

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

FRANK J. LAWRENCE, JR.,

Plaintiff,

Case No.: 4:05cv14 RH/WCS

vs.

PAUL J. SCHWIEP, et al.,

Defendants.

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**MOTION TO DISMISS AMENDED COMPLAINT BY
DEFENDANTS SCHWIEP AND HUNTER
(and MEMORANDUM OF LAW IN SUPPORT)**

Defendants Paul J. Schwiep (“Schwiep”) and Eleanor Mitchell Hunter (“Hunter”), Chairman and Executive Director of the Board of the Florida Board of Bar Examiners (“FBBE” or “Board”), respectively, move to dismiss Plaintiff’s amended complaint (doc. 9) pursuant to the Younger abstention doctrine; or in the alternative, Defendants move to dismiss the complaint pursuant to Rule 12(b)(1), Fed. R. Civ. P., for lack of subject matter jurisdiction under the Rooker-Feldman doctrine and/or the Eleventh Amendment. Defendants also move to dismiss pursuant to Rule 12(b)(6) for failure to state a claim.

I. INTRODUCTION

Plaintiff Frank J. Lawrence (“Plaintiff” or “Lawrence”) seeks relief under 42 U.S.C. § 1983, alleging that the FBBE has violated his First and Fourteenth Amendment rights to free speech and due process during the proceeding on his application for admission to The Florida

Bar. Plaintiff seeks declaratory and injunctive relief against Defendants Schwiep and Hunter in their official capacities. Plaintiff also seeks attorney's fees pursuant to 42 U.S.C. §1988.

A. Rules of the Florida Supreme Court Relating to Bar Admissions

Under the Rules of the Florida Supreme Court Relating to Bar Admissions (“Bar Admission Rules”), all applicants seeking admission to The Florida Bar must “produce satisfactory evidence of good moral character, an adequate knowledge of the standards and ideals of the profession, and proof that the applicant is otherwise fit to take the oath and perform the obligations and responsibilities of an attorney.” Fla. Bar Admiss. R. 2-12. The Board, as an arm of the Court, makes a determination whether applicants have provided satisfactory evidence of good moral character and fitness. Fla. Bar Admiss. R. 3-12. The primary purpose of the character and fitness screening “is to protect the public and safeguard the judicial system.” Fla. Bar Admiss. R. 1-14.1.

The Bar Admission Rules relating to the character and fitness determination set forth criteria to guide the Board in making this determination. Rule 3-10 sets forth the “Standards of an Attorney,” and states that “An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them.” Fla. Bar Admiss. R. 3-10. The Bar Admission Rules also set forth “Essential Eligibility Requirements,” which include: “[k]nowledge of the fundamental principles of law and their application” and the “ability to and the likelihood that, in the practice of law, one will: (1) Comply with deadlines; (2) Communicate candidly and civilly with clients, attorneys, courts, and others; (3) Conduct financial dealings in a responsible, honest, and trustworthy

manner; (4) Avoid acts that are illegal, dishonest, fraudulent, or deceitful; and (5) Conduct oneself in accordance with the requirements of applicable state, local, and federal laws, regulations, and statutes; any applicable order of a court or tribunal; and the Rules of Professional Conduct.” Fla. Bar Admiss. R. 3-10.1. Finally, the Rules also include a list of “disqualifying conduct” (Fla. Bar Admiss. R. 3-11) and a list of factors that the Board is to use in assigning weight and significance to an applicant’s prior conduct. Fla. Bar Admiss. R. 3-12.

Moreover, the Florida Supreme Court interprets and applies the Bar Admission Rules so that application of the Rules will conform with constitutional requirements. See Florida Board of Bar Examiners re: Eimers, 358 So.2d 7 (Fla. 1978) (holding that character and fitness inquiry must satisfy requirements of Fourteenth Amendment’s due process clause, such that allegedly disqualifying conduct must be rationally related to issue of fitness to practice law); Florida Board of Bar Examiners re: Doe, 770 So.2d 670, 674 (Fla. 2000) (same).

In connection with the FBBE’s character and fitness determination, the Board may request an applicant to appear for an informal investigative hearing. Fla. Bar Admiss. R. 3-22. At the conclusion of this informal hearing, the Board may make one of several determinations, including “that the applicant ... has established his or her qualifications as to character and fitness” or that further investigation is warranted or “that specifications be filed charging the applicant or registrant with matters which if proven would preclude a favorable finding by the Board.” Fla. Bar Admiss. R. 3-22.5.

Applicants are afforded the right to file an answer to the specifications and to a formal hearing on the specifications. At the formal hearing, the applicant has the right to

representation by counsel, to introduce testimony of witnesses and exhibits in his or her behalf, to compel the appearance of witnesses by subpoena, and to conduct cross examination of witnesses. Fla. Bar Admiss. R. 3-23 , 3-23.1 & 3-23.2. Absent consent of the applicant, the Board members who participate in the informal, investigatory hearing do not participate in the formal hearing. Fla. Bar Admiss. R. 3-23.2.

