

In The
United States Court of Appeals
for the Sixth Circuit

FRANK J. LAWRENCE, JR.
Plaintiff – Appellant,
v.

JOHN T. BERRY, ET. AL.,
Defendants – Appellees.

**On Appeal from the United States District Court
for the Western District of Michigan
Southern Division**

FINAL BRIEF OF APPELLANT

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Oral Argument Requested

**STATEMENT OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1 Appellant makes the following statements:

1. Is any party a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome?

No.

Dennis B. Dubuc (P67316)

Dated: January 22, 2007

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents claims under the First and Fourteenth Amendments concerning Michigan regulations that govern attorney licensing, focusing in particular on the statutory requirement that an applicant must prove good moral character to the “satisfaction” of the licensing authorities.

Appellant believes that oral argument would aid in the determination of these constitutional issues concerning an important regulatory area of Michigan procedure, one that deals with an issue central to the practice of law, namely, how applicants are licensed as attorneys.

Pursuant to Sixth Circuit Rule 34(a), Appellant requests that this Court docket this appeal for oral argument. Appellant believes that oral argument will enable counsel to succinctly place his client’s position before the Court in this important First and Fourteenth Amendment case and aid this Court in its decisional process. Oral argument will also afford counsel the opportunity to address any questions that the Court may have concerning the lower court record and the specifics of the parties’ respective positions on appeal.

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

On September 8, 2006 Appellant Frank J. Lawrence, Jr. (hereinafter “Appellant”) filed his Verified Complaint in the district court seeking equitable relief pursuant to 42 U.S.C. §1983, asserting that he was denied a Michigan license to practice law in violation of his protected First Amendment activities. Additionally, Appellant sought damages from three State Bar of Michigan investigators, in their personal capacities, for retaliating against Appellant because they disproved of his exercise of certain federally secured rights. Jurisdiction was based on 28 U.S.C. §§ 1331, 1343(a)(3) and (4) and 2201 and 2202. (R. 1, complaint, Apx. 10). With the Verified Complaint, Appellant filed a motion for a preliminary injunction. (R. 2 and 3, motion and brief for prelim. inj., Apx. 72).

On December 14, 2006, the district court entered an opinion dismissing this action and denying Appellant’s motion for preliminary injunction, which was pursuant to Appellees’ pre-answer motions to dismiss (R. 50, opinion, Apx. 63). On the same day, the district court entered the final judgment (R. 51, order, Apx. 62). On December 15, 2006, Appellant filed a timely notice of appeal (R. 52, notice of appeal, Apx. 70).

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 because it stems from the December 14, 2006, final judgment of the district court, which disposed of all pending claims and closed the case.

STATEMENT OF ISSUES FOR REVIEW

- I. Does the Rooker-Feldman¹ doctrine bar Appellant's civil rights claims in Count I of his Complaint, which consist of an as-applied challenge to a final administrative decision of the Michigan Board of Law Examiners, a state administrative agency that was created by the Michigan Legislature? Alternatively, assuming arguendo that the Rooker-Feldman doctrine does apply to such administrative decisions, did Appellant's notice of reservation of federal claims and defenses pursuant to England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411; 84 S. Ct. 461; 11 L. Ed. 2d 440 (1967), which Appellant asserted at the onset of his state administrative proceedings, preclude application of the Rooker-Feldman doctrine in this case?
- II. Are Appellant's as-applied prospective relief claims, which pertain to his future reapplication process, ripe for judicial review and does Appellant have standing to raise those claims, given that he has already been denied admission in a final administrative decision, due to the licensing officials' disapproval of his statements about certain state officials, and

¹ See Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983).

Appellant's complaint states that he intends to continue engaging in those same, or substantially similar, activities in the future?

- III. Are individuals who perform "investigative" functions pursuant to Michigan law, and who have no authority to grant or deny an applicant's application to practice law, entitled to absolute immunity from suit? Alternatively, does Appellant's complaint plead sufficient facts and law to overcome a pre-answer motion to dismiss based upon qualified immunity?
- IV. Did the district court abuse its discretion in denying Appellant's motion for a preliminary injunction?

