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

PHILLIP J. STODDARD,

Plaintiff,

vs. Case No.: 4:06-cv-00414-RH-WCS

FLORIDA BOARD OF
BAR EXAMINERS, et al.

Defendants.
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MOTION TO DISMISS PLAINTIFF'S COMPLAINT BY DEFENDANTS FBBE, HUNTER, POBJECKY, RIGSBY AND YATES (AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT)

Defendants Eleanor Hunter ("Hunter"), Thomas A. Pobjecky ("Pobjecky"), R. Terry Rigsby ("Rigsby"), Leighton D. Yates, Jr. ("Yates"), and the Florida Board of Bar Examiners ("FBBE" or "Board") (collectively "FBBE Defendants"), move to dismiss Philip J. Stoddard's Complaint pursuant to Rule 12(b)(1) and (b)(6), Fed. R. Civ. P., and submit this memorandum of law in support.[1]

I. The Bar Admission Process in Florida and Plaintiff's Claims

This action arises out of the Florida Board of Bar Examiners' judicial proceeding on Philip J. Stoddard's application for admission to The Florida Bar. (Complaint, ¶5) (doc. 1). Mr. Stoddard has sued: the FBBE; Eleanor Mitchell Hunter, the Board's former Executive Director; R. Terry Rigsby, the Board's current Chair; Thomas A. Pobjecky, the Board's

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[1] The FBBE Defendants incorporate by reference any and all grounds and arguments for dismissal asserted by Defendant R. Fred Lewis, Chief Justice of the Florida Supreme Court (doc. 14-2).

General Counsel; Leighton D. Yates, Jr., a former Chair and current Member Emeritus of the Board; Supreme Court Chief Justice R. Fred Lewis; and "John Does One through Twenty," who are *alleged* individual conspirators not yet identified. (doc. 1). Each of the individual defendants is being sued in his or her personal and official capacities.[2]

Mr. Stoddard seeks injunctive relief and damages pursuant to the Americans with Disabilities Act, 42 U.S.C. §12131 et seq. ("ADA"); Art. I, §10 of the United States Constitution (Bill of Attainder clause); the First Amendment right to freedom of speech and the Fourteenth Amendment right to procedural due process. (doc. 1). Mr. Stoddard seeks an award of $2,500,000 in compensatory damages and an award of $7,250,000 in punitive damages against the individual defendants in their *personal* capacity. (doc. 1,¶¶ 61, 62).

A. The Bar Admission Process in Florida

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. Acting under its exclusive, constitutional jurisdiction, the Florida Supreme Court has promulgated Rules Relating to Admissions to the Bar. *See* Rules of the Florida Supreme Court Relating to Admissions to the Bar (hereafter "the Rules").

Pursuant to the Rules, 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

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[2] As noted below, this is the *second* civil complaint filed by Mr. Stoddard relating to his bar admission application. Mr. Stoddard's first civil action was filed in 2002. U.S. District Judge Stephan Mickle dismissed the action on several alternative grounds, and the Eleventh Circuit Court of Appeals affirmed on the ground that Mr. Stoddard's claims were not ripe and he lacked standing. See Exhibits A and B (Case No. 4:02CV106SPM/WW) (hereafter, "*Stoddard I*").

admission." Fla. Bar Admiss. R. 1-12. The Rules provide that it is the responsibility of the Board to "ensure that each applicant has met the requirements of the Rules with regard to character and fitness, education and technical competence prior to recommending an applicant for admission." Fla. Bar Admiss. R. 1-14.2. Because the Florida Supreme Court has "inherent and exclusive constitutional authority over its agencies who act on its behalf," *The Florida Bar*, 398 So.2d 446, 447 (Fla. 1981), the Court has held that "[a]s an arm of this Court, the [Florida Board of Bar Examiners] is answerable solely to this tribunal." *In re Board of Florida Bar Examiners*, 353 So.2d 98, 100 (Fla. 1977).

The attorney admission process is initiated by the filing of two separate applications: the Exam Application and the Bar Application. Fla. Bar Admiss. R. 2-21. After the filing of these applications, the process for the Bar Examination and character and fitness investigation may proceed. The Board, as an arm of the Florida Supreme Court, makes a determination regarding whether applicants have provided satisfactory evidence of good moral character and fitness. Fla. Bar Admiss. R. 3-12. The Rules contain criteria and factors that the Board is to take into consideration when making its character and fitness determination. Fla. Bar Admiss. R. 3-10.1, 3-11 and 3-12.

In connection with the Board's function of making the character and fitness determination, the Board is authorized by Supreme Court rule to request information from the applicant and to also request the applicant to appear for an informal investigative hearing. Fla. Bar Admiss. R. 3-21 & 3-22. When an informal hearing is held, the Board may make one of several determinations, including (a) "that the applicant ... 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 [whereby] 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;" or (c) that further investigation is warranted or (d) "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.

