

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

FRANK J. LAWRENCE, JR.,

CIVIL NO. 4:05-cv-14 RH/WCS

Plaintiff,

v.

PAUL J. SCHWIEP, ET. AL.,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

Now Comes Plaintiff, Frank J. Lawrence, Jr., by and through his attorney Dennis B. Dubuc, and in response to Defendants' motions to dismiss, Plaintiff states the following:

I. Introduction

Plaintiff filed this action seeking to adjudicate federal claims and defenses that he reserved in state bar admission proceedings with a valid England, infra, reservation. The relief that Plaintiff seeks from this Court is necessary so that Plaintiff does not again undergo the expensive and arduous bar admission application process, only to be denied character certification due to the Florida state officials' disapproval of his protected First Amendment activities. Plaintiff complains of ongoing violations of federal law and the relief he seeks is prospective, thereby warranting this Court's review and adjudication. Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610, 616 (6th Cir. 2003); Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989); Roe # 2 v. Ogden, 253 F.3d 1225, 1233 (10th Cir. 2001).

II. Standard of Review

Defendants have brought motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) (for lack of subject matter jurisdiction) and 12(b)(6) (for failure to state a claim for which relief can be granted). Defendants' arguments premised upon Rule 12(b)(1) represent facial attacks to Plaintiff's complaint, in which "the district court takes the allegations as true in deciding whether to grant the motion." Morrison v. Amway Corp., 323 F.3d 920, 925 fn.5, (11th Cir. 2003).

Similarly, the analysis of a 12(b)(6) motion is essentially limited to a facial challenge to the complaint. Br Brooks v. Blue Cross & Blue Shield, 116 F.3d 1364, 1368 (11th Cir. 1997). It is read alongside Fed.R.Civ.P. 8(a), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. When a motion to dismiss is brought pursuant to Rule 12(b)(6), the complaint must be construed in a light most favorable to the plaintiff and the factual allegations taken as true. See SEC v. ESM Group, Inc., 835 F.2d 270, 272 (11th Cir.), reh'g denied, 840 F.2d 25, cert. denied, 486 U.S. 1055; 108 S. Ct. 2822; 100 L. Ed. 2d 923 (1988).

Because "the factual allegations [must be] taken as true," it is therefore presumed that Plaintiff is the target of retaliation for the exercise of his First Amendment activities, including but not limited to his criticism of the Florida licensing system (Am. Complaint, pp. 2-3, ¶¶ 39, 40, 41, 47), that exculpatory information was wrongfully concealed from Plaintiff with the intent of keeping it from his admission hearing and review, in violation of the Florida Board of Bar Examiners' (hereinafter "FBBE") admission rules (Am. Complaint, ¶¶ 34-36), that Defendants' subjectively disapprove of an applicant's protected First Amendment activities, without any procedural safeguards (Am. Complaint, ¶¶ 14, 16, 18, 40, 63, 65), that Defendants base licensing recommendations upon information not provided to an applicant (Am. Complaint, ¶¶ 19, 32),

that Defendants use information from individuals whom applicants cannot confront and cross-examine during their admission hearing and review (Am. Complaint, ¶¶ 45, 58), that Defendants use non-conviction arrest information against an applicant (Am. Complaint, ¶¶ 39, 59), that Defendants refuse to provide an applicant access to the FBBE's investigative files concerning the applicant (Am. Complaint, ¶¶ 37-38), that following a formal hearing, regarding an applicant's admission to the Florida Bar, the FBBE's opinion is drafted by the prosecutor of the Board's Specifications or a member of the prosecutor's staff (Am. Complaint, ¶¶ 51-53, 72), that Justice Pariente enforces the Florida attorney licensing rules and policies related to admission of an applicant to the Florida Bar (Am. Complaint, ¶ 6), that Defendants Hunter's and Schwiep's recommendation regarding the character of an applicant necessarily shapes the proceedings before Defendant Pariente, and the decision of Defendant Pariente is largely driven, if not dictated, by the recommendation provided to her by the Florida licensing officials (Am. Complaint, ¶¶ 10, 48, 67), and that Plaintiff is involuntarily in a state forum (Am. Complaint, ¶ 44).