STATEMENT OF THE CASE

This lawsuit is a sequel to this Court's May 16, 2006 decision in Lawrence v. Chabot, Sixth Circuit Nos. 05-1082, and 05-1397; 2006 U.S. App. LEXIS 12191 (6th Cir. 2006), which found, inter alia, that Appellant Frank J. Lawrence, Jr.'s as-applied federal civil rights claims against Michigan attorney licensing officials were unripe and that Appellant lacked standing. Subsequently, on June 14, 2006, the Michigan Board of Law Examiners denied Appellant a license to practice law in a final administrative decision (R. 1, exhibit to complaint, Apx. 37). During Appellant's state administrative proceedings, he had the burden of proving that his

First Amendment activities should not be the basis for character rejection. (R. 1, complaint, ¶ 37, Apx. 23).

Rather than seek state judicial review of that administrative decision, on September 8, 2006, Appellant filed this lawsuit. Defendant-Appellee John T. Berry is the Executive Director of the State Bar of Michigan (hereinafter “SBM”) and Defendant-Appellee Louis A. Smith is the President of the Michigan Board of Law Examiners (hereinafter “BLE”), both of which are charged with the duty of evaluating licensing applicants’ “good moral character”. These individuals have been sued in their official capacities. (R. 1, complaint, ¶¶ 4, 5, Apx. 11). Defendants-Appellees David Baum, Randy Musbach and Sonal Mithani are investigators for the State Bar of Michigan. They have been sued in their individual capacities. (R. 1, complaint, ¶ 6, Apx. 12).

Appellant’s three-count complaint sought three types of relief. In Count I, Appellant challenged the June 14, 2006 administrative decision of the Michigan Board of Law Examiners, as authorized by Patsy v. Bd. of Regents, 457 U.S. 496; 102 S. Ct. 2557; 73 L. Ed. 2d 172 (1982) and Norfolk & W. R. Co. v. Public Utilities Com., 926 F.2d 567, 572 (6th Cir. 1990), which cited Thomas v. Texas State Bd. of Medical Examiners, 807 F.2d 453 (5th Cir. 1987). Specifically, Appellant sought relief on the grounds that the Board’s decision was issued in retaliation for his protected First and Fourteenth Amendment rights. Alternatively,

Count II of Appellant's complaint sought as-applied prospective relief pertaining to Appellant's future reapplication process. Specifically, Appellant requested equitable relief enjoining Appellees from again denying Appellant a license to practice law due to his exercise of his federally secured rights. Finally, Count III of the complaint sought damages from three investigators, who have no ability to approve or deny applications to practice law in Michigan. Count III is based upon First and Fourteenth Amendments retaliation theories. Appellant also filed a separate motion for preliminary injunction.

On October 2, 2006, Appellee Louis Smith filed a FRCP 12(b)(1) and (6) motion to dismiss and brief in support (R. 25 and 27, Smith motion to dismiss and brief, Apx. 107), and on October 10, 2006, he responded to Appellant's motion for preliminary injunction. (R. 29, Smith response to motion for prelim. inj., Apx. 170). Appellee Smith argued that his final administrative decision was barred from federal review pursuant to the Rooker-Feldman doctrine, that Appellant's prospective claims were unripe for federal review, that this Court's May 16, 2006 decision collaterally estopped Appellant's claims in this suit, and that the lower court should abstain from this case pursuant to Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943). Appellee Smith reiterated these defenses in his response to Appellant's motion for preliminary injunction, and

further argued that Appellant failed to meet the prerequisites for preliminary injunctive relief.

On October 16, 2006, Appellee John T. Berry responded to Appellant's motion for preliminary injunction (R. 33, Berry response to motion for prelim. inj., Apx. 228), and he filed a motion to dismiss Appellant's complaint pursuant to FRCP 12(b)(1) and (6) (R. 34 and 35, Berry motion to dismiss and brief, Apx. 290). Appellee Berry advanced the same, or similar, arguments set forth by Appellee Smith. Additionally, Appellee Berry argued that the district court should abstain from adjudicating Appellant's equitable claims pursuant to Wilton v. Seven Falls Co., 515 U.S. 277; 115 S. Ct. 2137; 132 L. Ed. 2d 214 (1995) and Parker v. Turner, 626 F.2d 1 (6th Cir. 1980).

On the same day, Appellees Baum, Musbach and Mithani filed a combined motion to dismiss Appellant's damages claims (R. 36 and 37, Baum, Musbach and Mithani motion to dismiss and brief, Apx. 369). They argued that Appellant's damages claims were absolutely barred pursuant to this Court's decision in Sparks v. Character and Fitness Comm. of Ky., 859 F.2d 428 (6th Cir. 1988). Alternatively, Appellees Baum, Musbach and Mithani argued that Appellant's complaint failed to plead sufficient facts and law to overcome a pre-answer motion to dismiss.