When specifications are filed, applicants have the right to answer the specifications and to have a formal hearing. 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. Following a formal hearing, the FBBE may make one of the following recommendations to the Florida Supreme Court: (a) that the applicant has established his qualifications as to character and fitness; (b) that the applicant be "conditionally admitted" in exceptional cases on certain conditions; (c) that the applicant's admission be withheld for a specified period of time not to exceed two years, at the end of which the Board shall recommend the applicant's admission if the applicant has complied with all special conditions; or (d) that the applicant has not established his qualifications as to character and fitness. Fla. Bar Admiss. R. 3-23.6.

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 the applicant has the right to petition the Supreme Court of Florida for review of the adverse recommendation. Fla. Bar Admiss. R. 3-23.7 & 3-40.1. A bar applicant may raise federal constitutional claims and claims under the ADA in the Petition for Supreme Court review.[3]

The Rules also provide that 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. Similarly, any applicant who is dissatisfied with an administrative ruling of the Board that does not relate to character and fitness matters may petition the Board for reconsideration and may also petition the Florida Supreme Court for review. Fla. Bar Admiss. R. 2-30.

B. Plaintiff's Allegations

In the instant case, Mr. Stoddard alleges that he is a current applicant for admission to The Florida Bar. (doc. 1, page 2 & ¶5)(Plaintiff "is ... an applicant for admission to the practice of law in Florida" whose application "remains pending before the Florida Board of Bar Examiners (the Board) as of the date of the filing of this action."). The gist of Mr. Stoddard's complaint in the instant case is his allegation that he is "prima facie" qualified for admission to The Bar, but that the FBBE has wrongfully determined that Specifications

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[3] *See Dale v. Moore*, 121 F.3d 624 (11th Cir. 1997) (Florida bar applicant could raise ADA argument in answer to specifications and petition to Florida Supreme Court for review of Board's character and fitness determination); *Florida Board of Bar Examiners re: S.G.*, 707 So.2d 323 (Fla. 1998) (considering bar applicant's ADA arguments); *Florida Board of Bar Examiners re: Applicant*, 443 So.2d 71 (Fla. 1984) (considering bar applicant's federal constitutional claims).

should be filed against him relating to whether he satisfied the Board's character and fitness requirements. (doc. 1, page 2 and ¶13).

Mr. Stoddard initially filed his application for admission in 1999. (doc. 1, page 2). Following that hearing, in November of 2001, the Board filed Specifications against Mr. Stoddard. (doc. 1, ¶19). Before a formal hearing was held on the 2001 Specifications, Mr. Stoddard filed his first civil action relating to his application for admission, *Stoddard v. Ressell* et al., Case No. 4:02CV106SPM/WW (Northern District of Florida) (hereafter, "*Stoddard I*"). (Doc. 1, ¶20).

In *Stoddard I*, Mr. Stoddard sued the Honorable Chief Justice Charles T. Wells; former FBBE Executive Director Kathryn Ressel and former FBBE Chair C. Jeffrey McInnis. *See* Exhibit A.[4] Mr. Stoddard's claims and allegations in the instant case are substantially similar to his allegations in *Stoddard I*: he alleged in *Stoddard I* that he had made a "prima facie" showing of good character and fitness and that the FBBE was, therefore, wrong to file Specifications against him. (Exhibit B, pages 3 - 5). In *Stoddard I* (like the instant case), he asserted claims under the ADA and 42 U.S.C. §1983. Judge Mickle dismissed *Stoddard I* on the face of the complaint based on the (i) *Rooker-Feldman* doctrine, (ii) Eleventh Amendment immunity, (iii) absolute judicial immunity, and (iv) failure to state a claim for relief. (Exhibit A). The Eleventh Circuit Court of Appeals affirmed the dismissal for lack of standing and ripeness (without addressing the merits of the

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[4] As he has done in *Stoddard II*, Mr. Stoddard also sued each of the individual defendants in their official and personal capacities in *Stoddard I*. In *Stoddard I*, Mr. Stoddard did not sue Ms. Hunter, Mr. Pobjecky or Mr. Yates.

claims), because Mr. Stoddard had dropped his claim for damages and had also withdrawn his application for admission. (Exhibit B).

Mr. Stoddard later submitted a "renewed application" for admission in July of 2004. (doc. 1, ¶ 22). The Board held another informal hearing and then filed Specifications against Mr. Stoddard in August of 2005. (doc. 1, page 2 and ¶19).[5] Mr. Stoddard filed the instant complaint on or about September 8, 2006, while his application for admission was still pending before the Board. (doc. 1).

II. THIS ACTION SHOULD BE DISMISSED BASED ON THE ABSTENTION DOCTRINE OF *YOUNGER V. HARRIS*.

This action is subject to dismissal based on the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). "Under *Younger v. Harris* and its progeny, federal district courts *must refrain* from enjoining pending state court proceedings except under special circumstances." *Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 124 F.3d 1258, 1261 (11th Cir. 1997) (citations omitted) (emphasis added), *cert. denied*, 523 U.S. 1047 (1998).

