

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

FRANK J. LAWRENCE, JR.,

Plaintiff,

vs.

CASE NO.: 4:05-CV-14 RH/WCS

**PAUL J. SCHWIEP, in his official
capacity as Chairman of the Florida
Board of Bar Examiners, et al.,**

Defendants.

_____ /

**DEFENDANT CHIEF JUSTICE PARIENTE’S MOTION TO DISMISS
AMENDED COMPLAINT**

_____The Defendant, the Honorable BARBARA J. PARIENTE, sued in her official capacity as Chief Justice of the Florida Supreme Court, pursuant to Rule 12, Fed. R. Civ. P., moves this Honorable Court to enter an order dismissing Plaintiff’s Amended Complaint. As grounds therefor, Defendant would state:

1. Plaintiff has filed an Amended Complaint naming Chief Justice Pariente, in her official capacity only, as a defendant. (Amended Complaint ¶6). Plaintiff also sues Eleanor M. Hunter, the Executive Director of the Florida Board of Bar Examiners (the Board), and Paul J. Schwiep, the Chairman of the Board, both in their official capacities only. (Amended Complaint, ¶¶4 & 5) The Amended Complaint seeks declaratory and injunctive relief, costs and attorneys’ fees. (Complaint, pp. 33-35)

Plaintiffs' Legal Claims

2. Plaintiff brings this action pursuant to 42 U.S.C. § 1983. (Amended Complaint p. 3). He asserts violations of the First and Fourteenth Amendments of the United States Constitution. (Complaint, ¶1, and pg. 33)

3. The gist of Plaintiff's claims is that he fears he will be denied admission to The Florida Bar. Plaintiff apparently filed his application for admission to The Florida Bar on or about November 19, 2001. (Amended Complaint ¶22). Before seeking licensure in Florida, however, Plaintiff had applied to the State Bar of Michigan but subsequently withdrew this application. (Amended Complaint ¶24)

4. Plaintiff also asserts that the Rules of the Supreme Court Relating to Admission to the Bar require applicants to disclose protected First Amendment activities when applying for a license to practice law in Florida. This information is then used to determine moral character and fitness. Plaintiff asserts that such requirements violate the First and Fourteenth Amendments to the United States Constitution. (Amended Complaint, ¶¶7-11, 13, 14-15, 18, 56-57, 60, 63, 64, 66)

5. Plaintiff asserts that the practice of the Board of using non-conviction arrest records in the admissions process constitutes a violation of the Fourteenth Amendment to the United States Constitution. (Amended Complaint, ¶59)

6. Plaintiff asserts that the Board requires applicants to disclose employment history, including the bases for any termination of employment, and that this violates the First and Fourteenth Amendment to the United States Constitution. (Amended Complaint, ¶62)

Chronology of Events as Described in Amended Complaint

7. On or about January 16, 2003, the Board held an investigative hearing concerning Plaintiff's application. (Amended Complaint, ¶26)

8. By letter dated January 24, 2004, Plaintiff was advised that the investigative hearing panel had decided to file Specifications¹ against Plaintiff, pursuant to Rule 3-22.5(d), Rules of the Supreme Court relating to Admissions to The Bar.² The Specifications would contain matters which if proven would preclude a favorable finding by the Board on Plaintiff's application for admission to the Florida Bar. (Amended Complaint ¶28).

9. Specifications were filed on or about November 25, 2003, with respect to Plaintiff's application for admission. (Amended Complaint ¶29). Plaintiff alleges that the Specifications generally encompassed six categories: (1) Plaintiff's criticisms of the Florida

¹/Specifications are defined as a "formal charging document filed in those cases where the Board has cause to believe that the applicant or registrant is not qualified for admission to The Florida Bar." Fla Bar Admiss. R. 3-23.

²/Fla. Bar Admiss. R. 3-22.5, entitled "Board Action Following an Investigative Hearing," provides:

After an investigative hearing, the Board shall make one of the following determinations:

- (a) that the applicant or registrant has established his or her qualifications as to character and fitness;
- (b) that a Consent Agreement be entered into with the applicant in lieu of the filing of Specifications pertaining to drug, alcohol or psychological problems. In a Consent Agreement, the Board shall be authorized to recommend to the Court the admission of the applicant who has agreed to abide by specified terms and conditions upon admission to the Florida Bar;
- (c) that further investigation into the applicant's or registrant's character and fitness is warranted;
- (d) that Specifications be filed charging the applicant or registrant with matters which if proven would preclude a favorable finding by the Board.

licensing system and its officials; (2) litigation Plaintiff brought against Michigan licensing officials; (3) a grievance that Plaintiff filed against a Michigan attorney; (4) an ordinance charge prosecuted by the President of the Michigan State Bar; (5) non-conviction police involvement; and (6) employment terminations in which Plaintiff had previously not been found guilty of misconduct in prior administrative unemployment proceedings.³ (Amended Complaint ¶39).