III. ARGUMENT

A. Abstention

The Eleventh Circuit stated, "abstention is to be invoked particularly sparingly in actions involving alleged deprivations of First Amendment rights." Pittman v. Cole, 267 F.3d 1269, 1287 (11th Cir. 2001), citing Cate v. Oldham, 707 F.2d 1176, 1184 (11th Cir. 1983). This is particularly true because the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373; 96 S. Ct. 2673; 49 L. Ed. 2d 547 (1976). Plaintiff claims irreparable injury and a chilling effect on his First Amendment rights. (Am. Complaint, ¶¶ 41, 56, 57, 64, 68, 69, 74.)

For the following reasons, this case is not an appropriate candidate for abstention. In the alternative, as discussed in part III.F, infra, if this Court elects to abstain, it should stay this case pending the outcome of any future state proceedings, and allow Plaintiff to continue reserving his federal claims and defenses for subsequent adjudication in this Court. See, Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299, 1305 (11th Cir. 1992).

1. The Pendency Of An Action In The State Court Is No Bar To Proceedings Concerning The Same Matter In A Federal Court Having Jurisdiction.

The Defendants cite a plethora of state-created rules and cases for the proposition that the FBBE's administrative tasks are considered "judicial." These state-created rules were apparently enacted so as to shield the Defendants from federal scrutiny and they are certainly not binding on this Court. Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610, 618 (6th Cir. 2003) ("no state law or rule can immunize anyone from liability for violating the United States Constitution")¹. The Defendants, additionally, fail to recognize that federal law, not state law, dictates whether the Defendants' administrative functions are judicial in nature. Forrester v. White, 484 U.S. 219, 227; 108 S. Ct. 538; 98 L. Ed. 2d 555 (1988). While the act of making a decision on an applicant's application for admission may very well be a "judicial" act by the Florida Supreme Court, Defendants Hunter's and Schwiep's involvement in conducting investigations and making "recommendations" is an administrative function.

¹ Rule 1-12 of the Rules Of The Supreme Court Relating To Admissions To The Bar (hereinafter "Rules") specifically refers to the "administrative" nature of the Defendants' functions ("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.") (emphasis added). As an administrative agency performing administrative functions, the FBBE Defendants' functions are analogous with the administrative personnel decisions made by Judge Howard Lee White in Forrester, infra.

Defendants take the position that *because* Plaintiff is a present applicant for a license, abstention is required. However, the Eleventh Circuit recently disagreed with that proposition and stated, "generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." Wexler v. Lepore, 385 F.3d 1336, 1340 (11th Cir. 2004).²

2. The Federal Government's Substantive Interest In Vindicating Those Who Are Being Penalized For Exercising Federal Rights Overrides Any State Interest

Defendants claim that bar admission proceedings involve important state interests. That is true. However, there is no state interest that can authorize retaliation or other similar acts against a person for exercising a federally protected right. In this situation, there is no justifiable important state interest. See, Rowe v. Griffin, 676 F.2d 524, 562 fn.2 (11th Cir. 1982) (recognizing a bad faith exception to Younger). This argument is more fully discussed in part III.A.4, infra.

3. The Defendants Fail To Acknowledge The Principle Of Respecting A Plaintiff's Choice Of A Federal Forum For The Adjudication Of Federal Claims.

Defendants repeatedly state that Plaintiff has the opportunity to seek review in the Florida Supreme Court and, for obvious reasons, Defendants want Plaintiff to assert constitutional challenges only in their own state forum. While this may be an option, Plaintiff has specifically elected to reserve his federal claims for this Court. Federal courts have long recognized a plaintiff's right to litigate federal claims in a federal forum given the principle of respecting a

² Plaintiff's complaint seeks relief pertaining to his reapplication. Therefore, proceedings in this Court would not interfere in any ongoing state "judicial" proceedings. Nevertheless, Plaintiff will brief the abstention issues herein to show why abstention should not apply.

plaintiff's choice. England v. La. State Bd. of Med. Examiners, 375 U.S. 411, 415; 84 S.Ct. 461, 464; 11 L. Ed. 2d 440 (1964); Jennings v. Caddo, 531 F.2d 1331, 1332 (5th Cir. 1976). See also, McDonald v. City of West Branch, 466 U.S. 284, 290, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984) ("[T]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the peoples' federal rights."). In this respect, the Eleventh Circuit recently stated, "First, we find no federal authority supporting the proposition that federal claims that might be supported by the same alleged facts must be raised by state plaintiffs in cases arising under state law in state courts." Wexler v. Lepore, 385 F.3d 1336, 1339-1340 (11th Cir. 2004). The Court went on to note, "Instead, we recall the Supreme Court's reasoning from 1964: 'there are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled . . . to accept instead a state court's determination of those claims.'" Id.