In *Middlesex County Ethics Comm. v. Garden State Bar Assoc.*, 457 U.S. 423 (1982), a bar Ethics Committee investigated an attorney, made a finding of probable cause, and then served a formal statement of charges on the attorney. Instead of filing an answer to the disciplinary complaint, the attorney filed suit in federal district court, alleging that the New Jersey Bar's disciplinary rules violated his First Amendment free speech rights and "were facially vague and overbroad." *Id.* at 428-29. The district court dismissed the complaint

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[5] There is no allegation in the complaint that Mr. Yates had any involvement in connection with Mr. Stoddard's renewed application for admission. The only reference to Mr. Yates is with respect to the 2001 informal hearing.

based on the *Younger* abstention doctrine, but the court of appeals reversed. *Id.* In holding that dismissal of the federal district court action was proper, the Supreme Court in *Middlesex* set out three factors to guide the application of the *Younger* abstention doctrine:

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

Id. at 432 (emphasis in original).

In *Lawrence v. Schwiep*, Case No. 4:05cv14-RH/WCS (Northern District of Florida), this Court directly addressed these three questions in a very similar case and concluded that "in the case at bar, precisely as in *Middlesex*, the answer to each of these questions is yes." (Exhibit C, at p. 1) (Order of Dismissal). This Court thus dismissed the *Lawrence* action based on *Younger* abstention, and the Eleventh Circuit Court of Appeals affirmed the dismissal on September 21, 2006. (Exhibit D)(Order of Eleventh Circuit).

First, Judge Hinkle determined that "Florida bar admission proceedings, like the New Jersey attorney disciplinary proceedings at issue in *Middlesex*, are judicial in nature." (Exhibit C, at page 5) (citing Fla. Bar. Admiss. R. 1-11)("admission of attorneys to the practice of the profession of law is a judicial function."); *Dale v. Moore*, 121 F.3d 624 (11th Cir. 1997) (holding admission decision of Florida Supreme Court "judicial" for purposes of *Rooker-Feldman* doctrine). *Second*, Judge Hinkle concluded that "Florida's interest in attorney admission is as strong as the interest in attorney discipline involved in *Middlesex*." (*Id.* at p. 6). *Third*, Judge Hinkle concluded that "the Florida system afforded Mr. Lawrence

a full and fair opportunity to raise constitutional challenges in the Florida Supreme Court–an opportunity as adequate as that provided in *Middlesex* or in any other case involving *Younger* abstention." (*Id.*).

Judge Hinkle also expressly addressed, and rejected, two arguments that Mr. Stoddard is likely to make in the instant case: (i) that Mr. Stoddard's action may proceed under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) and (ii) that *Younger* abstention is inapplicable because a bar admission proceeding, unlike a bar disciplinary proceeding, is supposedly "remedial" (not "coercive") in nature. (doc. 1)(Complaint, ¶¶ 2, 3). Judge Hinkle rightly rejected both of these arguments in *Lawrence*, and the Eleventh Circuit Court of Appeals affirmed.

Judge Hinkle rejected Mr. Lawrence's argument under *England*, *supra*, concluding that "*England* dealt with abstention under *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) and [thus] has no applicability under *Younger*." Judge Hinkle explained:

> In the *Pullman-England* setting, a state court resolves an issue of state law that is distinct from the federal constitutional issue; the state has no overriding interest in having the entire controversy resolved in a single proceeding; and after the state law issue is resolved, a federal court can resolve any remaining federal constitutional issue without undermining the state decision. In the *Younger* setting, in contrast, the state interest in enforcing its laws is front and center; that interest cannot be vindicated until all defenses, including those based on the federal Constitution are addressed; and federal adjudication of those defenses, either while the state proceeding is ongoing or even thereafter, would interfere with the state's vindication of its interests.

(Exhibit C, pp. 6 - 7). Thus, Judge Hinkle concluded that "[a]n *England* reservation would defeat the entire purpose of *Younger* abstention." (*Id.* at p. 7). Accordingly, any attempt by

Mr. Stoddard to rely on *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), would be clearly misplaced. *England* has no application to *Younger* abstention.

Judge Hinkle also rejected the argument that *Middlesex* was distinguishable because it dealt with *discipline* of a Bar *member* rather than an *applicant* for admission to the Bar. Judge Hinkle explained that "an applicant to the bar who passes the examination is entitled to admission unless his or her character and fitness is found lacking." (*Id.* at p. 9). Thus, "[i]n order to block admission on the ground of character and fitness, the Board must file 'specifications' setting forth the basis for its action." (Id.). Judge Hinkle continued:

> Specifications against an applicant are, for present purposes, no different from charges against an existing member of the Bar. In either case, a person who wishes to practice law in Florida is subjected to specific charges that, if sustained, would preclude the person from doing so. In either case, the final decision rests with the Florida Supreme Court based on evidence presented in a formal hearing before an agency that is an arm of the court. In either case, federal constitutional defenses may be presented fully and fairly for determination by the Florida Supreme Court, with federal review available only in the United States Supreme Court by petition for writ of certiorari. And in either case, interference by a federal court with the ongoing proceedings would be equally disruptive.