Following a formal hearing, the Board may make one of the following recommendations to the Florida Supreme Court: that the applicant has established his qualifications as to character and fitness, that the applicant be “conditionally admitted” on certain conditions, or that the applicant has not established his qualifications as to character and fitness. Fla. Bar Admiss. R. 3-23.6. Where the Board recommends an applicant for admission, the Bar Admission Rules provide that “[i]f the Court is satisfied as to the qualifications of the applicant so recommended, an order of admissions shall be made and entered” Fla. Bar Admiss. R. 5-11.

When the Board does not recommend that the applicant has established his qualifications as to character and fitness, the Board must issue “written” findings of fact and conclusions of law; and such findings must be supported by “competent, substantial evidence in the formal hearing record.” Fla. Bar Admiss. R. 3-23.7. The applicant has the right to petition the Supreme Court of Florida for review of any such adverse recommendation. Fla. Bar Admiss. R. 3-40.1. In cases like that of the Plaintiff--involving an application for admission (as distinguished from an application for readmission)--the Board’s findings, conclusions and recommendation becomes “final if not appealed” to the Florida Supreme

Court. Fla. Bar Admiss. R. 3-23.7.

A bar applicant who seeks Supreme Court review of the FBBE's character and fitness recommendation may raise federal constitutional and federal statutory claims. See Dale v. Moore, 121 F.3d 624, 627 (11th Cir. 1997) (Florida bar applicant had opportunity to raise ADA argument in applicant's answer to specifications and in applicant's petition to Florida Supreme Court for review of Board's determination regarding applicant's character and fitness); Florida Board of Bar Examiners re: Applicant, 443 So.2d 71, 76 (Fla. 1984) (considering federal constitutional claims of bar admission applicant, on petition to Florida Supreme Court).¹

B. Plaintiff's Allegations and Claims in the Amended Complaint

Lawrence alleges that he is a "present applicant" for admission to The Florida Bar, whose application for admission remains "pending." (Amended Complaint, pp. 1-2) (doc. 9) (hereafter, "Complaint"). Lawrence has passed the Florida Bar Exam. (Complaint, ¶3).

In the course of conducting its background investigation regarding Lawrence's character and fitness for admission, the Board decided to hold an informal, investigative hearing in accordance with Rule 3-22 of the Bar Admission Rules. Accordingly, the Board requested that Mr. Lawrence appear for an informal hearing, and an informal hearing was held. (Complaint, ¶26). At the conclusion of the informal hearing, instead of making a determination that Mr. Lawrence had established his qualifications as to character and fitness for admission, the Board made a determination to file specifications relating to matters which,

¹Additionally, any applicant whose character and fitness investigation exceeds nine months from the applicant's submission of a completed bar application may petition the Supreme Court for an order directing the Board to conclude its investigation. Fla. Bar Admiss. R. 3-40.2.

if proven, would preclude a favorable finding by the Board. (Fla. Bar Admiss. R. 3-23.7). Accordingly, specifications were filed. (Complaint, ¶39).

After the specifications were filed, the Board held a formal hearing relating to the specifications. Lawrence appeared for the formal hearing. (Complaint, ¶43). Lawrence alleges that he began the formal hearing by stating that he was reserving his “as-applied” federal constitutional claims and defenses (that he had previously served on the Board), for resolution in a federal forum. (Complaint, ¶43). Lawrence also alleges that he asked the formal hearing panel to permit him to withdraw his application for admission without prejudice and that the formal hearing panel denied this request. (Complaint, ¶44). See Fla. Bar Admiss. R. 3-15 (“The Board shall consider acceptance of the request [for withdrawal of the application] but may continue its investigative and adjudicatory functions to conclusion.”).²

Lawrence claims that the Bar Admission Rules relating to the FBBE’s character and fitness screening process (Rule 3) give the FBBE “unbridled discretion to evaluate an applicant’s character” and Lawrence alleges further that the FBBE has violated his constitutional rights in connection with this aspect of his bar admission proceeding. (Complaint, ¶11). Specifically, Lawrence alleges that the FBBE delayed his character and fitness review process and filed specifications against him in retaliation for his allegedly protected First Amendment activity; and Lawrence further alleges that the specifications filed

² Although not alleged in Plaintiff’s Amended Complaint (which is dated February 14, 2005), the FBBE (on February 18, 2005) issued its written Findings, Conclusions and Recommendation relating to Lawrence’s application for admission to The Florida Bar. The Florida Supreme Court has not yet acted on Lawrence’s application for admission.