10. On or about November 19, 2004, the Board held a formal hearing on the Specifications filed against Plaintiff. (Amended Complaint ¶43). At the formal hearing, Plaintiff asked to withdraw his application for admission, but the request was denied. (Amended Complaint at ¶44).

11. As of the date of Plaintiff's Amended Complaint, the Board had allegedly not issued its written findings of fact and conclusions of law regarding Plaintiff's application for admission.⁴ (Amended Complaint ¶51)

12. Plaintiff does not allege that he has petitioned the Florida Supreme Court for relief of any kind in this matter, or that the Florida Supreme Court has evidenced a predisposition to act in any particular manner with respect to Plaintiff's application for admission to The Bar. (Amended Complaint)

Factual allegations relating to Chief Justice Pariente

³/These allegations represent Plaintiffs' summary of the Specifications. However, Plaintiff did not attach the actual Specifications to his Amended Complaint.

⁴/While not reflected in the Amended Complaint, Defendant believes that findings of fact and conclusions of law were issued in this proceeding, on February 18, 2005. Additionally, Defendant understands that Plaintiff has filed a motion for stay with the Florida Supreme Court regarding this proceeding.

13. The Amended Complaint contains only three (3) allegations relating to Chief Justice Pariente⁵ as follows:

- a. That Chief Justice Pariente enforces the Florida attorney licensing rules and policies. (Amended Complaint, ¶6)
- b. That Chief Justice Pariente evaluates an applicant's character only when there has been an adverse finding by the Board, and only upon request of an applicant who has been adversely impacted by the Board's findings. Additionally, Plaintiff alleges that the Board's "determination of the issues necessarily shapes the proceedings before Defendant Pariente, and the decision of Defendant is driven by the position of the" Board. Plaintiff also alleges that, while the Florida Supreme Court has the final power to determine the character issue, when it is asked to directly review the matter, the resolution of the applicant's moral character and fitness is largely influenced by the Board. (Amended Complaint, ¶10 and 48)
- c. That the Board "shapes the substantive and procedural issues that are reviewed by the Florida Supreme Court and Defendant Pariente." (Amended Complaint, ¶67)

⁵In paragraph 6, Plaintiff alleges that suing Chief Justice Pariente in her official capacity will be effective to obtain a remedy from the Court as a whole. (Amended Complaint, ¶6) The Florida Supreme Court is a collegial body, and not a state agency. As such, it is not clear that declaratory and injunctive relief against the Chief Justice is sufficient to obtain this remedy against the Court as a whole.

13. As discussed further below, the above-described allegations, which are clearly conclusory in nature, will not withstand a motion to dismiss unless supported by facts constituting a legitimate claim for relief. Plaintiff's Amended Complaint is devoid of any nonconclusory allegations relating to Chief Justice Pariente or the Florida Supreme Court to justify issuance of either declaratory or injunctive relief in this case.

14. Plaintiff's Amended Complaint must be dismissed against Defendant in her official capacity as Chief Justice of the Florida Supreme Court for the following reasons:

- A. The *Rooker-Feldman* Doctrine⁶ bars some of Plaintiff's claims.
- B. To the extent that the *Rooker-Feldman* Doctrine does not bar Plaintiff's claims, this Court should abstain from consideration of this case because of the abstention doctrine established in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).
- C. Plaintiff has failed to state a cause of action against Chief Justice Pariente in her official capacity for declaratory and injunctive relief.
- D. The claims against Chief Justice Pariente are not ripe for adjudication.

13. Accordingly, Plaintiff's Amended Complaint as to Chief Justice Pariente should be dismissed.

MEMORANDUM OF LAW

I. STANDARD FOR MOTION TO DISMISS

⁶See Rooker v. Fidelity Trust Company, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L.3d.2d 206, 103 S.Ct. 1303 (1982).

