the threat of suit on the part of a disappointed applicant. Accordingly, and as discussed above, the acts complained of by Plaintiff Ford occurred in the course of a proceeding that is judicial in nature, for which the individual Defendants are entitled to absolute judicial immunity. *See Diaz v. Moore*, 861 F. Supp. 1041 (N.D. Fla. 1994) (holding that the Florida Board of Bar Examiners, its

Executive Director and the Chairman of the Board, were entitled to absolute judicial immunity in connection with performance of their duties in the attorney admission process).

All of the actions which are the subject of Plaintiff's claims against Defendants relate to actions taken by them as employees of the FBBE; and such actions were taken *because* they were actions that only they, as agents of the FBBE (as agent of the Florida Supreme Court) could take during the process of admitting attorneys to the practice of law in Florida. No other persons could have performed the actions that form the crux of Ford's claims - they were the FBBE's function designated by the Florida Supreme Court. All of the actions which are the subject of Ford's complaint were exercises of discretionary decision-making by Defendants.<sup>9</sup> Therefore, it simply cannot be disputed that the FBBE's actions with respect to Ford's bar application were within the scope of the FBBE's judicial capacity and that such actions were within the FBBE's jurisdiction. *See Berry v. State*, 400 So. 2d 80, 83 (Fla. 4th DCA 1980), *rev. denied*, 411 So. 2d 380 (Fla. 1981). All of Plaintiff Ford's claims for damages are thus clearly barred by judicial immunity.<sup>10</sup>

**VII. Plaintiff Fails to State a Claim for Relief with respect to Counts I - X.**

In addition to the foregoing grounds for dismissal, Plaintiff also fails to state a claim for relief in the Complaint, and the action should thus be dismissed on this basis as well.<sup>11</sup>

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<sup>9</sup> In Florida, the clear remedy for a participant in a judicial process who has been aggrieved by a judicial officer's refusal or failure to perform a ministerial act is to seek a writ of mandamus from a higher tribunal. *See, e.g., City of Coral Gables v. Worley*, 44 So.2d 298, 300. (Fla. 1950).

<sup>10</sup> A fortiori, all of Plaintiff's claims for damages are likewise barred by qualified immunity.

<sup>11</sup> With the exception of Count IX, Plaintiff does not delineate whether the individual defendants are being sued in their official or personal capacities. Nevertheless, all claims are due to be dismissed without respect to this distinction.

Counts I and II - ADA and Rehabilitation Act. To state a claim for relief under the ADA, Plaintiff must show: (1) that she is a “qualified individual with a disability;” (2) that she was “excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity” or otherwise “discriminated [against] by such entity;” (3) “by reason of such disability.” 42 U.S.C. § 12132; Kornblau v. Dade County, 86 F.3d 193, 194 (11<sup>th</sup> Cir. 1996). Under the Rehabilitation Act, Plaintiff must satisfy the foregoing requirements and must also show that the defendant received federal funds. See 29 USC §794(a). Plaintiff fails to state a claim against the FBBE Defendants in Counts I and II.<sup>12</sup>

Among other things, Plaintiff’s request that the FBBE average her Bar Examination test scores from different administrations would “fundamentally alter the measurement of the skills or knowledge the examination is intended to test” and is, therefore, not required under the ADA. *See* 28 C.F.R. § 36.309(b)(3); *Florida Board of Bar Examiners re S.G.*, 707 So.2d 323 (Fla. 1998)(bar applicant given extra time to complete bar examination not entitled to have FBBE average scores on parts A and B of exams taken at separate administrations - this was not a request for accommodation *in the administration* of the exam, but *in the scoring of her exam*, which would fundamentally alter the measurement of the skills or knowledge the examination is intended to test).

Count III, IV, V, VIII & X - Section 1983, 1985 and Constitutional Claims. Plaintiff “cannot maintain a Section 1983 action in lieu of--or in addition to--a Rehabilitation Act or

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<sup>12</sup> Moreover, the individual FBBE defendants are also entitled to dismissal of these claims because there is no individual liability regarding plaintiff’s ADA and Rehabilitation Act Claims. *See Shotz v. City of Plantation*, 344 F.3d 1161, 1171-72 & n. 17 (11<sup>th</sup> Cir. 2003).