against him by the FBBE are themselves based on protected First Amendment activity. (Complaint, pp. 1-3 & ¶¶ 40-41, 47, 49, 57, 60). Lawrence also claims that the FBBE violated his due process rights during the course of his bar application proceeding by its misapplication of particular Bar Admission Rules and/or the FBBE’s application of certain alleged unwritten policies. (See, e.g., Complaint, ¶¶ 15, 19, 26, 30-38, 45, 52, 53, 72).³

Lawrence asks the Court to issue an injunction against the FBBE and Justice Barbara Pariente regarding his pending bar application. Among other things, Lawrence requests this Court to order the FBBE: (i) to “immediately accept and process Plaintiff’s reapplication” (Complaint, p. 35);⁴ (ii) to not charge any “additional costs or penalties” relating to the review of such reapplication (*Id.*); (iii) to process said reapplication “within 3 months or less” and to “waive the requirement of Rule 2-29 that would find Plaintiff’s application to be stale;” and Lawrence requests that the Court enjoin Justice Pariente “from denying Plaintiff a license to practice law without consideration of constitutional procedural safeguards concerning Plaintiff’s constitutionally protected activities.” (*Id.*).

II. ARGUMENT

A. This Action should be Dismissed under the Younger Abstention Doctrine

Under Younger v. Harris, 401 U.S. 37 (1971) and its progeny, “federal district courts

³ Because Defendants are moving to dismiss the Amended Complaint pursuant to Rule 12(b), Defendants have not, in the body of this motion, addressed the factual accuracy of Lawrence’s allegations. However, the Defendants categorically deny that the FBBE, or any member or employee thereof, has acted inappropriately or otherwise taken any actions in violation of Lawrence’s constitutional rights.

⁴ Plaintiff does not allege that he has filed a “reapplication.”

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 (11th Cir. 1997) (citations omitted), cert. denied, 523 U.S. 1047 (1998).⁵ In Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423 (1982), the Supreme Court explained the important reasons for the Younger abstention doctrine:

Younger v. Harris, supra, and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying Younger abstention have been frequently reiterated by this Court. The notion of “comity” includes “a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”

Id. at 431 (citations omitted).

Federal courts have abstained under the Younger doctrine in deference to state bar attorney admission and attorney disciplinary proceedings. See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Assoc., 457 U.S. 423 (1982) (applying Younger abstention to state bar disciplinary proceeding); Edwards v. Illinois Bd. of Admissions to the Bar, 2000 WL 343333 (N.D. Ill. 2000) (applying Younger abstention to state bar admission proceeding), aff’d, 261 F.3d 723 (7th Cir. 2001) (where Illinois Supreme Court made determination on bar application during the appeal, Seventh Circuit affirmed based on Rooker-Feldman doctrine).

In Middlesex County, supra, a bar Ethics Committee investigated an attorney, made

⁵ Moreover, “the principles of Younger apply to declaratory judgments that would effectively enjoin state proceedings.” Id.

a finding of probable cause, and then served a formal statement of charges on the attorney. Instead of filing an answer to the complaint in the disciplinary proceeding, 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 Supreme Court held that Younger abstention was warranted, and the Court set out three factors to guide the application of the Younger abstention doctrine: “*first*, 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).

1. Plaintiff’s Application for Admission to the Florida Bar is an Ongoing State Judicial Proceeding

Lawrence alleges in his Amended Complaint that his application for admission remains pending and that he remains a current applicant for admission. (Complaint, pp. 1-2). Accordingly, Lawrence’s attorney admission proceeding is “ongoing.”⁶ Thus, the only question as to the first Younger requirement is whether the proceeding is judicial in nature.

In determining that the New Jersey bar disciplinary proceeding was judicial in nature, the Court in Middlesex County relied on the facts that the Ethics Committee was an “arm of the court” in performing its attorney discipline functions and that the New Jersey Supreme

⁶ Although the FBBE has issued its written Findings, Conclusions and Recommendation in accordance with Bar Admission Rule 3-23.7, Lawrence correctly alleges that his application for admission remains pending such that the proceeding is “ongoing.”

Court considered the attorney disciplinary proceeding to be judicial in nature. Id. at 433. The bar admission process in Florida, like the attorney disciplinary process in New Jersey, is clearly judicial in nature. The Florida Constitution provides that the Supreme Court of Florida “shall have exclusive jurisdiction to regulate the admission of persons to the practice of law” Art. V, § 15, Fla. Const. (emphasis added). The 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. Fla. Bar Admiss. R. 1-12. 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).⁷ And the Florida Supreme Court has declared, by Rule, that the “admission of attorneys to the practice of the profession of law is a judicial function.” Fla. Bar Admiss. R. 1-11 (emphasis added). Thus, the FBBE’s proceeding on Lawrence’s application for admission is judicial in nature. See, e.g., Dale v. Moore, 121 F.3d 624, 627 (11th Cir. 1997) (attorney admission process is judicial proceeding).