The analysis of a 12(b)(6) motion, like the instant one, is limited primarily to the face of the complaint and attachments thereto. Brooks v. Blue Cross and Blue Shield of Florida, Inc., 116 F.3d 1364, 1368 (11th Cir. 1997). Generally, on a motion to dismiss, this Court must accept as true the complaint's well-pleaded facts. Miccosukee Tribe of Indians of Florida v. Florida State Athletic Comm'n, 226 F.3d 1226, 1234 (11th Cir. 2000) ("We accept as true the complaint's well pleaded facts, even if disputed."). Conclusory allegations will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. Mun. Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991).

II. RULES RELATING TO THE ADMISSIONS PROCESS FOR FLORIDA LAWYERS.

One issue in this case is the rules which govern the process for admissions of attorneys to The Florida Bar. Pursuant to Article 5, Section 15 of the Florida Constitution, the Florida Supreme Court has exclusive jurisdiction to regulate the admission of persons to the practice of law in Florida. *See also* § 454.021(2), Fla. Stat. (2003).

The Florida Supreme Court has adopted rules establishing the procedures to be followed for admission of persons to the practice of law.⁷ *See* Rules of the Supreme Court Relating to

⁷Plaintiff challenges those same rules as being unconstitutional. The rules provide a mechanism for modifying the rules as follows:

The Rules of the Supreme Court Relating to Admissions to The Bar are reviewed, approved and promulgated by the Supreme Court of Florida. Modifications to the Rules require the filing of a petition with the Supreme Court of Florida and subsequent order by the Court.

Accordingly, if an affected individual believes that modifications to the Rules of the Supreme Court Relating to Admissions to The Bar are required (for whatever reason, including to conform to constitutional requirements), he or she may

Admissions to the Bar.⁸ The admission of attorneys to practice law in Florida is a judicial function. Fla. Bar Admiss. R. 1-11.

“The Florida Board of Bar Examiners is an administrative arm of the Supreme Court of Florida created by the Court to handle matters relating to bar admission.” Fla. Bar Admiss. R. 1-12. The Board is comprised of twelve members of The Florida Bar, and three members who are lay persons. Fla. Bar Admiss. R. 1-21. Members of the Board are ultimately responsible for recommending applicants for admission to The Florida Bar, and refusing to recommend applicants who lack “general and professional preparation or who lack good moral character.” Fla. Bar Admiss. R. 1-33.

Applicants, seeking admission to The Florida Bar, are required to do the following:

All applicants seeking admission to The Florida Bar shall 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*. See Rule 3, Background Investigation. (Emphasis supplied)

Fla. Bar Admiss. R. 2-12. The Rules of the Supreme Court Relating to Admission to The Bar detail offenses which would bar admission to The Florida Bar. Fla. Bar Admiss. R. 2-13.1-Fla. Bar Admiss. R. 2-13.5.

Fla. Bar Admiss. R. Chap. 3 provides for the background investigation of applicants for admission to The Florida Bar. The rule chapter establishes the standard for attorneys. “An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts,

petition the Supreme Court of Florida to modify such rules.

Fla. Bar. Admiss. R. 1-13.

⁸/The citation to these rules is Fla. Bar Admiss. R. ____.

and others with respect to the professional duties owed to them.” Fla. Bar Admiss. R. 3-10. Fla. Bar Admiss. R. 3-11 details the essential eligibility requirements for admission of attorneys. The Rules of the Supreme Court also detail disqualifying conduct which would negatively impact on the admission decision. Fla. Bar Admiss. R. 3-11.

The Rules of the Supreme Court Relating to Admissions to The Bar also emphasize the need on the part of the Board to evaluate current character, and establish criteria to be considered in evaluating prior conduct. Fla. Bar Admiss. R. 3-12.

The Rules of the Supreme Court relating to Admission to The Bar require applicants to submit a completed application. Fla. Bar Admiss. R. 3-14.1. The rules also provide for an investigative process to determine the fitness of each applicant for admission. Fla. Bar Admiss. R. 3-20. Pursuant to Fla. Bar Admiss. R. 3-21:

The Board shall conduct an investigation and otherwise inquire into and determine the character and fitness of every applicant or registrant. In every such investigation and inquiry, the Board may obtain such information as bears upon the character and fitness of the applicant or registrant and take and hear testimony, administer oaths and affirmations, and compel by subpoena the attendance of witnesses and the production of books, papers and documents.