(*Id.*). Thus, "[w]hen an applicant is entitled to admission unless pending charges are sustained, those pending charges are, for purposes of *Younger* and *Middlesex*, no different from charges against an existing member of the Bar." (*Id.*). Accordingly, *Middlesex* "remains controlling," and Mr. Stoddard's action should be dismissed on this basis.

The Eleventh Circuit Court Appeals not only affirmed the result in the *Lawrence* case, but rendered a Per Curiam Opinion which leaves no doubt that Mr. Stoddard's action (like that of Mr. Lawrence) should be dismissed based on *Younger* abstention. The Eleventh

Circuit ruled:

> Appellant ... Lawrence was denied admission to the Florida Bar for failing to meet the fitness requirements. He filed a complaint in the district court, raising federal constitutional and statutory challenges to the denial of his admission. In an order dated October 7, 2005, the district court dismissed his complaint based on the abstention principles set forth in *Middlesex* ... where the Supreme Court determined that federal action challenging ongoing state bar disciplinary proceedings is barred by the doctrine of *Younger v. Harris* ....
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> After careful consideration of the briefs and record, we find that the district court's orders constitute a proper application of the controlling law to the material facts in the case.

(Exhibit D). Accordingly, Mr. Stoddard's action should likewise be dismissed based on *Younger* abstention. *See also Peebles v. University of Dayton*, 412 F.Supp.2d 814 (S.D. Ohio 2005) (dismissing law student's ADA claim for injunctive relief and damages against law school based on *Younger* abstention); *Kotz v. Florida,* 33 F.Supp.2d 1019 (M.D. Fla. 1998) (applying *Younger* abstention to ADA claim regarding proceeding on application for license to practice medicine).

III. PLAINTIFF'S CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT

This action should be dismissed based on *Younger* abstention. Additionally, all of Plaintiff's claims for damages and retroactive injunctive relief against the Board and Defendants Hunter, Pobjecky, Rigsby and Yates in their official capacity should also be dismissed for the separate and independent reason that these claims are barred by the Eleventh Amendment.

As noted above, the Board is an official arm of the Supreme Court of Florida. Fla.

Bar Admiss. R. 1-12; *In re Board of Florida Bar Examiners*, 353 So.2d 98 (Fla. 1977). It is "well-settled that Eleventh Amendment immunity bars suits brought in federal court when the State itself is sued and when an 'arm of the State' is sued." *Manders v. Lee*, 338 F.3d 1304, 1308-09 (11th Cir. 2003) (citation omitted), *cert. denied*, 540 U.S. 1107 (2004). Additionally, "state officials sued in their official capacity are also protected by the amendment." *Harbert Intern., Inc. v. James*, 157 F.3d 1271, 1277 (11th Cir. 1998). Thus, the Eleventh Amendment applies to the claims against the Board and the individual defendants in their official capacity. *See Diaz v. Moore*, 861 F. Supp. 1041, 1049 (N.D. Fla. 1994) (holding that Eleventh Amendment applied to bar claims against the Board as an entity and the Board's Executive Director); *Stoddard I* (same) (Copy attached at Exhibit A).

There has been no waiver or proper Congressional abrogation of Eleventh Amendment immunity with respect to Plaintiff's claims. *See Quern v. Jordan*, 440 U.S. 332 (1979) (no proper Congressional abrogation regarding §1983); *United States v. Georgia*, 126 S.Ct. 877 (2006) (no valid Congressional abrogation of state sovereign immunity under Title II of ADA unless plaintiff's ADA claim alleges conduct that "*actually* violates the Fourteenth Amendment") (emphasis in original); *Cf. Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (failure to make special accommodations requested by individuals with disabilities was not unconstitutional). Mr. Stoddard's ADA claim is not predicated on conduct that also constitutes an "actual" violation of the Fourteenth Amendment. Accordingly, Plaintiff's ADA and § 1983 claims against the Board and Defendants Hunter, Pobjecky, Rigsby and Yates in their official capacity are barred by the

Eleventh Amendment.

The Court's decisions in *United States v. Georgia*, 126 S.Ct. 877 (2006) and *Tennessee v. Lane,* 541 U.S. 509 (2004) lend no support to Mr. Stoddard under the facts of the instant case. In *United States v. Georgia*, 126 S.Ct. 877 (2006), the plaintiff was a prison inmate who alleged conduct by the state in violation of the ADA which conduct would also be an *actual violation* of the *Eighth Amendment*. The Court thus held that–as to this specific unconstitutional conduct only–the Eleventh Amendment was validly abrogated. *Id.* at 882. Unlike the prison inmate in *United States v. Georgia*, Mr. Stoddard's ADA claim does not allege conduct violative of any substantive constitutional right.