2. Florida Bar Admission Proceedings Implicate Important State Interests

As to the second Middlesex County factor, the Court decided that New Jersey has “an extremely important interest in maintaining and assuring the professional conduct of attorneys it licenses” inasmuch as “the ultimate objective of such control is ‘the protection of the public,

⁷ The Florida Supreme Court has thus held that it has “inherent and exclusive constitutional authority over its agencies who act on its behalf,” The Florida Bar, 398 So. 2d 446, 447 (Fla. 1981) and that “[a]s an arm of this Court, the Board is answerable solely to this tribunal.” In re Board of Florida Bar Examiners, 353 So. 2d at 100.

the purification of the bar, and the prevention of a re-occurrence.” Id. at 434. The Court’s observations about New Jersey’s interest is equally applicable to the instant case: “The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice.” Id. Likewise, the “primary purpose of the character and fitness screening before admission to The Florida Bar is to protect the public and safeguard the judicial system,” Fla. Bar Admiss. R. 1-14.1, and the State of Florida thus has an extremely important interest in the attorney admission process. See Florida Board of Bar Examiners re: Applicant, 443 So.2d 71, 75 (Fla. 1984) (“[T]he state’s interest in ensuring that only those fit to practice law are admitted to the Bar is a compelling state interest.”).

3. There is an Adequate Opportunity in the State Proceedings for Plaintiff to Raise Constitutional Challenges

Like the bar disciplinary proceedings in New Jersey, id. at 435, bar applicants in Florida have the opportunity to raise constitutional challenges and other arguments during the bar admission proceeding. For instance, applicants are permitted to file an answer to the specifications and are thus afforded an opportunity to raise constitutional challenges and arguments in this context. Cf. Dale v. Moore, 121 F.3d 624, 627 (11th Cir. 1997) (bar applicant had opportunity to raise arguments under ADA in answer to FBBE’s specifications). Moreover, applicants are also afforded the opportunity to raise constitutional challenges and other arguments in a petition for review by the Florida Supreme Court. See Florida Board of Bar Examiners re: Applicant, 443 So.2d 71 (Fla. 1984) (Florida Supreme Court considered applicant’s argument that FBBE violated applicant’s federal constitutional right to due process

in connection with FBBE's character and fitness determination); Coleman v. Watts, 81 So.2d 650 (Fla. 1950) (reviewing applicant's due process challenge to action by FBBE). Cf. Florida Board of Bar Examiners re: S.G., 707 So.2d 323 (Fla. 1998) (Florida Supreme Court considered bar applicant's challenge to FBBE's adverse recommendation regarding application for admission, based on alleged violations of Americans with Disabilities Act); Dale v. Moore, 121 F.3d 624, 627 (11th Cir. 1997) (stating that bar applicant could have asserted alleged violation of ADA by FBBE in petition to Florida Supreme Court).⁸ Thus, Florida's attorney admission process satisfies the third Middlesex County factor that there be an adequate opportunity in the state proceeding to raise constitutional challenges.

Accordingly, this court should dismiss the instant action based on the Younger abstention doctrine. See Butler v. Alabama Judicial Inquiry Comm'n, 261 F.3d 1154 (2001) (holding Younger abstention doctrine applied, and thus vacating district court's judgment and remanding with instructions to dismiss federal constitutional challenge by Alabama Supreme Court Justice to ongoing disciplinary proceeding under Alabama Canon of Judicial Ethics, because plaintiff failed to overcome presumption that state courts will safeguard federal

⁸ The U.S. Supreme Court in Middlesex County stated that the plaintiff had an adequate opportunity to raise federal constitutional claims in the state proceeding – even assuming that he would not be able to raise such claims during the disciplinary proceeding itself – because the plaintiff could raise federal constitutional claims in a petition for review of any disciplinary action by the New Jersey Supreme Court. 457 U.S. at 435-37 & note 15. See also Ohio Civil Rights Comm'n v. Dayton Christian Schools, 477 U.S. 619, 629 (1986) (“it is sufficient under Middlesex, supra, ... that constitutional claims may be raised in state-court judicial review of the administrative proceeding”). Thus, the third Middlesex factor for Younger abstention is satisfied notwithstanding any allegation by Lawrence that the FBBE is not required to adjudicate his constitutional claims and that he would have to raise such defenses in a petition for review by the Florida Supreme Court.

constitutional rights); Edwards v. Illinois Bd. of Admissions to the Bar, 2000 WL 343333 (N.D. Ill. 2000) (where bar applicant sued for declaratory and injunctive relief relating to application for admission, alleging Fourteenth Amendment due process and ADA violations, district court dismissed action based on Younger abstention doctrine), aff'd on other grounds, 261 F.3d 723 (7th Cir. 2001).⁹