On October 24, 2006, Appellant filed his reply to Appellee Smith's response to Appellant's motion for preliminary injunction (R. 38, Lawrence Reply to Smith's response to motion for prelim. inj., Apx. 447) and October 30, 2006, Appellant similarly filed his reply to Appellee Berry's opposition to Appellant's motion. (R. 39, Lawrence reply to Berry's response to motion for prelim. inj., Apx. 458).

On October 30, 2006, Appellant filed his response to Appellee Smith's motion to dismiss (R. 40, Lawrence response to Smith's motion to dismiss, Apx. 476), and on November 17, 2006, Appellant filed his response to Appellee Berry's motion to dismiss (R. 41, Lawrence response to Berry's motion to dismiss, Apx. 479). Appellant argued that the Rooker-Feldman doctrine did not apply here, he was not required to seek state judicial review pursuant to Patsy v. Bd. of Regents, 457 U.S. 496; 102 S. Ct. 2557; 73 L. Ed. 2d 172 (1982), and that his reservation of federal claims and defenses precluded application of the Rooker-Feldman doctrine in this case. Appellant also argued that his prospective claims were ripe and that he had standing because he had already been denied a license in a final administrative decision which disapproved of his engaging in constitutionally protected activities and that he intended to continue engaging in those same activities in the future. Appellant also asserted that he was suffering present adverse affects from the Board's decision to deny him a license, and that it was "a

certainty” that Appellant would reapply for a license to practice law. Appellant further argued that Burford abstention did not apply here because this case does not involve a disputed issue of state law, but rather a conflict between state and federal laws. Finally, Appellant argued that abstention pursuant to Wilton, supra, or Parker, supra, is inapplicable here because there are no ongoing state proceedings and there was no evidence submitted by Appellees that federal adjudication of these issues would affect any cases presently pending in state court.

On November 13, 2006, Appellant responded to Appellees Baum’s, Musbach’s and Mithani’s motion to dismiss (R. 42, Lawrence response to Baum’s, Musbach’s and Mithani’s motion to dismiss, Apx. 515). Appellant argued that this Court’s 1988 decision in Sparks is inapplicable here, especially given the Supreme Court’s subsequent and clear pronouncements in Buckley v. Fitzsimmons, 509 U.S. 259; 113 S. Ct. 2606; 125 L. Ed. 2d 209 (1995) that state actors who perform “investigative” functions are not entitled to absolute immunity. Alternatively, Appellant argued that he pleaded sufficient facts in his complaint to defeat a pre-answer motion to dismiss and that the law is clearly established that licensing applicants cannot be denied a license to practice law for holding constitutionally protected beliefs. Baird v. State Bar of Arizona, 401 U.S. 1; 91 S. Ct. 702; 27 L. Ed. 2d 639 (1969); Perry v. Sindermann, 408 U.S. 593; 92 S. Ct. 2694; 33 L. Ed. 2d 570 (1972).

On November 17, 2006, Appellee Smith filed his reply to Appellant's response to Appellee Smith's motion to dismiss (R. 45, Smith reply to Lawrence response to motion to dismiss, Apx. 527), and on November 21, 2006, Appellee Berry filed his reply brief (R. 48, Berry reply to Lawrence response to motion to dismiss, Apx. 543). On November 27, 2006, Appellees Baum, Musbach and Mithani filed their reply briefs (R. 49, Baum, Musbach and Mithani reply to Lawrence response to motion to dismiss, Apx. 587).

On December 14, 2006, the district court entered its Opinion, (R. 50, opinion, Apx. 63) and Order (R. 51, order, Apx. 62), dismissing this lawsuit. The district court held that Appellant's claims in Count I were barred by the Rooker-Feldman doctrine, and it failed to address Appellant's claims relating to his England reservation. It also said that this Court's May 16, 2006 decision barred any facial challenges to the Michigan licensing system. The district court further found that the prospective claims in Count II of the complaint were unripe and that a favorable decision on the prospective claims would "necessarily imply that the hearing panel's decision was improper and forbidden by the constitution." Finally, the district court dismissed Appellant's damages claims against the State Bar investigators, finding that the claims were barred pursuant to Sparks, supra. Alternatively, the district court found that qualified immunity was appropriate

“since a reasonable officer would not have understood his or her conduct to have been illegal at the time”.

On December 15, 2006, Appellant filed his notice of appeal (R. 52, notice of appeal, Apx. 70).