The investigation may include an investigative hearing. Fla. Bar Admiss. R 3-22. As noted in Fla. Bar Admiss. R. 3-22, at least three (3) members of the Board may participate in an investigative hearing, which need not comply with formal rules of evidence. *Id.*

Here reportedly, the Board held an investigative hearing and, after the hearing, determined that Specifications should be filed, as provided in Rule 3-22.5(d). Procedurally, Plaintiff was then afforded an opportunity to answer the Specifications. Fla. Bar Admiss. R. 3-23.1. Then, on November 19, 2004, a formal hearing was held. (Amended Complaint, ¶43) The Rules of the

Supreme Court relating to Admission to The Bar describe the procedures to be followed in such proceedings. Fla. Bar Admiss. R. 3-23.3.

After a formal hearing, the Board has four options with respect to the recommendations it may make, set forth in Fla. Bar Admiss. R. 3-23.6. If the Board decides to recommend anything other than that the applicant has demonstrated his or her qualifications as to character and fitness, then findings of fact and conclusions of law must be prepared expeditiously. Fla. Bar Admiss. R. 3-23.7. If an applicant wishes to seek reconsideration of the Board's decision from the Board, he or she may do so, providing certain requirements are met. Fla. Bar Admiss. R. 3-30. Additionally, the Rules of the Supreme Court relating to Admission to The Bar also provide for review of the Board's recommendations by the Florida Supreme Court. Fla. Bar Admiss. R. 3-40.1. A bar applicant may raise constitutional claims in the petition for Supreme Court review. *See Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997); and Florida Board of Bar Examiners re: Applicant, 443 So.2d 71, 76 (Fla. 1983).

Additionally, if an applicant is dissatisfied with the investigative process, and particularly with the length of time taken to act on the application, he or she may petition the Florida Supreme Court. Fla. Bar Admiss. R. 3-40.2. Plaintiff does not allege that he has filed a petition with the Florida Supreme Court seeking any kind of relief with respect to his application for admission to The Florida Bar. (Amended Complaint)

Consistent with the procedure established in the Rules of the Supreme Court relating to Admission to The Bar, the Florida Supreme Court would only become involved in the bar admission proceeding pertaining to Plaintiff, if Plaintiff petitioned the Florida Supreme Court to review the findings of fact or conclusions of law issued by the Board, or if Plaintiff petitioned the

Florida Supreme Court to direct the Board to conclude its investigation. Fla. Bar Admiss. R. 3-40.1 and 3-40.2.

It should be noted that an applicant may request withdrawal of his or her application with or without prejudice. If the request to withdraw is without prejudice, “[t]he Board shall consider acceptance of the request but may continue its investigative and adjudicative functions to conclusion.” Fla. Bar Admiss. R. 3-15. If the request to withdraw is with prejudice, “[t]he Board *shall* accept the withdrawal and immediately dismiss its investigative and adjudicative functions. An applicant or registrant who files a withdrawal with prejudice shall be permanently barred from filing a subsequent application for admission to The Florida Bar.” Fla. Bar Admiss. R. 3-16 (Emphasis supplied). Presumably, the request made by Plaintiff at the actual formal hearing to withdraw his application for admission to The Florida Bar (Amended Complaint, ¶44), was without prejudice. Pursuant to the aforementioned rules, the Board was within its rights to continue the process, notwithstanding that request, particularly in view of the fact that the request was made at the formal hearing, rather than at a prior time.

III. PLAINTIFF FAILS TO ALLEGE STANDING TO SUE CHIEF JUSTICE PARIENTE FOR DECLARATORY OR INJUNCTIVE RELIEF.

The allegations in the Amended Complaint are inadequate to establish Plaintiff’s standing to sue Chief Justice Pariente with regard to Plaintiff’s application. “[T]o satisfy Article III’s standing requirements, a plaintiff must show that (1) it 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 fairly traceable to [conduct] of the defendant*; and (3) *it is likely, as opposed to merely*

speculative, that the injury will be redressed by a favorable decision.” Ala. Power Co. v. United States Doe, 307 F.3d 1300, 1308-1309 (11th Cir. 2002) (emphasis supplied).

A plaintiff must demonstrate three criteria to establish standing to sue for declaratory and injunctive relief. “First, . . . he must demonstrate that he is likely to suffer future injury; second, that he is likely to suffer such injury at the hands of the defendant; and third, that the relief the plaintiff seeks will likely prevent such injury from occurring.” Cone Corp. v. Florida Dep’t of Transp., 921 F.2d 1190, 1203-1204 (11th Cir. 1991).