4. Plaintiff's purported England Reservation is not applicable

Lawrence's purported reservation of claims under England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964), is irrelevant to this Court's determination regarding whether to abstain under Younger v. Harris. In England, the Court established a procedure whereby a federal-court litigant, who is forced into state court because of Pullman abstention, may (in the state court proceeding) reserve the right to return to federal court to litigate his federal claim, upon conclusion of the state court proceeding. Thus, an England reservation does not prevent a federal district court from abstaining; rather, a properly-asserted England reservation, in an appropriate case, merely avoids the preclusive effect of the state court judgment when the litigant later asserts the previously-reserved federal claim in federal court. See Wright & Miller, 18B, Federal Practice and Procedure, Juris. 2nd, §4471.1 (discussing

⁹ Although Lawrence makes a conclusory allegation of retaliation and bad faith against the FBBE's Executive Director (Complaint, Par. 49), this bare allegation is insufficient to deny Younger abstention. See Crenshaw v. Supreme Court of Indiana, 170 F.3d 725 (7th Cir. 1999) (affirming dismissal of attorney disciplinary proceeding based on Younger abstention, notwithstanding plaintiff's allegations of bias and retaliation in disciplinary proceeding, because plaintiff failed to "allege specific facts to support her inferences of bad faith, bias and retaliation," noting that nothing in the record indicated that the Indiana Supreme Court would not fairly consider plaintiff's constitutional claim), cert. denied, 528 U.S. 871 (1999).

England reservation).¹⁰ Thus, in the instant case, Plaintiff's purported England reservation is irrelevant to the analysis of whether this Court should abstain under Younger v. Harris.

B. This Court lacks subject matter jurisdiction under Rooker-Feldman Doctrine

For the reasons explained above, this action should be dismissed based on the Younger abstention doctrine in deference to the ongoing State judicial proceeding. Additionally, the action also should be dismissed with respect to Defendants Schwiep and Hunter, under the 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.¹¹ Moreover, the doctrine also applies to decisions of committees or boards, acting under the direct supervision and control of the State's highest

¹⁰ Defendants do not concede that Plaintiff has made a proper England reservation, nor do Defendants concede that Plaintiff is entitled to litigate his federal claims in a federal forum upon conclusion of the state judicial proceeding on his application for admission.

¹¹ 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.

court, in connection with applications for admission to the Bar of a State. See Dale v. Moore, 121 F.3d 624, 627 (11th 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 (6th Cir. 1996).

The gravamen of Lawrence’s complaint is that the FBBE declined, at the informal hearing phase, to make a determination that Lawrence had established his qualifications as to character and fitness; and instead, the Board decided to file specifications against him and to hold a formal hearing on the specifications so filed. (Complaint, ¶55: “Plaintiff claims a present right to admission to the Florida Bar, given his passing Florida Bar Examination score and his submitted proofs as to his good moral character.”). Accordingly, Lawrence is, in effect, seeking federal district court review of a decision of an arm of the Florida Supreme Court relating to bar admissions, contrary to the Rooker-Feldman doctrine. Lawrence’s action is thus barred by the Rooker-Feldman doctrine.

Lawrence may attempt to avoid the effect of the Rooker-Feldman doctrine by arguing that there has not yet been a final decision on his application for admission to The Florida Bar. However, as discussed above, this action is essentially a challenge to the Board’s determination to file specifications rather than recommend his admission prior to a formal hearing. This case thus fits well within the Rooker-Feldman framework.

In McCready v. Michigan State Bar, 881 F.Supp. 300 (W.D. Mich. 1995) (“McCready I”) and 926 F.Supp. 618 (W.D. Mich 1995), aff’d, 100 F.3d 957 (6th Cir. 1996) (“McCready II”), the court dismissed actions by bar applicants like the action of Lawrence in the instant

case.¹² The court in McCready I and McCready II applied the Rooker-Feldman doctrine even though the federal district court action had been filed “[d]uring the pendency of the investigation of plaintiff’s character and fitness to practice law, and before a final decision to grant or deny plaintiff’s application was made.” 881 F.Supp., at 302; 926 F.Supp., at 619 & 621 (plaintiff’s challenge in McCready II was “to defendant’s ongoing proceedings”). After a preliminary report was issued recommending against McCready’s admission to the bar, the Committee on Character and Fitness held an informal prehearing conference with him to discuss issues that would be addressed and the manner of proceeding at the formal hearing. However, McCready filed his federal court action before the formal hearing was held and thus prior to any final decision by the Michigan Supreme Court on his application. When suit was filed, the Committee’s character and fitness review was held in abeyance pending disposition of the federal action. 881 F.Supp., at 302.

The district court in McCready I held that the Rooker-Feldman doctrine barred McCready’s challenge relating to his bar application proceeding, reasoning:

Plaintiff correctly observes that he is not asking the Court to review the state’s final adjudication of his application. What he seeks, however, is no less intrusive and improper. It is in the nature of a preemptive appeal of anticipated interlocutory decisions in a state court proceeding. The relief requested is both premature and, under *Feldman*, addressed to the wrong court.