Similarly, in *Tennessee v. Lane, supra*, the plaintiffs alleged that physical barriers denied disabled individuals the right of access to the courts – a right protected by the Due-Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment.[6] Mr. Stoddard makes no such allegations in the instant case. *See Kirkpatrick v. Shaw*, 70 F.3d 100, 102-04 (11th Cir. 1995) ("right to practice law is not a fundamental right"). Mr. Stoddard's ADA claims are, therefore, barred by the Eleventh Amendment. *See, e.g., Zabriskie v. Court Admin.*, 2006 WL 231528 (11th Cir. Feb. 1, 2006) (holding that Eleventh Amendment barred ADA claim against Judicial Circuit's Office of Court

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[6] The plaintiffs in *Tennessee v. Lane* were paraplegics who used wheelchairs for mobility. One plaintiff alleged that he was compelled to appear to answer criminal charges on the second floor of a county courthouse that had no elevator. He alleged that he had to crawl up two flights of stairs to get to the courtroom. When he returned to the courthouse for a hearing, he refused to crawl again or to be carried by officers to the courtroom. He was then arrested and jailed for failure to appear. The other plaintiff, a certified court reporter, alleged that she had not been able to gain access to a number of county courthouses, and thus lost both work and an opportunity to participate in the judicial process. *Id.* at 513-14.

Administration alleging denial of access to the court's Self Help Center for *pro se* litigants).

IV. DEFENDANTS HAVE ABSOLUTE (JUDICIAL) IMMUNITY FROM ANY CLAIMS FOR DAMAGES.

All of the individual defendants are clearly entitled to absolute immunity from any damages claims against them in their personal capacity. Thus, to the extent Mr. Stoddard asserts claims for compensatory and punitive damages against Defendants Hunter, Pobjecky, Rigsby and Yates in their personal capacity, the action should be dismissed on this basis as well. *See, e.g.*, *Stoddard I* (dismissing Stoddard's claims for damages against FBBE Executive Director and FBBE Chair based on, *inter alia*, absolute judicial immunity).

Judges are "absolutely immune from civil liability ... for acts performed in their judicial capacity, provided such acts are not done in the 'clear absence of all jurisdiction.'" *Roland v. E.W. Phillips*, 19 F.3d 552 (11th Cir. 1994) (citation omitted). The doctrine of judicial immunity is well established as an essential way of protecting the independence of judges and other decision-makers whose decisions may have adverse effects on certain individuals. *Forrester v. White*, 484 U.S. 219 (1988). Judicial immunity has therefore long been part of federal and Florida law. *See Roland v. E.W. Phillips*, 19 F.3d 552 (11th Cir. 1994); *Office of the State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So. 2d 1097 (Fla. 1993)("[A] strict guarantee of judicial immunity is necessary to preserve the effectiveness and impartiality of judicial and quasi-judicial offices."); *Johnson v. Harris*, 645 So. 2d 96 (Fla. 5th DCA 1994)(affirming trial court's granting of motion to dismiss, with prejudice, action against judge and judge's assistant based on absolute judicial immunity),

rev. denied, 659 So. 2d 271 (Fla. 1995); *Rivello v. Cooper City*, 322 So. 2d 602 (Fla. 4th DCA 1975)(affirming motion to dismiss, with prejudice, action against judge for failure to place probationer on supervised probation based on judicial immunity).

"Nonjudicial officers are encompassed by a judge's absolute immunity when their official duties 'have an integral relationship with the judicial process.'" *Roland v. E.W. Phillips*, 19 F.3d 552, 555 (11th Cir. 1994). The attorney admission process is itself a "judicial function."[7] Moreover, the FBBE, and its officers, in all of their conduct related to Mr. Stoddard's application for admission, carried out duties imposed on the Board by the Supreme Court of Florida. *See* Fla. Bar Admiss. R. 1-12 (Florida Supreme Court created the Board as an agency of the Court for the express purpose of regulating the admission of applicants to The Florida Bar). All of the individual defendants' involvement in Mr. Stoddard's application for admission thus had "an integral relationship" with the judicial process, for which they are afforded absolute immunity. *See Diaz v. Moore*, 861 F. Supp. 1041 (N.D. Fla. 1994) (holding that the Florida Board of Bar Examiners, its Executive Director and the Chairman of the Board, were entitled to absolute judicial immunity in connection with performance of their duties in the attorney admission process);[8] *Sparks v.*

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[7] *See* Art. V, § 15, Fla. Const. (Supreme Court of Florida "shall have *exclusive jurisdiction* to regulate the admission of persons to the practice of law . . . .") (emphasis added); Fla. Bar Admiss. R. 1-11 ("admission of attorneys to the practice of the profession of law *is a judicial function*") (emphasis added). *Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) (referring to FBBE's character and fitness investigatory process and determination as "judicial inquiry"); *Marin v. Hazelton*, 916 F.2d 716 (9th Cir. 1990) (Table, Text in Westlaw 1990 WL 157128) ("Determining whether a particular individual is suited to be a member of the bar is *inherently* a judicial function ... ."), *cert. denied*, 502 U.S. 888 (1991) (emphasis added).