Plaintiff fails to plead any nonconclusory facts which establish that he is likely to suffer future injury at the hands of Chief Justice Pariente. He fails to allege any particularized or concrete injury which he has suffered or is likely to suffer at the hands of the Chief Justice. Specifically, Plaintiff does not allege that he has petitioned the Florida Supreme Court (as provided for in Fla. Bar Admiss. R. 3-40.1 and 3-40.2), to either direct the Board to act, because he believes that the action taken on his application is untimely, or to review decisions made. He fails to allege any pattern of practice with respect to the Florida Supreme Court which would suggest that Chief Justice Pariente is likely or disposed to ignore constitutional concerns.

In the absence of some legally sufficient allegations of future harm (or indeed any harm), all claims against Chief Justice Pariente should be dismissed.

IV. SHOULD PLAINTIFF SEEK RELIEF BASED ON A THEORY THAT THE COURT ADOPTED THE RULES AT ISSUE, ABSOLUTE LEGISLATIVE IMMUNITY WOULD BAR ANY RELIEF IN THIS CASE.

Plaintiff asserts that he is challenging the rules pertaining to admission of attorneys to The Florida Bar. (Amended Complaint) The Amended Complaint alleges the existence and content of various rules (see e.g., Amended Complaint ¶¶7-11, 14-20, 27-29, 44, 49, 51 and 54). Plaintiff

alleges, in reference to Fla. Bar Admiss. R. 3-21 and 3-22, that the determination of character and fitness by the Board is conducted without any consideration of procedural safeguards, specifically as it relates to constitutionally protected activities, and that this authorizes unbridled decision making.⁹ (Amended Complaint, ¶¶14 and 15)

It appears that Plaintiff sues Chief Justice Pariente only based on a theory that she “enforces the Florida attorney licensing rules and policies,” although there are no nonspeculative allegations regarding how Chief Justice Pariente would enforce said rules as it relates to Plaintiff. (Amended Complaint, ¶6) Should Plaintiff also sue Chief Justice Pariente on a theory that she is responsible for promulgating the rules at issue, such an action would be barred based on absolute **legislative** immunity. Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980).

V. THE ROOKER-FELDMAN DOCTRINE OPERATES AS A JURISDICTIONAL BAR TO AT LEAST SOME OF THE CLAIMS BROUGHT BY PLAINTIFF IN THIS CAUSE.

It should be noted that, while Plaintiff nominally seeks “general relief” in this case, presumably to challenge Fla. Bar Admiss. R. 3-21 and 3-22, the Amended Complaint is devoid

⁹/At this stage, since this is a motion to dismiss, the Court must treat Plaintiff’s nonconclusory legally sufficient allegations as true. *See Part I supra*. However, Chief Justice Pariente does not concede that the rules at issue are constitutionally deficient. A review of those rules discloses the comprehensive and detailed scheme for determining educational background and character and fitness required for admission to The Florida Bar.

Additionally, Chief Justice Pariente does not concede that there are “no procedural safeguards,” with respect to the character determination. Here, as Plaintiff concedes, he received “Specifications” which provided notice of the matters at issue, and a hearing. (Amended Complaint)

of any nonconclusory allegations that are not specific to Plaintiff, and the manner in which his application for admission to The Florida Bar has been addressed. (Amended Complaint)

Included among the claims brought by Plaintiff are a challenge to the admission by the Board of a transcript of the investigative hearing in evidence during the formal hearing (Amended Complaint, ¶19), decisions by the Board about whether the Executive Director of the Board should have been required to testify at the hearing (Amended Complaint, ¶42), and the decision by the Board to allow statements from other individuals to be introduced at hearing (Amended Complaint, ¶21). This Court lacks jurisdiction to sit in review over these evidentiary decisions of the Board, pursuant to the *Rooker-Feldman* Doctrine. *Id.*, *cited supra*. The Plaintiff explicitly asks this court to review the interlocutory decisions of the Board sitting in its adjudicative capacity. The *Rooker-Feldman* doctrine is intended to prevent such federal review of state judicial and quasi-judicial proceedings.

If Plaintiff is dissatisfied with these evidentiary decisions and the procedures followed by the Board in addressing his application for admission to The Florida Bar, his remedy is to appeal. He may do so either through a petition for writ of certiorari review (if he can demonstrate that the prerequisites for certiorari review are met) or through a petition to the Florida Supreme Court challenging the Board's ultimate findings of fact and conclusions of law. This court lacks jurisdiction to review the above-described evidentiary decisions and procedures. *Pemberton v. Tallahassee Memorial Regional Medical Center, Inc.*, 66 F.Supp. 2d 1247 (N. D. Fla. 1999). These individual decisions particularly as it relates to evidentiary issues and whether testimony of the Executive Director is relevant or should be required in the action relating to Plaintiff are in essence interlocutory court orders.