Defendants fail to address the fact that Plaintiff is involuntarily in a state forum. (Am. Complaint, ¶ 44). If Plaintiff's case is dismissed by this Court, he will then be deprived of a federal district court forum for his federal claims "without [his] consent and through no fault of [his] own." England, 375 U.S. at 415. Additionally, as a prerequisite to seeking Younger abstention, Defendants must show that the relief Plaintiff seeks would result in an *undue interference* with the state's court system, akin to a federal takeover. Wexler, 385 F.3d at 1339, 1341. Here they have failed to make any such showing.

Plaintiff is entitled to have his federal claims litigated in this Court. The relief that Defendants seek would result in a highly inappropriate consequence to federal authority.

4. **Abstention Is Unavailable When A Plaintiff Can Establish Evidence Of Bad Faith By State Actors. Bad Faith And Harassing State Proceedings Encompass Those Proceedings That Are Initiated For Or Discourage The Exercise Of Constitutional Rights.**

The Defendants urge this Court to apply the Younger abstention doctrine to this matter, as adopted in Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423; 102 S.Ct. 2515; 73 L.Ed.2d 116 (1982). However, the United States Supreme Court held in Younger v. Harris, 401 U.S. 37; 27 L. Ed. 2d 669; 91 S. Ct. 746 (1971) that federal courts can enjoin a pending state proceeding provided that it was (1) commenced in bad faith or to harass, (2) based on a flagrantly and patently unconstitutional statute, or (3) related to any other such extraordinary circumstance creating a threat of "irreparable injury" both great and immediate. 401 U.S. at 53-54.

When considering a Rule 12 motion to dismiss, this Court should accept the truth of the Plaintiff's allegations that he is the target of retaliation due to Florida state licensing officials' disapproval of certain things that Plaintiff has said and done, which were activities protected by the First Amendment of our Constitution. In this context, abstention is unavailable because, by definition, bad faith and harassing state proceedings encompass those proceedings that are initiated for or discourage the exercise of constitutional rights. Lewellen v. Raff, 843 F.2d 1103, 1109-1110 (8th Cir. 1988), cert. denied, 489 U.S. 1033; 103 L.Ed. 2d 229; 109 S.Ct. 1171 (1989). Further, a showing that a state proceeding was brought in retaliation for or to discourage the exercise of federal constitutional rights "will justify an injunction regardless of whether valid convictions conceivably could be obtained." Fitzgerald v. Peek, 636 F.2d 943, 945 (5th Cir. 1981). Also see, Cullen v. Fliegner, 18 F.3d 96, 103-104 (2nd Cir. 1994) (the court affirmed injunction against state disciplinary proceedings brought in bad faith and noted "a refusal to abstain is also justified where a prosecution or proceeding has been brought to retaliate for or to deter constitutionally protected conduct, or where a prosecution or proceeding is otherwise brought in bad faith or for the purpose to harass."), Bishop v. State Bar of Texas, 736 F.2d 292,

294 (5th Cir. 1984) (injunctive relief can be used against state disciplinary proceedings that are brought in bad faith), Wilson v. Thompson, 593 F.2d 1375, 1383 (5th Cir. 1979)(authorized injunction against state criminal prosecution and noted “with respect to the interests of the state, it by definition does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights”), Rowe v. Griffin, 676 F.2d 524, 562, fn. 2 (11th Cir. 1982) (court enjoined state prosecution brought in bad faith by noting “in such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights”), Lewellen, supra at 1110, (court enjoined state criminal prosecution and noted, “The state does not have any legitimate interest in pursuing such a prosecution; perhaps the most important comity rationale of Younger deference -- that of respect for the State's legitimate pursuit of its substantive interests -- is therefore inapplicable.”) citing Wilson, supra, Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 899 (8th Cir. 2000) (court enjoined state administrative proceedings and noted “although federal courts are generally reluctant to interfere with ongoing state administrative proceedings, the deference owed such proceedings does not apply if they are used to harass or discourage the exercise of a federal right”).