[8] In *Diaz*, the plaintiff made allegations similar to those being made by Mr. Stoddard. Mr. Diaz was an applicant to The Florida Bar who sued the Executive Director and Chairman of the Board of Bar Examiners, in their personal and official capacities. Mr. Diaz alleged that his rights were violated because of the defendants' intentional failure to act

Character and Fitness Committee of Kentucky, 859 F.2d 428, 431 (6th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) ("The act of considering an application to the bar is a judicial act. And it is no less a judicial act simply because it is performed by nonjudicial officers in whom the responsibility for the performance of such duties is lawfully delegated by the judiciary. Therefore, those who perform those duties on behalf of the judiciary are entitled to the same judicial immunity as would be enjoyed by judicial officers performing the same act."). *See also* Rule 1-71, Fla. Bar Admiss R. (FBBE, its agents and employees, are "immune from all civil liability").[9]

V. PLAINTIFF LACKS STANDING AND/OR THE MATTER IS NOT RIPE

Plaintiff's claims should also be dismissed for the separate and independent reasons that Mr. Stoddard lacks standing and/or the matter is not ripe for disposition. To establish the "irreducible minimum" for constitutional standing, the plaintiff must allege and prove that: "(1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that

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on his application to the bar, which was allegedly done "in a malicious attempt to financially drain him." *Id.* at 1043 & n.1. Diaz also argued that the defendants' "demand that he undergo a psychiatric evaluation by a psychiatrist of the Board's choosing at his expense before any decision will be made on his application was made solely in an effort to harass him and stall any decision on his application." *Id.* at 1043.

[9] Because all the allegations relating to Mr. Pobjecky concern the "judicial" function of admission to The Florida Bar, Mr. Pobjecky – like the other individual defendants – is clearly entitled to judicial immunity. Moreover, to the extent Plaintiff argues that Mr. Pobjecky functioned in the capacity of an advocate, in the nature of a "prosecutor" of the Specifications, Mr. Pobjecky would also be entitled to absolute prosecutorial immunity. *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1279 (11th Cir.2002) ("Absolute prosecutorial immunity applies to all actions a prosecutor takes while performing his function as advocate ... ."). Additionally, all of the individual defendants are also protected from liability by *qualified* immunity, although it is unnecessary for the court to reach that issue.

the injury will be redressed by a favorable decision." *Dillard v. Baldwin County Com'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). Moreover, federal courts "should not speculate concerning the existence of standing or piece together support for the plaintiff." *Stoddard I*, Decision of 11th Circuit, at p. 12 (Copy at Exhibit B).

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

In the instant case, Mr. Stoddard alleges that his application for admission remains pending. Although the FBBE has decided to file Specifications (and Specifications were filed), it has not yet been finally determined whether or not Mr. Stoddard will be admitted to The Florida Bar. If the FBBE ultimately determines that Mr. Stoddard has *not* satisfied the Board's character and fitness requirements, Mr. Stoddard will have the right to petition the Florida Supreme Court for review of any adverse character and fitness determination by

the FBBE. *See* Rule 3-40.1, Fla. Bar Admiss. R. Thus, Plaintiff has failed to allege facts to demonstrate that he has standing and that the matter is ripe for adjudication.

VI. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF

Plaintiff's Complaint should be dismissed in its entirety for the reasons expressed above. Additionally, the Complaint should also be dismissed for the separate and independent reason that Plaintiff fails to state a claim for relief.

A. Counts I and II - First Amendment Freedom of Speech and Fourteenth Amendment Due Process

In Count I, Mr. Stoddard sues defendants Pobjecky, Yates and Rigsby, alleging that Specification 8 (issued in 2005) violates Mr. Stoddard's right to freedom of speech. (doc. 1, ¶34). However, Mr. Stoddard fails to allege facts to show a constitutional violation; and he makes no specific factual allegations of any personal involvement by any of these defendants in any event.

Specification 8 is quoted by Mr. Stoddard in paragraph 34 of his complaint:

> Specification 8
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> That following your investigative hearing held on September 8, 2001 the Board's Executive Director notified you by letter dated September 14, 2001, that the Board had ruled to prepare and file Specifications in your case. That by letter dated September 27, 2001, you objected to the payment of the transcript of your investigative hearing. That **in your letter, you stated** in part:
>
> > **Considering the speed with which the board's letter arrived at my doorstep after the hearing it is plain that the decision to file specifications was made in advance of the hearing**.