STATEMENT OF FACTS

A. Michigan Licensing Framework

An applicant for a license to practice law in Michigan initiates the licensing process by filing an application. At all times during the application process, an applicant is in control over whether his application remains pending or not. As such, application proceedings are remedial and/or non-coercive, unlike the criminal proceedings in Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), or the disciplinary proceedings in Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982). (R. 1, complaint, ¶ 34, Apx. 22). Additionally, the BLE was created by the Michigan Legislature and it operates pursuant to a grant of legislative authority. The Michigan attorney licensing process is administrative in nature. (R. 1, complaint, ¶ 5, Apx. 11).

Michigan regulates the practice of law, as with other professions and occupations, by requiring a license as a condition of practice. An applicant for a law license must meet certain eligibility requirements, which are divided generally

between integrity fitness (evaluated by review of “good moral character”) and education fitness (evaluated by written examination of familiarity with standard legal concepts). The SBM and the BLE, through Appellees Berry and Smith, are charged with the responsibility of evaluating applications for admission to the practice of law in the State of Michigan. Appellant’s lawsuit is an as-applied challenge to the manner in which Appellees administer the rules governing the assessment of licensing applicants’ “good moral character” pursuant to MCL 600.934. (R. 1, complaint, ¶ 7, Apx. 12).

Michigan law gives the BLE final administrative decision-making authority over the assessment of “good moral character,” MCL 600.934(1). However, the SBM first conducts an investigation and formulates a recommendation concerning an applicant’s character, which is then transmitted to the BLE. (R. 1, complaint, ¶ 8, Apx. 13). The constitutional claims in this lawsuit have been brought because the SBM, through Appellee Berry, and the BLE, through Appellee Smith, use protected speech as a basis for the denial of a government-issued license and as a censorship tool. (R. 1, complaint, ¶¶ 38, 41-43, Apx. 23).

The BLE has admitted that when it and the SBM “make character decisions based on content of an applicant’s speech” their “conclusion of unacceptability was not supported by any finding the statements were constitutionally unprotected.”

(R. 41, answer in Dubuc case, Apx. 512-514) (emphasis added)². Although there exists a review process wherein an applicant aggrieved by an adverse administrative decision can seek mandamus review in the Michigan Supreme Court pursuant to MCR 7.304(A), the Court’s response to such requests is historically a one-sentenced decision, even when constitutional challenges are brought (R. 1, complaint, ¶ 16, Apx. 15). This is particularly concerning to Appellant since he discovered a confidential internal BLE memo, discussing how applicants had been denied character clearance by the SBM simply because the applicants were not liked. (R. 41, internal memo, Apx. 503). As further evidence of Appellees’ documented practice of using protected First Amendment activities as a basis for character rejection, Appellant discovered the following litigation statements made by the SBM in Dean v. Byerley, 354 F.3d 540 (6th Cir. 2004):

The bar has had several applicants who exercised free speech in a fashion that contributed to a recommendation of denial.

* * *

Although an individual may have a constitutional right to engage in a certain activity under certain circumstances, the activity may constitute a basis on which an applicant is denied admission to the Bar. On occasion, Bar applicants have been denied admission for activity that is lawful, but that reflects poorly on the applicant’s suitability to practice law.

* * *

² Appellee Berry argued to the district court that Appellant’s England reservation of federal claims and defenses “affirmatively prevented” the Appellees from making constitutional rulings. (R. 35, motion, Apx. 302). This argument was disingenuous, given that the BLE admitted that constitutional rulings are not made when speech is considered (R. 41, answer in Dubuc case, Apx. 512-514).

If Mr. Byerley had told plaintiff that he may not be admitted to the Bar because of his picketing, Mr. Byerley would merely have been pointing out to plaintiff a very real possibility.

* * *

Plaintiff may certainly continue to picket in front of the State Bar building, but a reasonable person would recognize that the picketing may reflect adversely on plaintiff's character and fitness to practice law.

(R. 34, exhibit to motion, Apx. 331-332)

It is important to reiterate that the BLE considers applicants' speech in its administrative decision-making, and when rejecting applicants on account of their speech, the BLE does not make "any finding the statements [are] constitutionally unprotected". (R. 41, answer in Dubuc case, Apx. 512-514). **During the state administrative proceedings, the burden is on the applicant to prove that constitutionally protected activities should not warrant character rejection.**

(R. 1, complaint, ¶ 37, Apx. 23).