The allegations of bad faith in Plaintiff’s complaint must be accepted as true, with regard to Defendants’ motions to dismiss. As such, any “sovereign interest” that the State of Florida may have in regulating the practice of law will not protect it from a plaintiff who establishes evidence of bad faith or evidence that state proceedings punish an applicant for the exercise of

his protected First Amendment activities. Lewellen, supra, Fitzgerald, supra, Cullen, supra, Bishop, supra, Wilson, supra, Rowe, supra.

B. Rooker-Feldman

Defendants' argument that the Rooker-Feldman doctrine deprives this Court of subject matter jurisdiction, primarily rely upon this Circuit's decision in Dale v. Moore, 121 F.3d 624 (11th Cir. 1997), in which the Court "conclude[d] that under the Rooker-Feldman doctrine, the district court lack[ed] subject matter jurisdiction over Dale's complaint." Id. at 625. However, pursuant to the March 30, 2005 decision of the Supreme Court of the United States in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. ____ (2005); 2005 U.S. LEXIS 2929, the Eleventh Circuit's holding in Dale has been overruled. In Exxon, a unanimous Court stated:

The Rooker-Feldman doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.

* * *

Since Feldman, this Court has never applied Rooker-Feldman to dismiss an action for want of jurisdiction.

Exxon, slip opinion p. 2, 5 (emphasis added)

Here, Plaintiff is not a "state-court loser" and no Florida court has ever ruled on the issues sub judice. There have been no "state-court judgments rendered before the district court proceedings commenced." Therefore, the Supreme Court's decision in Exxon defeats Defendants' Rooker-Feldman arguments.

Additionally, Defendants fail to provide any persuasive response to Plaintiff's argument that a valid reservation of federal claims preserves a litigant's right to a federal forum. England v. La. State Bd. of Med. Examiners, 375 U.S. 411, 421; 84 S.Ct. 461, 464; 11 L.Ed. 2d 440 (1964); Jennings v. Caddo, 531 F.2d 1331, 1332 (5th Cir. 1976); Fields v. Sarasota Manatee

Airport Authority, 953 F.2d 1299, 1303 (11th Cir. 1992); Barnes v. McDowell, 848 F.2d 725, 731 (6th Cir. 1988) (A plaintiff is not bound to forego his choice of a federal forum and could, by notifying the parties and the state court that he was reserving his federal issues, limit the state court's determination to the state issues, even though the state court might otherwise have had concurrent jurisdiction over the federal issues); Executive Arts v City of Grand Rapids, 227 F.Supp.2d 731, 736 (W.D. Mich. 2002) ("...a valid England reservation precludes application of the Rooker-Feldman doctrine."). Plaintiff has asserted a valid reservation in this matter (Am. Complaint, p. 2, and ¶¶ 43 and 44).³

Even in the absence of the Supreme Court's decision in Exxon, the Rooker-Feldman doctrine would still be inapplicable to this case. The Rooker-Feldman doctrine provides that federal courts, other than the United States Supreme Court, have no authority to review the final judgments of state courts. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486; 103 S. Ct. 1303, 1317; 75 L. Ed. 2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16; 44 S. Ct. 149, 150; 68 L. Ed. 362 (1923). Here, there has been no state court judgment (Am. Complaint, ¶ 51). At the time that this action was filed, the Defendants had not even formulated the Board's opinion (this action was filed on January 14, 2005 and the Board's opinion is dated February 18, 2005). The Defendants claim that the subsequent issuance of their recommendation somehow affects this Court's jurisdiction. However, by taking further action

³ The only case that Defendants cite pertaining to federal reservations in a bar admission case is the unpublished decision in Pawlaw v Pennsylvania Bd. of Law Examiners, 1995 WL 517646 (E.D. Pa. 1995). However, the citation of that case is not helpful to Defendants, given that the Third Circuit (the circuit in which Pawlaw was decided) subsequently considered, yet declined to decide the availability of a non-abstention reservation, Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 419 (3rd Cir. 2003), and the law of the Eleventh Circuit is that federal abstention is not a prerequisite to a valid England reservation. Jennings v. Caddo, 531 F.2d 1331 (5th Cir. 1976).

after this lawsuit was filed, the Defendants have not affected this Court's jurisdiction. Jones v Securities and Exchange Comm, 298 U.S. 1, 15-18; 56 S. Ct. 654; 80 L. Ed. 1015 (1936) ("After a defendant has been notified of the pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided."); accord, Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567; 124 S. Ct. 1920; 158 L. Ed. 2d 866 (2004) ("The jurisdiction of a court depends upon the state of things at the time of the action brought."). Defendants Hunter and Schwiep suggest that this action represents a challenge to their February 18, 2005 written opinion, but at the time this lawsuit was filed on January 14, 2005, there was no opinion to challenge. The only state actions to challenge at that time were the alleged constitutional violations as outlined in the Plaintiff's complaint.