881 F.Supp., at 304. In its dismissal of McCready’s amended complaint in McCready II, the district court reaffirmed its earlier Rooker-Feldman holding, and the Sixth Circuit affirmed. McCready v. Michigan State Bar, 926 F.Supp. 618, 621 (W.D. Mich 1995) (plaintiff’s

¹² Following dismissal of the complaint in McCready I, the plaintiff amended his complaint and refiled his claims in McCready II. 926 F.Supp., at 619-20.

challenge to defendant’s “ongoing proceedings” barred by Rooker-Feldman), aff’d, 100 F.3d 957 (6th Cir. 1996) (Table).¹³ See also Bosdorf v. Beach, 79 F.Supp.2d 1337, 1340-42 (S.D. Fla. 1999) (because the Rooker- Feldman doctrine is based on “federalism—the dual dignity of state and federal courts in interpreting the law” and the spirit of the doctrine is to “prevent federal courts from interfering with state court rulings,” the Rooker-Feldman doctrine is not strictly limited to final state court judgments, but also applies to non-final and interlocutory orders of state courts) (collecting cases).¹⁴

Lawrence also cannot avoid the effect of the Rooker-Feldman doctrine by arguing that he 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 his 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 (10th Cir. 1996).¹⁵

In Dale v. Moore, 121 F.3d 624, 627 (11th Cir. 1997), a bar applicant filed his action before a final decision on his application had been made. However, the Board subsequently recommended his admission, and the Florida Supreme Court thus admitted the applicant to

¹³ The Sixth Circuit affirmed the district court’s dismissal “for the reasons stated by that court.” McCready, supra, 1996 WL 637484 (unpublished decision).

¹⁴ Moreover, as noted above, the FBBE has issued its written Findings, Conclusions and Recommendation relating to Lawrence’s application for admission. This fact is not subject to dispute by Lawrence. Thus, the FBBE’s character review process has concluded.

¹⁵ The Johnson decision was cited with approval by the Eleventh Circuit in Dale v. Moore, 121 F.3d 624, 627 (11th Cir. 1997).

The Bar. The court in Dale observed that the plaintiff was claiming to not be challenging the decision on his application for admission, but instead was seeking relief “under the ADA for the FBBE’s alleged disability discrimination against him in conducting a judicial inquiry into his fitness to practice law in Florida.” Id. at 627. However, the Eleventh Circuit held that resolution of the applicant’s federal claim “would require the federal district court to review the application of these rules to the particular factual circumstances of [applicant’s] case” and the applicant’s federal claim was thus barred by the Rooker-Feldman doctrine. Id. The same is true of Lawrence’s action in the instant case.

In Johnson v. State of Kansas, *supra*, a bar applicant filed suit, alleging violations of Title II of the ADA in connection with the decision made on his application for admission to the Bar of Kansas. The plaintiff in Johnson sought to avoid the effect of the Rooker-Feldman doctrine by alleging that he was not challenging the particular decision on his application for admission, but rather was challenging the validity of certain unwritten rules used by the Kansas Board of Law Examiners to discriminate against persons with a history of bipolar disorder. Johnson, 888 F.Supp. at 1083-84.

The court in Johnson held that “Johnson’s efforts to paint his case as a general challenge to state bar admission rules are unavailing” because the relief he seeks and the claims he alleges are “inextricably intertwined” with the determination that was made on his bar admission application. Id. at 1084. The court noted that the “overwhelming thrust of Johnson’s complaint” was a challenge to the decision on his application, rather than a general challenge to a rule. Thus, in order to adjudicate his federal action, the district court would necessarily “have to go beyond the mere review of the state rule as promulgated, to an

examination of the rule as applied” to Johnson in ““the particular factual circumstances”” of his bar admission proceeding. Id. (emphasis in original).

The court also observed that inasmuch as the challenged standards had never been formally promulgated as a rule of the Kansas Supreme Court, there were no “non-judicial” proceedings giving rise to the alleged rule. Id. Accordingly, the Rooker-Feldman exception--which allowed for federal district court review of a state-court’s legislative (“non-judicial”) rule promulgation proceeding--was not applicable. Id. at 1084-85. See Feldman, 460 U.S. at 486 (If the district court is merely being asked to assess the validity of a rule promulgated in a nonjudicial proceeding, the “proceedings giving rise to the rule are nonjudicial [and] the policies prohibiting United States District Court review of final state-court judgments are [thus] not implicated.”).