ADA cause of action” to the extent “the alleged deprivation is the [plaintiff’s] rights created by the Rehabilitation Act and the ADA.” *Badillo v. Thorpe*, 158 Fed.Appx. 208 (11<sup>th</sup> Cir. 2005), citing *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1531 (11<sup>th</sup> Cir.1997). Plaintiff also may not sue the FBBE or its employees in their official capacities for money damages under Section 1983. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989).

Plaintiff fails to allege facts that rise to the level of a constitutional violation in any event. *See Kirkpatrick v. Shaw*, 70 F.3d 100, 102-04 (11<sup>th</sup> Cir. 1995) (“right to practice law is not a fundamental right and therefore rational basis review is the appropriate standard for classifications affecting applicants for admission to the bar”); *Cline v. Supreme Court of Georgia*, 781 F.2d 1541 (11<sup>th</sup> Cir. 1986) (affirming dismissal of bar applicant’s due process and equal protection challenges to Georgia rules limiting number of times applicants can take Georgia bar exam and making distinctions based on whether applicant graduated from approved or non-approved law schools); *Jones v. Bd. of Comm’s of Alabama State Bar*, 737 F.2d 996 (11<sup>th</sup> Cir.1984)(affirming dismissal of bar applicant’s due process and equal protection challenges to Alabama rule limiting number of times an applicant can sit for Alabama bar exam); *Giannini v. Committee of Bar Examiners of State Bar of California*, 847 F.2d 1434 (9<sup>th</sup> Cir. 1988) (dismissing due process and equal protection claims by bar applicant because, under such circumstances, there has been no “deprivation”).<sup>13</sup>

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<sup>13</sup>Additionally, to state a § 1985 claim, the plaintiff must allege “invidious discriminatory intent” on the part of the defendants. *Trawinski v. United Techs.*, 313 F.3d 1295, 1299 (11<sup>th</sup> Cir.2002). “[C]onclusory, vague, and general allegations of conspiracy may justify dismissal of a complaint.” *Kearson v. S. Bell Tel. & Tel. Co.*, 763 F.3d 405, 407 (11<sup>th</sup> Cir.1985) (per curiam).

Counts VI & VII - Negligence. Plaintiff likewise fails to state a claim for relief based on negligence. *See, e.g.*, Section 768.28(9)(a), *Fla. Stat.*; *Trianon Park Condominium Assoc. v. City of Hialeah*, 468 So.2d 912, 917 (Fla.1985)(standard for common law liability of governmental entities); *Holodak v. Lockwood*, 726 So.2d 815 (Fla. 4<sup>th</sup> DCA 1999) (driver failed to state negligence claim against clerk for erroneous suspension of drivers license based on clerk's negligent failure to properly record driver's payment of traffic fines); *Monroe v. Sarasota County School Bd.*, 746 So.2d 530 (Fla. 2d DCA 1999) (plaintiff failed to state negligence claim where plaintiff did not allege bodily injury or property damage, but sought only economic damages based on allegation that School Board administrators negligently omitted his name from list of potential eligible employees); *R.J. v. Humana of Fla., Inc.*, 652 So.2d 360, 362 (Fla.1995)(stating Florida's impact rule).<sup>14</sup>

### VIII. CONCLUSION

Based on the foregoing, the FBBE Defendants respectfully request that the Court dismiss Plaintiff's Complaint.

Respectfully submitted,

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<sup>14</sup> Count IX merely incorporates claims in other Counts and is also due to be dismissed.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been furnished by electronic service via ECM/CM filing and/or United States Mail this 23rd day of March, 2006, to Laura Ford, pro se, 3020 Port Royal Drive, Orlando, FL 32827 and Leah L. Marino, Florida Office of the Attorney General, The Capitol, Suite PL01, Tallahassee, FL 32399.

s/James J. Dean  
James J. Dean