> That your above-quoted statement was unprofessional in that it was **made without any reasonable basis in fact of belief** in that you were specifically advised by the presiding officer at the close of your investigative hearing of the follow:
>
> > MR. ARAN: Okay. That concludes this proceeding. As I mentioned to you, we're part of the overall Board meeting here this weekend. What we will do is deliberate; make a recommendation to the full Board, and you [sic] **should be able to have a written response to you within a week**.

(doc. 1, ¶ 34) (emphasis added).

Mr. Stoddard's free speech claim is entirely without merit. Bar licensing authorities may constitutionally enforce rules, like Florida Rule of Professional Conduct 4-8.2(a), which proscribe the making of statements concerning the qualifications or integrity of a judge or other adjudicatory officer which the licensee "*knows to be false or with reckless disregard as to its truth or falsity.*" *See Wightman v. Texas Supreme Court*, 84 F.3d 188, 190 (5th Cir. 1996) (affirming dismissal based on *Younger* abstention where attorney alleged that bar disciplinary proceeding charging attorney with violation of Texas counterpart to Florida Rule of Professional Conduct 4-8.2(a) violated his First Amendment rights). Moreover, the Eleventh Circuit has specifically held that the Rules relating to the character and fitness requirement do not facially violate the First Amendment. *See Kirkpatrick v. Shaw*, 70 F.3d 100, 102-04 (11th Cir. 1995). The Court stated:

> 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).[10]

In Count II, Mr. Stoddard sues defendants Pobjecky, Rigsby and Hunter, alleging that his procedural due process rights were violated when the FBBE denied his request to waive Rule 4-18.2, which provides that bar examination results are valid for only five years. (doc. 1, ¶¶23, 39). However, Plaintiff again alleges no facts to show that any of these defendants personally violated Mr. Stoddard's constitutional rights. Additionally, Mr. Stoddard falls far short of stating a viable due process claim. Mong other things, Plaintiff cannot show a deprivation inasmuch as he has not sought review of the FBBE's decision in the Florida Supreme Court pursuant to Rule 2-30.2, Fla. Bar. Admiss. R. *See* , *e.g.*, *Giannini v. Committee of Bar Examiners of State 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"). *See also Cline v. Supreme Court of Georgia*, 781 F.2d 1541 (11th Cir. 1986) (affirming dismissal of bar applicant's due process challenges to Georgia rules limiting number of times applicants can take Georgia bar exam); *Jones v. Bd. of Comm's of Alabama State Bar*, 737 F.2d 996 (11th Cir.1984)(affirming dismissal of bar applicant's due process challenge to Alabama rule limiting number of times

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[10] Moreover, Plaintiff's allegation that the substance of this specification included constitutionally protected speech does not overcome the important interests embodied in the *Younger* abstention doctrine. *See, e.g.*, *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, where Plaintiff alleged that charges were based on constitutionally protected speech in the form of criticism of other judges).

an applicant can sit for Alabama bar exam).

Moreover, the Eleventh Circuit has upheld the facial validity of the character and fitness requirements against Fourteenth Amendment due process and equal protection challenges. *See Kirkpatrick v. Shaw*, 70 F.3d 100, 102-04 (11th Cir. 1995). In rejecting these challenges, 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.

B. Counts III and IV - Bill of Attainder

In Counts III and IV, Plaintiff alleges that certain Board actions violated the prohibition against bills of attainder in Article I, Section 10 of the United States Constitution.[11] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of [sic] the protections of a judicial trial." *Nixon v. Administrator, Gen. Servs.*, 433 U.S. 425, 468 (1977). The constitutional prohibition against bills of attainder applies only to acts of legislatures. *Marshall v. Sawyer*, 365 F.2d 105 (9th Cir.1966), *cert. denied*, 385 U.S. 1006 (1967) ("a bill of attainder is an act of a legislative body that applies either to named individuals or to

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[11] This provision states in relevant part that "[no] State shall … pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts…."

easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial"). Plaintiff fails to allege any facts to show any violation of the prohibition on bills of attainder. *See, e.g., State Bar of Texas v. Sutherland*, 766 S.W.2d 340 (Tex. App. El Paso 1989) (prohibitions against bills of attainder do not apply to state bar rules dealing with attorney reinstatement).

C. Counts III, V and VI - ADA Discrimination

To state a claim for discrimination under Title II of the ADA, a plaintiff must allege facts to show: (1) that he is a "qualified individual with a disability;" (2) that he was "excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity" or otherwise "discriminated [against] by such entity;" (3) "by reason of such disability." 42 U.S.C. §12132; *Kornblau v. Dade County,* 86 F.3d 193, 194 (11th Cir. 1996)("the plaintiff must show disability, the denial of a public benefit, and that such 'denial of benefits, or discrimination was by reason of the plaintiff's disability.'").

As a threshold matter, each of the individual defendants is entitled to dismissal of Plaintiff's ADA discrimination claims, for failure to state a claim, because there is no individual liability for discrimination under the ADA (Title II). *See Shotz v. City of Plantation*, 344 F.3d 1161, 1171-72 & n. 17 (11th Cir. 2003).