Like the plaintiffs in Dale v. Moore, supra, and Johnson v. State of Kansas, supra, Lawrence’s “efforts to paint his case as a general challenge to state bar admission rules is unavailing” because the relief he seeks is inextricably intertwined with the determinations made in connection with the particular facts relating to his application for admission. See Stoddard v. Supreme Court et al., Case No. 4:02-CV-106-SPM (United States District Court, Northern District of Florida) (Mickle, J.) (dismissing bar applicant’s challenge to actions of FBBE in connection with application for admission under Rooker-Feldman doctrine), aff’d based on lack of standing, No. 03-11662 (11th Cir. Oct. 24, 2003) (copy attached at Exhibit A); McCready v. Michigan State Bar, 881 F.Supp. 300 (W.D. Mich. 1995) (dismissing ADA and procedural due process claims, based on Rooker-Feldman doctrine, notwithstanding plaintiff’s claim that he was making a general challenge to regular practice of Character and

Fitness Committee to require “certain” bar applicants to undergo psychiatric evaluations, because there was no formally promulgated rule and the Committee was exercising discretionary decision-making of a judicial nature in requiring a psychiatric examination; thus, adjudication of plaintiff’s claim was inextricably intertwined with the particular facts of plaintiff’s bar application proceeding).

Finally, Lawrence also cannot avoid the effect of Rooker-Feldman by arguing that he has reserved the right to assert his “as-applied” federal claims in a federal forum under England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964). The Supreme Court, in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), expressly distinguished the Feldman case from the circumstances in England because England “arose in the abstention context.” Id. at 480 n. 14. Moreover, the Supreme Court expressly rejected the former Fifth Circuit’s contrary decision in Dasher v. Supreme Court of Texas, 658 F.2d 1045 (5th Cir. 1981), stating as follows:

If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court’s denial in a judicial proceeding of a particular plaintiff’s application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do. Moreover, the fact that we may not have jurisdiction to review a final state court judgment because of a petitioner’s failure to raise his constitutional claims in state court does not mean that a United States District Court should have jurisdiction over the claims. By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims. [citations omitted]. ... [O]ne of the policies underlying the requirement that constitutional claims be raised in state court as a predicate to our certiorari jurisdiction is the desirability of giving the state court the first opportunity to consider a state statute or rule in light of federal constitutional arguments. A state court may give the statute a saving construction in response to those

arguments. [citation omitted].

Finally, it is important to note in the context of this case the strength of the state interest in regulating the state bar. As we stated in Goldfarb v. Virginia State Bar, [citation omitted], “the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” [citation omitted].

Id. at n.16.

Accordingly, an England reservation is not available in the circumstances of the instant case. See Pawlak v. Pennsylvania Bd. of Law Examiners, 1995 WL 517646 (E.D. Pa. 1995) (purported England reservation during bar admission proceeding does not overcome Rooker-Feldman doctrine). The court thus lacks subject matter jurisdiction of Lawrence’s action based on the Rooker-Feldman doctrine.

C. The Eleventh Amendment Bars Plaintiff’s Claims

Lawrence’s Section 1983 action also is barred by the Eleventh Amendment. There has been no waiver or proper Congressional abrogation of Eleventh Amendment immunity with respect to Section 1983. See Quern v. Jordan, 440 U.S. 332, 340-45 (1979) (no Congressional abrogation regarding Section 1983); Zatler v. Wainwright, 802 F.2d 397, 400 (11th Cir. 1986) (Florida has not waived immunity from suit under Section 1983).

Moreover, this is not an action that falls within the Ex parte Young exception to the Eleventh Amendment relating to actions solely against state officials in their official capacity for prospective injunctive relief. See Ex parte Young, 209 U.S. 123 (1908). “Because of the important interests of federalism and state sovereignty implicated by Ex parte Young,” the doctrine applies only to “ongoing and continuous violations of federal law.” Summit Medical Associates, P.C. v. Pryor, 180 F.3d 1326, 1337 (11th Cir. 1999)(citations omitted), cert. denied,

529 U.S. 1012 (2000). Thus, Lawrence “may not use the doctrine to adjudicate the legality of past conduct.” Id. In the instant case, the FBBE has already conducted its formal hearing and, as noted below at note 2, the FBBE has issued its Findings, Conclusion and Recommendation relating to Lawrence’s application. Even accepting Lawrence’s allegations as true, Lawrence has not alleged any facts to show “ongoing and continuous violations of federal law” by the FBBE. Accordingly, the Ex parte Young exception to Eleventh Amendment immunity does not apply in the instant case.

Moreover, the Ex parte Young doctrine does not authorize an action to enforce federal rights when Congress has adopted a separate, narrower remedial scheme inconsistent with an Ex parte Young action. See Seminole Tribe v. Florida, 517 U.S. 44 (1996). Section 1983 includes an express limitation on the availability of injunctive relief, providing that “in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” The Executive Director and Chairman of the Board of Bar Examiners, acting as an arm of the Supreme Court of Florida in the attorney admissions process, are within the foregoing exception. Cf. Roland v. E.W. Phillips, 19 F.3d 552, 555 (11th Cir. 1994) (“Nonjudicial officers are encompassed by a judge’s absolute immunity when their official duties ‘have an integral relationship with the judicial process.’”); Dale v. Moore, 121 F.3d 624, 627 (11th Cir. 1997) (FBBE’s character and fitness proceeding is “judicial inquiry”); 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); Brooks v. New York State Supreme Court, 2002 WL 31528632 (E.D.N.Y. 2002) (holding prospective injunctive relief not available under §1983 against members of attorney disciplinary committee). Thus, even if Lawrence were seeking only prospective injunctive relief, the Ex parte Young exception would still not apply.