The *Rooker-Feldman* Doctrine has its roots in two United States Supreme Court cases, Rooker v. Fidelity Trust Company, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L.3d.2d 206, 103 S.Ct. 1303 (1982).¹⁰ In Rooker, the Supreme Court determined that District Courts lacked jurisdiction to review the correctness of state court decisions, even where constitutional issues were involved, because such issues should be resolved by state courts in the first instance, with ultimate jurisdiction being in the U.S. Supreme Court. In Feldman, the Court addressed the jurisdiction of district courts to sit in review of decisions by District of Columbia Court of Appeals on bar admission matters. The Court concluded that the district court lacked subject matter jurisdiction to review such decisions. However, in Feldman, Plaintiffs also brought a general attack to the constitutionality of a rule. The Court concluded that the district court had subject-matter jurisdiction over that claim. The Court, quoting Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), stated:

¹⁰/The Eleventh Circuit has stated:

Rooker-Feldman bars lower federal court jurisdiction where four criteria are met: (1) the party in federal court is the same as the party in state court; (2) the prior state court ruling was a final or conclusive judgment on the merits; (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceeding; and (4) the issue before the federal court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment."

Storck v. City of Coral Springs, 354 F.3d 1307, 1310 (11th Cir. 2003). Defendant asserts that the "interlocutory decisions" on the evidentiary issues, including whether to compel testimony of the Executive Director, are "conclusive decisions" on the merits of those issues.

The Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or the administration of the rules, . . . *Such is not true where review of a state court's adjudication of a particular application is sought.* The Court ruled that the latter claim may be heard, if at all, exclusively by the Supreme Court of the United States.

Feldman, 460 U.S., at 485.

From Feldman, the courts have inferred a jurisdictional bar to consideration of even as-applied constitutional challenges regarding rule-making or the administration of rules, when the challenge would require review of a state court's adjudication of a particular application. *See e.g.* Hale v. Committee on Character and Fitness for the State of Illinois, 335 F.3d 678 (7th Cir. 2003) (Court determined that District Court lacked jurisdiction over as applied challenge to Illinois bar admission rule prohibiting discrimination, because this issue was inextricably intertwined with decision on merits of admissions proceeding, and any appeals); Edwards v. Illinois Board of Admissions to the Bar, 261 F.3d 723 (7th Cir. 2001) (Challenge to requirement that an applicant disclose all records of mental health treatment was determined not to be independent of state court judgment denying admission to the bar, because (1) no facts were presented or alleged to support assertion that defendants made such a disclosure a precondition to certification for anyone other than herself; and (2) the harm complained of by Plaintiff related to the decision not to certify her for admission to the Illinois bar); Craig v. State Bar of California, 141 F.3d 1353 (9th Cir. 1998) (Court concluded that a challenge to an oath required as a precondition to admission to the California Bar was not a general attack on the oath itself, but was specific to appellant's application for a waiver, and, as such, the district court lacked subject matter jurisdiction to consider challenge to oath); and Musslewhite v. State Bar of Texas, 32 F.3d 942 (5th Cir. 1994)

(Court concluded that all claims were challenges to the constitutionality of the State Bar’s practices as applied to applicant in his disciplinary proceedings, and, therefore, any consideration of those claims would require a review of the state court judgement, over which the district court had no subject matter jurisdiction).

Here, although Plaintiff has asserted that his challenge to “rules” is for “general relief” (Amended Complaint, pg. 33-34), the facts pled relate only to the handling of Plaintiff’s Bar admissions matter, and any asserted harm relates solely to the handling of his particular Bar admissions matter. Accordingly, consideration by this court of those claims (and more particularly, claims challenging the judicial decision of the Board on evidentiary matters, and on whether the Executive Director of the Board should be required to testify in the proceeding) is barred by the *Rooker-Feldman* Doctrine. *See also Dale v. Moore*, 121 F.3d 624, 626 (11th Cir. 1997) (“Federal district courts may not exercise jurisdiction to decide federal issues which are inextricably intertwined with a state court’s judgement.”). To the extent that Plaintiff seeks judicial review of those decisions, he must avail himself of state court appellate remedies. This Court lacks subject matter jurisdiction over those claims.¹¹

VI. THIS COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION IN THIS CASE.

¹¹/Additionally, if Plaintiff opts not to petition the Florida Supreme Court to review the findings of fact, conclusions of law and recommendation of the Board (issued on February 18, 2005), within the time permitted by rule (Fla. Bar Admiss. R. 3-40.1), then those findings, etc., will become final. Fla. Bar Admiss. R. 3-23.7. In that event, the *Rooker-Feldman* Doctrine would also operate as a bar to subject matter jurisdiction in this case, *en toto*, for the reasons already outlined herein.