B. Facts Regarding Appellant's As-Applied Claims

Appellant graduated from an accredited law school in May, 2001, and he passed the July, 2001, Michigan Bar Examination. Appellant's first (withdrawn) application to practice law was addressed in this Court's May 16, 2006 decision. Appellant's second application to practice law is the subject of this lawsuit. Appellant filed his second application on or about August 18, 2004, and in doing so, he asserted a reservation of federal claims and defenses. (R. 1, complaint, ¶ 22, Apx. 18). 12 months later, on August 15, 2005, Appellees Baum, Musbach and

Mithani were selected by the SBM to conduct an informal interview and investigation of Appellant. The investigative non-adjudicatory duties of Appellees Baum, Musbach and Mithani are set forth in Michigan Supreme Court Rule 15, §(1)(5)(c). (R. 34, SBM rules, Apx. 322)

Appellant's complaint alleges that he has had an extremely contentious relationship with SBM staff and that, inter alia, Appellant was responsible for publicly exposing that the SBM's executive director, Appellee John Berry, committed plagiarism in one of Appellee Berry's articles on the character and fitness process (R. 1, complaint, ¶ 21, Apx. 17), something that the SBM and Appellee Berry have never denied. Appellant's complaint alleged numerous other events that were a motivating factor for Appellee Baum's, Musbach's and Mithani's retaliatory motives and intentions. (R. 1, complaint, ¶ 21, Apx. 17).

On August 19, 2005, Appellees Baum, Musbach and Mithani issued a "report and recommendation" based on their investigation. (R. 1, complaint, ¶ 23, Apx.18). It was an unfavorable character recommendation based, inter alia, on Appellant's criticism of the Michigan state court system (R. 1, complaint, ¶ 24, 25, 64, Apx. 19). For example, Appellees Baum, Musbach and Mithani stated in their investigative recommendation:

Applicant made it clear that, at least in part because of the litigation, he has little respect – and indeed considerable disdain – for the state court system. For example, he explained that it became his goal early on in the litigation to do whatever he could

to get the matter into Federal court. He explained that it is really the Federal courts that are the guardians of the constitution, and that, in contrast, the state court system fails adequately to protect individuals' constitutional rights. We are concerned about providing a law license to someone who, even before he has handled his first case as a member of the bar, has effectively written off such a huge component of the justice system.

(R. 1, complaint, ¶ 24, Apx. 18) (emphasis added)

After receiving the SBM investigative report, Appellant publicly criticized Appellees Baum and Mithani. Specifically, Appellant sent a letter to the Board of Directors of Community Legal Resources (the former employer of Appellee Mithani) criticizing her for violating Appellant's constitutional rights. The complete text of Appellant's letter to Community Legal Resources is embodied in the BLE's opinion (R. 1, exhibit to complaint, Apx. 46). Also, Appellant contacted the University of Michigan Student Government Office to make arrangements for Appellant to meet with students (Appellee Baum is employed at the University of Michigan). Specifically, Appellant desired to share his experience with students who might be interested in learning about how Appellee Baum abused Appellant's constitutional rights.

After Appellees Baum, Musbach and Mithani forwarded their investigative recommendation to Appellee Smith and the BLE, it was brought to the BLE's attention that Appellant had been publicly criticizing Appellees Baum and Mithani. This information infuriated the BLE, which conducted an administrative hearing

concerning Appellant's character and fitness on April 20, 2006. Before and during Appellant's BLE hearing, the members of the BLE were reminded that Appellant continued to reserve his federal claims and defenses for adjudication in a federal forum (R. 1, complaint, ¶ 29, Apx. 20). On June 14, 2006, the BLE and Appellee Smith denied Appellant's request for a license to practice law in a final administrative decision. However, the BLE rejected all of Appellee Baum's, Musbach's and Mithani's investigative recommendations and the BLE came up with its own independent reason for character rejection. (R. 1, complaint, ¶ 30, Apx. 20). Specifically, the BLE issued a written opinion withholding Appellant's character approval due to Appellant's speech related activities between the time of Appellant's SBM district investigative committee hearing on August 15, 2005 and the BLE hearing on April 20, 2006, namely, on account of Appellant's public statements against Appellees Baum and Mithani (R. 1, exhibit to complaint, Apx. 37). Importantly, **Appellant was not denied for making false or untruthful statements**. Both the SBM's and BLE's decisions were made without regard to whether Appellant's First Amendment activities were protected by state law or not. (R. 1, complaint, ¶¶ 32, 42, Apx. 21).