Further, Rule 1-16 only permits Defendants Hunter and Schwiep to make "recommendations," not decisions or judgments. Also, Florida's licensing structure is markedly different from the licensing system discussed in McCready v. State Bar of Michigan 881 F.Supp. 300 (W.D. Mich. 1995)(a case heavily cited here by Defendants), where, unlike the FBBE, the Michigan Board of Law Examiners is charged with the duty of issuing a final licensing decision. Judicial review by the Michigan Supreme Court is by leave only, Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610, 613 (6th Cir. 2003). Because the Defendants here can only make administrative "recommendations," judicial review in Florida is a right, Rule 3-40. McCready is completely inapposite and of no help to the Defendants, particularly since the Sixth Circuit (the Circuit in which McCready was decided) recently stated that a bar applicant's federal prospective claims regarding his *reapplication* process were not barred by Rooker-Feldman. Dubuc, supra, 342 F.3d at 619 ("There has been no state court judgment with regard to his rights

to reapply for admission to the Bar, and, therefore, Dubuc is not seeking a review of any state court judgment in contravention of the Rooker-Feldman doctrine.”) See also, Centifanti v. Nix, 865 F.2d 1422, 1429-30 (3d Cir. 1989) (holding that a plaintiff's suit in federal court, which sought an injunction against future denials of petitions for readmission to the Pennsylvania bar without certain procedural safeguards, was not barred by Rooker-Feldman because it sought only prospective relief and thus would not prevent the enforcement of the Pennsylvania Supreme Court's order denying the plaintiff's petition for readmission).

The Supreme Court's March 30, 2005 decision in Exxon, Plaintiff's valid reservation of his federal claims, the absence of any state court judgment, the fact that this action was filed before the FBBE formulated its February 18, 2005 recommendation, and the fact that Plaintiff seeks only prospective relief regarding his *reapplication*, all render the Rooker-Feldman doctrine inapplicable to this lawsuit.

C. The Eleventh Amendment Is Not A Bar To The Relief Sought In Plaintiff's Complaint

Defendants' argument that relief pursuant to the holding in Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), cannot be premised on proof of past misconduct in Plaintiff's licensing process is without merit: such relief is "is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." Idaho v. Coeur D'Alene Tribe of Idaho, 521 U.S. 261, 294, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) (O'Connor, J., concurring) (emphasis in original). While the relief granted under Ex parte Young may only be prospective, proof for the claim necessitating relief can be based on historical facts, and most often will be. Energy Ark., Inc. v. Nebraska, 210 F.3d 887, 898 (8th Cir. 2000); Edelman v. Jordan, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347

(1974) (authorizing prospective relief based on the manner in which a state historically administered its federally funded benefits program). Therefore, the allegations in Plaintiff's complaint relating to how his bar application was processed, properly support his present claim for prospective relief.

This circuit has expressly noted the availability of prospective relief to enjoin ongoing violations of federal law. Cate v. Oldham, 707 F.2d 1176, 1181 (11th Cir. 1983). The Defendants argue that the Supreme Court's 1997 decision in Idaho v. Coeur D'Alene somehow narrowed the "legal fiction" to the Ex Parte Young doctrine. However, that same argument has been considered and rejected by a number of different courts in bar admission cases. Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610, 615-618 (6th Cir. 2003); Roe # 2 v. Ogden, 253 F.3d 1225, 1233-34 (10th Cir. 2001)(holding that members of the Colorado State Board of Law Examiners were not entitled to immunity under the Eleventh Amendment from a lawsuit challenging bar admission rules). Determining whether the Ex parte Young doctrine applies does not involve an analysis of the merits of a plaintiff's claims. Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 646, 152 L. Ed. 2d 871, 122 S. Ct. 1753 (2002).