With respect to any remaining claims (or to the extent that this Court determines that the *Rooker-Feldman* Doctrine is inapplicable, with respect to all claims), this case must be dismissed under the abstention doctrine enunciated in Younger v. Harris, 91 S.Ct. 746 (1971), because the Florida Board of Bar Examiners and the Florida Supreme Court function in their judicial capacities while acting upon Plaintiff's application to practice law.¹² Thus, any declaratory or injunctive relief granted by this Court would interfere with on-going state court proceedings.

Younger abstention is a doctrine essential to maintaining the balance in state-federal relations. "The Younger abstention doctrine derives from 'the vital consideration of comity between the state and national governments' . . . as 'sensitivity to the legitimate interests of both State and National Governments.'" Pompey v. Broward County, 95 F.3d 1543, 1546-47 (11th Cir. 1996). Younger and its progeny "reflect the longstanding national public policy, based on principles of federalism, of allowing state courts to try cases - - already pending in state court - - free from federal court interference." Butler v. Alabama Judicial Inquiry Comm'n, 245 F.3d 1257, 1261 (11th Cir. 2001). Under Younger, federal courts must avoid 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). Moreover, "the principles of Younger apply to declaratory judgments that would effectively enjoin state proceedings." Id. Finally, federal

¹²/Plaintiff suggests that an "*England*" reservation preserves his right to litigate federal claims in federal court. (Amended Complaint, ¶¶43) See England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); and Jennings v. Caddo Parish School, 531 F.2d 1331 (5th Cir. 1976). If abstention is under Younger, an "*England*" reservation is ineffective. Howell v. State Bar of Texas, 710 F.2d 1075, 1078 (5th Cir. 1983) ("The *England* reservation mechanism applies only in the event of a Pullman abstention. This was not such a case.").

courts should only refrain from abstaining when there is a compelling demonstration of bad faith or harassment,¹³ or when there is no realistic opportunity to present federal claims in the state proceeding. Younger, 401 U.S., at 49; Butler v. Alabama Judicial Inquiry Comm'n, 245 F.3d 1257, 1262 (11th Cir. 2001); Old Republic Union, 124 F.3d at 1261.

The policies underlying Younger abstention are fully applicable to noncriminal judicial proceedings when important state interests are involved. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982).¹⁴ In applying Younger principles to a noncriminal judicial proceeding, the inquiry is threefold:

- (1) Do the proceedings constitute an ongoing state judicial proceeding?
- (2) Do the proceedings implicate important state interests?
- (3) Is there an adequate opportunity in the state proceedings to raise constitutional challenges?

Middlesex, 102 S.Ct. at 2521. The answer to each of these questions in this case is yes.

¹³ Trainor v. Hernandez, 97 S.Ct. 1911, 1919 (1977).

¹⁴ In Middlesex County, the Supreme Court reviewed an opinion reversing an order dismissing a case brought by lawyers against a grievance committee, which challenged the constitutionality of New Jersey Bar disciplinary procedures. The action was filed after a disciplinary proceeding was initiated against the lawyers, involving the rules at issue. The Supreme Court determined that Younger abstention was appropriate in that instance, and reversed the appellate opinion. The Court stated:

Because respondent Hinds had an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings.
(Citation omitted)

Middlesex County Ethics Comm., 457 U.S., at 437.

First, as noted above, Plaintiff's bar application proceedings are clearly on-going state judicial proceedings. The process is outlined fully in Part II above. During that process, the Board may hold both an informal (investigatory) and a formal hearing if deemed necessary. Fla. Bar Admiss. R. 3-22; 3-23.2. Any applicant who is dissatisfied with the Board's recommendation concerning such applicant's character and fitness may petition the Supreme Court of Florida for review, which review will be conducted pursuant to the Florida Rules of Appellate Procedure. Fla. Bar Admiss. R. 3-40.1. Additionally, any applicant whose character and fitness investigation is not finished within 9 months from the date of submission of a completed bar application may petition the Supreme Court of Florida for an order directing the Board to conclude its investigation. Fla. Bar Admiss. R. 3-40.2. Those proceedings are not yet complete. Plaintiff does not allege that the Board has issued findings of fact, conclusions of law and a recommendation (although Chief Justice Pariente understands that this has in fact been issued, since the filing of Plaintiff's Amended Complaint) with respect to his application for admission to The Florida Bar. Additionally, the time has not yet elapsed for Plaintiff to seek review of any findings of fact, conclusions of law and recommendation to the Florida Supreme Court (indeed we do not know presently whether the recommendation is for or against admission to The Bar). Fla. Bar Admiss. R. 3-40.1.