Appellees' district court briefs repeatedly discussed how Appellant's then attorney, Hugh Davis, said he found Appellant's speech to be "personally reprehensible", while omitting any mention of Mr. Davis' explanation to the BLE

that in his professional judgment Appellant's conduct could not be the basis for character rejection. (R. 1, exhibit to complaint, Apx. 54). This is consistent with Supreme Court Justice Sandra Day O'Connor's remark that "the hallmark of the protection of free speech is to allow free trade in ideas--even ideas that the overwhelming majority of people might find distasteful or discomforting." Virginia v. Black, 538 U.S. 343, 358, 155 L. Ed. 2d 535, 123 S. Ct. 1536 (2003). Mr. Davis' point should have been well taken by the BLE, especially since all of its members are lawyers: free speech that Mr. Davis personally thinks is "reprehensible" cannot constitutionally be the basis for character rejection. "[O]ne man's vulgarity is another's lyric." Cohen v. California, 403 U.S. 15, 25; 91 S. Ct. 1780; 29 L. Ed. 2d 284 (1971).

Appellant continues to engage in the same conduct that resulted in the BLE's decision to deny him character approval. (R. 1, complaint, ¶ 33, Apx. 21). For example, following receipt of the BLE's June 14, 2006 opinion, Appellant picketed the law office of BLE member Gerald Marcinkoski with a large sign that stated "I do not recommend attorney Gerald Marcinkoski". (R. 1, complaint, ¶ 33, Apx. 21). Also, Appellant sent individual letters to the members of the Civil Rights Commission criticizing BLE member Linda V. Parker for the manner in which she handled Appellant's application, the letter being similar in form to the one Appellant sent about Appellee Mithani (Linda V. Parker works for the Civil

Rights Commission) (R. 1, complaint, ¶ 33, Apx. 21). Appellant also intends to picket the law office of Appellee Smith. (R. 1, complaint, ¶ 33, Apx. 21). These activities are analogous to those the BLE used to deny Appellant character clearance and most assuredly will result in future denials unless a federal court grants the prospective relief requested by Appellant. Therefore, Appellant alleged, the need for prospective relief concerning future character rejection is not speculative or hypothetical because he is suffering from present adverse effects of the BLE's decision (he cannot qualify for a license to practice law until he ceases his protected First Amendment activities). (R. 1, complaint, ¶ 61, Apx. 29). Appellant's complaint alleges that he is suffering a "chilling effect" and that he has "an actual and well-founded fear" of suffering future deprivations of constitutional dimension. (R. 1, complaint, ¶¶ 33, 61, Apx. 21).

C. Appellees Do Not Make "Judicial" Decisions

In its May 16, 2006 decision, this Court relied upon (and cited) Magistrate Joseph Scoville's Report and Recommendation in Lawrence v. Chabot, 2003 U.S. Dist. LEXIS 17894 (W.D. Mich. 2003) at *56, which held that "the Sixth Circuit's decision in Fieger governs the present case" since licensing applicants can bring constitutional challenges in state administrative proceedings. See, Lawrence, 2003 U.S. Dist. LEXIS 17894 at * 56, citing Fieger v. Thomas, 74 F.3d 740 (6th Cir. 1996) ("Plaintiff's challenge to the adequacy of the right of judicial review is

foreclosed by a decision of the Sixth Circuit Court of Appeals rendered in a closely analogous case. Fieger v. Thomas”). In Fieger, the Sixth Circuit stated:

Fieger emphatically contends that the procedure summarized above does not afford him an opportunity to raise constitutional challenges. He maintains that the hearing panel and the Board cannot consider constitutional challenges to the Rules of Professional Conduct.

* * *

In contrast, counsel for the Commission has stated in her briefs and oral argument before the district court and the appellate panel that the hearing panel and the Board are not precluded from hearing Fieger's constitutional claims.

Fieger, 74 F.3d at 747-748

In this Court's 1996 decision in Fieger, it held that since Mr. Fieger could bring constitutional challenges before the administrative disciplinary board, Mr. Fieger's claims of inadequate review were unpersuasive. Id. at 748.