D. Plaintiff Fails to state a Claim under Section 1983

The Eleventh Circuit has specifically rejected claims (like those being asserted by Lawrence in the instant case) that the Bar Admission Rules relating to the character and fitness requirement are *facially* invalid under the First Amendment Free Speech clause, the Equal Protection clause, and the Due Process clause. Like Lawrence, the plaintiff in Kirkpatrick v. Shaw, 70 F.3d 100, 102-04 (11th Cir. 1995), alleged that the “FBBE’s character review process is unduly lengthy, burdensome and irrelevant, and that the bar’s character requirements are unconstitutionally vague and subjective.” Id. at 103. In rejecting Kirkpatrick’s due process/equal protection challenge, the court stated as follows:

The 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. [citation omitted]. We agree with the district court that Florida may require bar applicants to undergo a character and fitness investigation before being allowed to practice law. This requirement is rationally related to Florida’s interest in regulating the practice of law. [citation omitted].

Id. at 103. In rejecting Kirkpatrick’s free speech challenge, the Court stated as follows:

Kirkpatrick argues that Florida’s bar admissions process constitutes a prior restraint on protected commercial speech by attorneys. Kirkpatrick’s basic argument is that the Florida Bar Rules prevent otherwise qualified applicants from engaging in speech as attorneys, pending the favorable outcome of a character investigation. His argument fails, inter alia, because he has not “qualified” and because his claim that Florida is improperly rejecting his application is without merit. **None of the challenged Florida Bar Rules**

violate the First Amendment. The district court properly found this argument to be without merit.

Id. at 104 (emphasis added).

Moreover, the District Court for the Western District of Michigan rejected nearly-identical First Amendment free speech arguments made by Lawrence in an action he filed against the Michigan Board of Law Examiners. See Lawrence v. Chabot et al., Case No. 4:03-cv-20 (United States District Court, Western District of Michigan)(Order dated September 29, 2003, approving Report and Recommendation of Dismissal)(copy of Magistrate Judge's Report and Recommendation and District Court's Order attached as Exhibit B). In the Michigan action, the District Court rejected Lawrence's arguments because the Michigan rules (like the Bar Admission Rules in Florida) are completely content-neutral and do not infringe any applicant's freedom of speech. See Order, Exhibit B, at pp. 10-14.¹⁶

Lawrence's various *as-applied* constitutional claims relating to the FBBE's handling of his application for admission also fail to state a claim for relief. To the extent Lawrence has complaints about the manner in which the FBBE has handled his application for admission, Lawrence has a procedural remedy that he may pursue in the state judicial proceeding in the form of review by the Supreme Court of Florida (Fla. Bar Admiss. R. 3-40.1); and Lawrence concedes that it is the Florida Supreme Court, not the FBBE, that has the final authority to determine whether Lawrence should be admitted to the Bar. (Complaint, ¶10). Accordingly, because Lawrence has not obtained review by the Florida Supreme Court, he has not alleged a viable procedural due process claim. See Giannini v. Committee of Bar Examiners of State

¹⁶ Lawrence has appealed the Final Judgment in Michigan, and his appeal is pending.

Bar of California, 847 F.2d 1434 (9th Cir. 1988) (dismissing due process and equal protection claims by bar applicant because, under such circumstances, there has been no “deprivation”).

Moreover, Lawrence has not alleged facts that rise to the level of a constitutional violation in any event. For example, Lawrence neither alleges, nor has any factual basis to allege, that the formal hearing panel received testimony from a witness as to whom Lawrence was denied the right of cross examination. Lawrence also fails to allege, and has no factual basis to allege, that the FBBE’s General Counsel who presented Lawrence’s case to the formal hearing panel participated in any way in the formal hearing panel’s deliberations. Lawrence received adequate notice of the substance of the specifications against him and he was afforded an opportunity for a hearing with the right to present witnesses and exhibits in his own behalf. Lawrence’s allegations are insufficient to state a claim. See, e.g., Withrow v. Larkin, 421 U.S. 35 (1975) (outlining procedures that satisfy constitutional due process).

III. CONCLUSION

Based on the foregoing, defendants Schwiep and Hunter respectfully request that the Court dismiss Plaintiff’s Amended Complaint.

Respectfully submitted,

s/James J. Dean
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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 21st day of March, 2005, to Dennis D. Dubuc, Essex Park Law Office, P.C., 12618 10 Mile Rd., South Lyon, MI 48178.

s/James J. Dean
James J. Dean