"In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" Verizon Maryland, supra, 535 U.S. at 645 (quoting Justice O'Connor's concurring opinion in Idaho v. Coeur d'Alene Tribe of Idaho). A federal lawsuit alleging ongoing violations of federal law by licensing officials and seeking relief regarding a bar applicant's *future reapplication* "seeks relief properly characterized as prospective." Dubuc, supra, 342 F.3d at

616; see also, Roe #2, supra, 253 F.3d at 1233 (“The Students' action therefore falls squarely within the Ex parte Young exception...”). The Eleventh Amendment is no bar to this lawsuit.

D. Failure to State A Claim

Plaintiff’s complaint alleges, inter alia, that Defendants use their disapproval of an applicant’s protected First Amendment activities as a basis for licensure denial. Those allegations must be accepted as true with regard to Defendants’ motions to dismiss. The Defendants assert that Plaintiff’s complaint fails to state a claim. In Perry v. Sindermann, 408 U.S. 593, 597; 33 L. Ed. 2d 570; 92 S. Ct. 2694 (1972), the Supreme Court of the United States stated:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

Although in Perry the Court was discussing a “benefit,” the federal interest here is much stronger because the right to admission to the practice law is not a matter of the states’ “grace and favor,” Willner v. Committee on Character & Fitness, 373 US 96, 102; 83 S Ct 1175; 10 LEd2d 224 (1963), and the substantive predicates used in the Rules create federal liberty/property interests (Am. Complaint, ¶¶ 54, 70). As far as free speech is concerned, the Eleventh Circuit has been vigilant in protecting federally secured freedoms impinged by state-created rules and statutes, even when considering content-neutral regulations. Cooper v. Dillon ___ F.3d ___ (11th Cir. 2005) (No. 04-11150, published March 22, 2005).

Pursuant to 28 U.S.C. § 1331, district courts have jurisdiction over all civil actions arising under federal laws or the Constitution. Clearly, a federal court has jurisdiction over a properly asserted First Amendment or Due Process claim because it involves the infringement of a constitutional right. In Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610 (6th Cir. 2003) the Sixth Circuit Court of Appeals remanded the case to the district court to decide whether the manner in which the licensing defendants handled the plaintiff's *first application* warranted prospective relief regarding his future *reapplication*. In Centifanti v. Nix, 865 F.2d 1422, 1429-30 (3d Cir. 1989) the Third Circuit Court of Appeals remanded the case to the district court to decide whether court-promulgated procedural rules governing bar admission violate the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. In Dean v. Byerley, 354 F.3d 540, 545 (6th Cir. 2004), the Sixth Circuit remanded the case to the trial court to decide a plaintiff's claim for "equitable relief in the form of an order from the district court that [a Michigan character and fitness official] refrain from interfering with Plaintiff's rights of free speech." Clearly, Plaintiff's challenges to the licensing rules in the matter sub judice state a cognizable constitutional claim.

Defendants cite Kirkpatrick v. Shaw, 70 F.3d 100 (11th Cir. 1995) for the proposition that the Eleventh Circuit has given its imprimatur to the entire Florida attorney licensing system, thus insulating it from any further First Amendment challenges. Defendants' basis is a single sentence in the opinion that reads: "None of the challenged Florida Bar Rules violate the First Amendment." However, Mr. Kirkpatrick's challenge to the Rules was premised on an alleged burden to "commercial speech." Id. at 104. Therefore, Defendants' reliance on Kirkpatrick is misplaced. Although Plaintiff alleges that certain admission Rules are unconstitutional, here it is not only the Rules that violate the Constitution, but it is the lack of rules that would provide

procedural safeguards for the protected First Amendment rights of an applicant. It is the unfettered discretion of the Florida licensing officials that allows constitutional injury to Bar applicants.

Finally, Defendants Hunter and Schwiep attached as exhibits to their motions, copies of the unpublished Lawrence opinions, which address the circumstances where Plaintiff was subjected to an 18-month delay in processing his application for admission in Michigan while the president of the Michigan licensing body simultaneously prosecuted Plaintiff for a minor ordinance violation. Plaintiff was advised that until he “resolved” the ordinance charge with the State Bar of Michigan’s president, his application for a Michigan law license would be held in abeyance. See also, Lawrence v. Van Aken, 2004 WL 228989 (W.D.Mich.), affirmed by Lawrence v. Van Aken, 316 F.Supp.2d 547 (W.D. Mich. 2004).