However, on July 31, 2006, things changed. Ten years after this Court's decision in Fieger (that constitutional challenges could be brought before the Board), and two months after this Court's May 16, 2006 decision in Appellant's case, the Michigan Supreme Court issued a decision proving that Mr. Fieger was correct all along:

A disciplinary proceeding in Michigan commences upon the filing of a formal complaint and is heard before a panel of three lawyers. Appeals are then taken to the ADB. The ADB is an administrative body, comprised of nine individuals appointed by this Court, three of whom are not attorneys. While the ADB, like all other governmental entities, must operate in accord with the Constitution, for example, on questions such as compelled witness self-incrimination, it does not

possess the power to hold unconstitutional rules of professional conduct that have been enacted by this Court. As we said in Wikman v Novi, 413 Mich. 617, 646-647; 322 N.W.2d 103 (1982), administrative agencies generally do not possess the power to declare statutes unconstitutional because this is a core element of the "judicial power" and does not belong to an agency that is not exercising this constitutional power. The power of judicial review is one that belongs exclusively to the judicial branch of our government.

Should any attorney appearing before the ADB believe a rule itself to be unconstitutional, such as in this case, resort must be made to an appeal to this Court, and, if we concur in this assessment, it is our responsibility to declare such rule unconstitutional.

Griev. Adm'r v. Fieger, 476 Mich. 231, 253-254;719 N.W.2d 123 (2006)
(emphasis added)

Because Appellees do not possess such declaratory authority, their administrative decisions cannot be considered “judicial” in nature and the only opportunity for state judicial review is through a mandamus action that is functionally equivalent to a “leave to appeal” process. (R. 1, complaint, ¶ 16, Apx. 15). See also, Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610, 613 (6th Cir. 2003) (“Dubuc sought leave to appeal the Board's decision to the Michigan Supreme Court, which declined to grant review.” emphasis added)

SUMMARY OF THE ARGUMENT

In this case, there has been no “state court judgment”, only an administrative decision by Appellee Smith. Because Appellant has not presented his claims to any Michigan court, this case is unlike Feldman, and the Rooker-Feldman doctrine

cannot apply. The district court erred in failing to follow the pronouncements of the Supreme Court in its recent decision in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284; 125 S. Ct. 1517; 161 L. Ed. 2d 454 (2005), namely, that the doctrine is “confined” to litigants “complaining of injuries caused by state-**court** judgments” (emphasis added). The relief requested in Count I of Appellant’s complaint is authorized by Patsy v. Board of Regents, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982) and this Circuit’s decision in Norfolk & W. R. Co. v. Public Utilities Com., 926 F.2d 567, 572 (6th Cir. 1990), which expressly rejected a requirement of exhausting administrative remedies before suing under 42 U.S.C. §1983.

Alternatively, the district court erred in failing to address Appellant’s argument that his England reservation of his federal claims precluded application of the Rooker-Feldman doctrine. A valid reservation precludes application of the Rooker-Feldman doctrine. DLX, Inc. v. Kentucky, 381 F.3d 511, 523 fn.9 (6th Cir. 2004); Barnes v. McDowell, 848 F.2d 725, 732 (6th Cir. 1988). Therefore, even if this Court were inclined to apply the Rooker-Feldman doctrine to administrative decisions, it should not be applied here because of Appellant’s reservation.

The district court also erred by dismissing Appellant’s prospective relief claims. A favorable decision granting prospective relief would not run afoul of the Rooker-Feldman doctrine and “necessarily imply that the hearing panel’s decision

was improper and forbidden by the constitution”. See, Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610, 618 (6th Cir. 2003) (this Court approved of a prospective relief action whereby an applicant “has explicitly not challenged the denial of his [prior] application” and “no outcome in [the] lawsuit could or would reverse any prior state court judgment”). The district court failed to recognize that while the relief granted under Ex parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), may only be prospective, “proof for the claim necessitating relief can be based on historical facts, and most often will be”. Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 898 (8th Cir. 2000); Edelman v. Jordan, 415 U.S. 651, 39, Ed. 2d 662, 94 S. Ct. 1347 (1974).