Second, the regulation of the admissions of persons to the practice of law implicates important state interests. *See Ippolito v. Florida*, 824 F.Supp. 1562 (M.D. Fla. 1993) ("The reason for judicial regulation, therefore, is to preserve the judiciary's integrity, independence, and autonomy."). The Rules also explain that 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. The State of Florida has a clear interest in the attorney admission process. *See Florida Board of Bar Examiners re: Applicant*, 443 So. 2d 71, 75 (Fla. 1983) (“[T]he state's interest in ensuring that only those fit to practice law are admitted to the Bar is a compelling state interest.”).

Third, there is an adequate opportunity in the state proceedings to raise constitutional challenges. Any applicant who is dissatisfied with the Board’s recommendation as to that applicant’s character and fitness may petition the Supreme Court of Florida for review. Fla. Bar Admiss. R. 2-30.2 and 3-40.1. Bar applicants thus have the opportunity to raise constitutional challenges and other arguments in the petition. *See Florida Board of Bar Examiners re: S.G.*, 707 So. 2d 323 (Fla. 1998) (considering bar applicant’s ADA arguments in connection with application for admission); and *Florida Board of Bar Examiners re: Applicant*, 443 So.2d 71, 76 (Fla. 1983).

Accordingly, this Court should abstain from considering Plaintiff’s claims based on *Younger* abstention. *Accord*, *Edwards v. Illinois Bd. of Admissions to Bar*, 261 F.3d 723 (7th Cir. 2001). Should this Court determine that Plaintiff has established standing to sue Chief Justice Pariente for declaratory and injunctive relief in this case, and to the extent that the *Rooker-Feldman* Doctrine does not bar some of Plaintiff’s claims, this Court should abstain from consideration of Plaintiff’s claims.

VII. PLAINTIFF’S CLAIMS AGAINST CHIEF JUSTICE PARIENTE ARE NOT YET RIPE.

Chief Justice Pariente contends that the claims brought against her are not ripe (or that Plaintiff has not pled facts which would establish the ripeness of Plaintiff’s claims as it relates

to Chief Justice Pariente). “Both ripeness and standing are doctrines relating to the justiciability of [Plaintiff’s] claims, which encompasses both constitutional and prudential concerns. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1223 (11th Cir. 2004). The constitutional concerns relate to the issue of whether there exists an Article III “case or controversy,” sufficient to establish the court’s jurisdiction. *Id.*

“The prudential concern purpose of the ripeness doctrine is ‘to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. . . . In deciding whether a claim is ripe for adjudication or review, [the court should] look primarily at two considerations: 1) the fitness of the issues for judicial decision, and 2) the hardship to the parties of withholding court consideration.’” *Id.*, at 1224 (citation omitted).

Here both constitutional and prudential concerns suggest that this Court should determine that the matters as they relate to Chief Justice Pariente are not ripe for resolution. Plaintiff does not allege that findings of fact, conclusions of law and a recommendation have been issued. Plaintiff does not allege that he has filed a Petition with the Florida Supreme Court seeking review of any aspect of his Bar admissions process. Accordingly, exercising jurisdiction over claims relating to Chief Justice Pariente would be premature. It does not appear that, at the present time, there exists a case or controversy between Plaintiff and Chief Justice Pariente. Accordingly, Plaintiff’s Amended Complaint should be dismissed as to Chief Justice Pariente on ripeness grounds.

CONCLUSION

For the foregoing reasons, Plaintiff’s Amended Complaint must be dismissed as to Chief Justice Pariente.

WHEREFORE Defendant moves this Honorable Court to enter an order dismissing Plaintiff's claims against Chief Justice Pariente, in her official capacity, as contained in the Amended Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by United States Mail, to DENNIS B. DUBUC, ESQUIRE, at Essex Park Law Office, P.C., 12618 10 Mile Road, South Lyon, Michigan 48178, and to JAMES J. DEAN, ESQUIRE, at Post Office Box 1876, Tallahassee, Florida 32302-1876, this 21st day of March, 2005.

s/ Stephanie A. Daniel
Stephanie A. Daniel
Senior Assistant Attorney General