What the Defendants do not tell this court about the Lawrence opinions is that the attorney who represented the Michigan licensing officials, (former) Character and Fitness Director Thomas Byerley, “shaped [his] arguments to further [the State Bar’s] procedural position in order to gain dismissal on non-meritorious grounds” *Character and Fitness Review – Is the Process Fit?*, 82 Michigan Bar Journal 9 (December, 2003).

Attached hereto, as Exhibit 1, is a copy of the Bar Journal publication mentioned above, which was circulated to all 37,000 Michigan attorneys. Although the publication was written in September 2003, it was not published in the Michigan Bar Journal until December 2003, well after District Judge David McKeague’s opinion had been issued. Since that time, Mr. Byerley’s employment relationship with the State Bar of Michigan abruptly ended and Judge McKeague’s Lawrence opinion is presently on appeal in the Sixth Circuit Court of Appeals.

E. Standing / Ripeness

Article III standing requires the party who invokes the court's authority to “show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.” Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472; 70 L. Ed. 2d 700; 102 S. Ct. 752 (1982). The threat of having to defend the Florida licensing officials’ specifications on First Amendment grounds causes an injury-in-fact that is injurious enough. Doe v. Pryor, 344 F.3d 1282, 1287 (11th Cir. 2003). See also, Am. Complaint, ¶¶ 39-41. Even a plaintiff bringing a *pre-enforcement* challenge against a statute need not demonstrate to a certainty that he will be prosecuted under the statute to show injury, but only that he has "an actual and well-founded fear that the law will be enforced against" him. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393; 98 L. Ed. 2d 782; 108 S. Ct. 636 (1988). When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." Id.

Defendants rely on the opinion in Stoddard v. Supreme Court of Florida (Case No 03-11662, 11th Circuit Court of Appeals), which cannot be located on Lexis or Westlaw. The Defendants’ reliance upon the unpublished decision in Stoddard is distinguishable because Mr. Stoddard did not have a pending application and he was not actively pursuing a Florida law license at the time (11th Cir. slip opinion at pp. 5, 11-12). Here, Plaintiff is actively in pursuit of a license to practice law (Am. Complaint, p.2 and ¶ 23).

Defendant Pariente’s standing and ripeness argument was similarly considered and rejected by the 10th Circuit in Roe # 2 v. Ogden, 253 F.3d 1225, 1233-34 (10th Cir. 2001). In

Roe, students brought constitutional challenges against Colorado licensing rules and mandatory questions concerning students' disabilities. The 10th Circuit expressly held that even students who had not yet taken the bar examination had standing to assert their federal challenges and that their claims were ripe. Roe, supra, 253 F.3d at 1231. In doing so, the Court noted "Delayed review will cause the Students hardship." Id. at 1231. Plaintiff has passed the Florida Bar Examination and delayed review by this Court will cause or allow irreparable constitutional injury. In light of the inordinate hardship to Plaintiff and the relaxed ripeness standards for First Amendment challenges, Plaintiff has standing and this case is ripe for judicial review.

F. In The Alternative, If This Court Elects To Abstain, It Should Do So Under Pullman, and Stay This Case Pending The Outcome Of Any Future State Proceedings.

In the alternative, if this Court elects to abstain, it should do so under the Pullman abstention doctrine, allowing this Court to defer to the Florida Supreme Court's resolution of underlying issues of state law. Plaintiff will then litigate in state court whether state law permits Plaintiff to be denied admission for criticizing Florida licensing officials and for Plaintiff's litigation against the Michigan licensing officials.⁴ The resolution of state law issues may materially alter the constitutional questions presented here, thereby falling within the scope of Pullman abstention. Siegel v. LePore, 234 F.3d 1163, 1174 (11th Cir. 2000) (en banc). This case should be stayed and the Court should retain jurisdiction over this matter. Plaintiff can then continue to reserve his federal claims and defenses in any state-related proceedings. At the conclusion of the state court proceedings, Plaintiff can use his forum of choice (federal court) for

⁴ Defendants' February 18, 2005 recommendation states that only two Specifications were proven and disqualifying, namely: (1) Plaintiff's statements against the Florida licensing officials and the Michigan judiciary; and (2) Plaintiff's litigation against the Michigan licensing officials.

an adjudication of his federal claims. A procedure similar to this was approved in Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299, 1305 (11th Cir. 1992).