Moreover, the FBBE is also entitled to dismissal of Plaintiff's ADA claims for failure to state a claim. As to the first element of Plaintiff's ADA claims, Plaintiff alleges – without any supporting underlying facts – that he "is disabled ... because he has a history that included a diagnosis of a mental illness, because he is an active member of a long-term

recovery group and because he is regarded ... as having a mental illness." (doc. 1, ¶ 14). Plaintiff also alleges that the FBBE's "investigative file" contains information relating to his "diagnosis and treatment for post traumatic stress disorder (PTSD)" in 1987 and consultations with psychiatrists in 2000 for PTSD, in 2001 when he was tentatively diagnosed with bipolar disorder, and in 2003 when it was recommended that his treatment be terminated. (doc. 1, ¶15(e)(j)(k)(o)). However, Plaintiff fails to make any sufficient *factual* allegations to show that he is a "qualified individual with a disability" within the meaning of the ADA.[12]

Plaintiff also fails to sufficiently allege that was "excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity" or otherwise "discriminated [against] by such entity" because of any alleged disability. Mr. Stoddard's primary "factual" allegation seems to be his allegation that Mr. Yates made inquiry regarding Mr. Stoddard's mental health at the 2001 informal hearing and that Mr. Pobjecky, as counsel, raised the issue again at the 2005 informal hearing. (doc. 1, ¶¶ 17, 30). However, Mr. Stoddard himself admits that "there is not a single reference to a mental health issue in the Specifications document." (doc. 1, ¶57). Mr. Stoddard makes no allegations that he was denied reasonable accommodations in connection with the *process* of making application for admission. Mr. Stoddard also makes no allegations of any

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[12] Plaintiff cannot merely make a conclusory allegation that defendants "regarded" him as disabled; nor is it sufficient for plaintiff to merely allege that he was seen by a psychiatrist or treated for bipolar disorder or depression. Plaintiff must, but has failed to, allege *facts* to show that he is or is regarded as being disabled within the meaning of the ADA. Additionally, there is also a substantial question as to whether Plaintiff is "qualified" inasmuch as he does not have a currently-valid passing Bar Examination score.

violations during any FBBE *formal* hearing nor during any review of any FBBE determinations by the Florida Supreme Court. Mr. Stoddard merely makes conclusory allegations that the FBBE informal hearing panels in 2001 and 2005 declined to find that he had satisfied the FBBE's character and fitness requirements and thus filed Specifications, requiring a formal hearing.[13]

As explained above, it has not yet been finally determined whether or not Mr. Stoddard will be admitted to The Florida Bar. Thus, Mr. Stoddard has not alleged and cannot show that he that he has been "excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity," let alone that any such deprivation was "by reason of" a disability.

Finally, even assuming arguendo that Mr. Stoddard had otherwise stated a claim for relief under the ADA, Question No. 26(b) on the Application for Admission (doc. 1, ¶52) does not violate the ADA. *See Applicants v. Texas State Bd. of Law Examiners*, 1994 WL 923404 (W.D. Tex. 1994) (finding no violation of ADA where Texas application included question asking "[w]ithin the last ten years, have you been diagnosed with or have you been treated by bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder?"). As the court stated in *McCready v. Ill. Bd. of Admissions*, 1995 WL 29609 (N.D. Ill. 1995):

> The point of mental health inquiries by bar committees is not to "screen out"

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[13] Mr. Stoddard does not identify the members of the 2001 and 2005 informal hearing panels (He identifies only one member of the 2001 panel, Mr. Yates); and Mr. Stoddard also does not identify all the members of the FBBE who acted on the informal hearing panel recommendations in 2001 and 2005. Mr. Stoddard alleges absolutely no facts to support any factual basis to show that any of these individuals, let alone the respective panels and the FBBE as a whole, violated any of Mr. Stoddard's rights under the U.S. Constitution or the ADA.

> or "single out" individuals with mental disabilities or make it more difficult for them to become licensed attorneys. Whether an individual is qualified notwithstanding a disability or unqualified because of a disability depends on all of the facts of the case, including all pertinent facts about the disabling condition as well as all mitigating factors. The real point of the inquiry, and of all questions asked of applicants, is to develop a comprehensive picture of each individual, to compile a record of significant life events upon which informed judgments as to character and fitness can be based. Title II of the ADA places none of those facts off limits.

Id. at 6.

VII. CONCLUSION

Based on the foregoing, Defendants Hunter, Pobjecky, Rigsby, Yates and the Florida Board of Bar Examiners respectfully request that the Court dismiss Plaintiff's Complaint in its entirety with prejudice.

Respectfully submitted,

s/James J. Dean

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CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of October, 2006 the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, and notice of electronic filing to: Jeffrey H. Northcutt, 1814 Cedar River Drive, Jacksonville, FL 32210.

s/James J. Dean
James J. Dean