Plaintiff, however, urges this Court not to abstain, given the First Amendment nature of this case and the immediate need to protect against loss of such fragile, and cherished, constitutional interests. Citizens of this nation possess a fundamental right to criticize state officials and petition the government for redress of grievances, irrespective of licensing officials' subjective disapproval. "Mere unorthodoxy in the field of political and social ideas does not, as a matter of fair and logical inference, negative good moral character." Schwartz v. Board of Bar Examiners, 353 US 232, 244; 77 S Ct 752; 1 L. Ed. 2d 796 (1957). In Sweezy v. New Hampshire, 354 U.S. 234; 77 S. Ct. 1203; 1 L. Ed. 2d 1311 (1957), the Supreme Court stated:

History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Id. at 251

III. CONCLUSION

Defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim represent facial challenges to Plaintiff's complaint, which require this Court to accept as true Plaintiff's claims of bad faith and First Amendment retaliation. Morrison, supra; Br Brooks, supra. Defendants fail to acknowledge that Plaintiff's complaint seeks prospective relief for ongoing violations of federal law and that Plaintiff does not seek invalidation of any final state court judgment. Dubuc, supra; Centifanti, supra; Roe, supra. Defendants Hunter and Schwiep suggest that this action represents a challenge to their written opinion, but at the time

this lawsuit was filed, there was no written opinion. The jurisdiction of this Court is measured at the time the complaint was filed. Grupo Dataflux, supra.

The Rooker-Feldman doctrine is confined to cases of the kind from which the doctrine acquired its name: cases brought *by state-court losers* complaining of injuries caused by *state-court judgments rendered before the district court proceedings commenced* and inviting district court review and rejection of those judgments. Exxon, supra. The cases cited by Defendants in support of their Rooker-Feldman arguments were all decided prior to the Supreme Court's March 30, 2005 decision in Exxon. The cases cited by Defendants misapplied the Rooker-Feldman doctrine. Id.

Additionally, Defendants fail to acknowledge the principle of respecting a plaintiff's choice of a federal forum for the adjudication of federal claims, England, supra; Jennings, supra, and Plaintiff has asserted a valid reservation of federal claims and defenses. A valid reservation of federal claims precludes application of the Rooker-Feldman doctrine, particularly since Plaintiff is involuntarily in a state forum. Id. This Court has recognized that "state and federal law include different provisions that address different concerns." Children A & B v. State, 2004 U.S. Dist. LEXIS 27023 at *5 (N.D. Fla. 2004). This case "is not in any sense a forbidden appeal of the state court's decision; this case is, instead, an original action raising issues not adjudicated in state court." Id.

Plaintiff has Article III standing and this case is ripe for adjudication because Plaintiff has been charged with Specifications for criticizing the Florida licensing officials. The Florida licensing officials disapproved of Plaintiff's criticisms and they have retaliated against Plaintiff for what he said. This causes a chilling effect and an injury-in-fact that is not speculative or hypothetical. Doe, supra. In fact, the 10th Circuit has held that standing and ripeness principles

did not inhibit students, who have not yet taken the bar examination, from bringing federal challenges. Roe #2, supra.

Defendants fail to acknowledge the bad faith exception to Younger abstention, which “encompass[es] those proceedings that are initiated for or discourage the exercise of constitutional rights.” Lewellen, supra. Plaintiff’s complaint alleges, inter alia, that is a violation the Constitution when state licensing officials’ disapprove of protected speech and use their disapproval of such First Amendment activities as a basis for denial of a license to practice law. “There are some reasons upon which the government may not rely”, namely, those that contravene the First Amendment. Perry, supra.

What the Defendants really believe is that they are complete immunity from suit in a federal district court. This case presents important constitutional questions that, once adopted and clarified through a written opinion of this Court, will enforce the rule of law and equity upon state actors who believe that they are above the law. As the Supreme Court stated in McDonald, supra, “[T]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the peoples' federal rights.” Plaintiff respectfully requests that this Court act as his constitutional guardian.

WHEREFORE, Plaintiff prays that this Court deny the Defendants’ motions to dismiss.

Dated: April 8, 2005

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 8, 2005, a true and correct copy of the foregoing was sent by electronic mail to the following:

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