The district court erred by finding that Appellant lacked standing and his prospective relief claims were unripe by basing its decision on Grendell v. Ohio Supreme Ct., 252 F.3d 828 (6th Cir. 2001). Unlike the situation in Grendell, the lower court record contains sworn evidence that “it is a certainty” that Appellant will reapply for a law license (R. 4, affidavit, ¶ 5, Apx. 93), that Appellant has engaged and will continue to engage in the same conduct that resulted in his first denial (R. 1, complaint, ¶¶ 33, 61 and exhibit to complaint, Apx. 21, 59), that Appellant must immediately change his conduct to be eligible for a law license in the future (R. 1, exhibit to complaint, Apx. 55), and that a future denial for the same conduct would be a violation of the First Amendment (R. 1, complaint, ¶¶ 38,

51, 64-65, Apx. 23). An allegation that a plaintiff wishes to engage in prohibited activity is generally sufficient to confer standing. See, e.g., Kolender v. Lawson, 461 U.S. 352, 355 n.3, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983). In this case, unlike in Grendell where “the sanctions imposed by the Ohio Supreme Court have already been perfected”, 252 F.3d at 832, Appellant is suffering continuing, present adverse effects: he cannot qualify for a license to practice law in Michigan until he ceases protected First Amendment activities of which Appellees disapprove. The facts and circumstances of this case are far more analogous to Fieger v. Ferry, ___ F.3d ___ (6th Cir. 2006); 2006 U.S. App. LEXIS 31745 (6th Cir. 2006), where this Court recently held that Fieger had standing to bring his claims because it was “likely, rather than speculative, that Fieger will again face the recusal issue that he has faced in past cases...”.

Ripeness most often is addressed in situations where “litigants seek to enjoin the enforcement of statutes, regulations, or policies that have not yet been enforced against them.” Ammex, Inc. v. Cox, 351 F.3d 697, 706 (6th Cir. 2003) (emphasis added). Here, the injury has already occurred and without federal relief, it will most assuredly occur again. This Court has before it a situation where factual developments have fully evolved and legal issues are now the focus of this litigation. The lower court’s ripeness decision, if upheld, effectively precludes typical federal question jurisdiction by relegating aggrieved applicants to an

illusory post-administrative review process that does not mandate, and is extremely unlikely to lead to, any actual judicial review. The ripeness doctrine should not be applied in a manner which effectively eliminates federal trial court jurisdiction of significant federal questions that involve government censorship and implicate injury to First Amendment rights, constitutional injuries that the law regards as irreparable. Prospective judicial consideration, by a federal district court, is the only effective (and truly meaningful) remedy for the censorship of such fragile, and cherished, constitutional interests.

The district court erred by finding that Appellees Baum, Musbach and Mithani are entitled to absolute immunity, when in fact, Appellees merely perform investigative functions pursuant to Michigan Law, and they have no authority to approve or deny a license. (R. 1, complaint, ¶ 63, Apx. 30). These Appellees are not adjudicative decision-makers. They “investigate” and conduct an “informal interview” with licensing applicants. (R. 1, complaint, ¶¶ 6, 63, Apx. 30, and Rule 15, §1(5)(c) of the Michigan Supreme Court Rules Governing the State Bar of Michigan). These individuals “perform[] the investigative functions normally performed by a detective or police officer” such as “searching for clues and corroboration that might give [them] probable cause” to recommend proceedings before actual adjudicative decision-makers. Buckley v. Fitzsimmons, 509 U.S. 259, 273, 276-78, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). Common law did not

provide absolute immunity for investigators who conduct “informal interviews” and who merely make investigative recommendations. Appellees Baum, Musbach and Mithani do not engage in functions that are “functionally comparable to that of a judge.” Butz v. Economou, 438 U.S. 478, 513, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). (internal quotation marks and citations omitted). The district court erred by relying upon Sparks v. Character & Fitness Comm. of Ky., 859 F.2d 428 (6th Cir. 1988) because Sparks pre-dated the Supreme Court’s clear and subsequent pronouncements in Buckley, supra, that investigative functions are not provided by absolute immunity.

The district court erred by stating that Appellant “has failed to cite any factual circumstances from which one could conclude that the judicial acts in question were the product of an improper bias or motive”. A fair reading of the Verified Complaint reveals completely the opposite. (R. 1, complaint, ¶¶ 21, 67-68 Apx. 17). Appellant’s factual allegations, accepted as true, could result in a finding that Appellees’ actions were not objectively reasonable and that they violated Appellant’s clearly established right to hold the belief “that it is really the Federal courts that are the guardians of the constitution, and that, in contrast, the state court system fails adequately to protect individuals’ constitutional rights” (R. 1, complaint, ¶ 24, Apx. 18). Appellant had a clearly established right not to have his political beliefs used against him during administrative proceedings. 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.

See also, Baird v. State Bar of Arizona, 401 U.S. 1; 91 S. Ct. 702; 27 L. Ed. 2d 639 (1971) and separate opinions by Black, Douglas, Brennan, and Marshall, JJ. (under the First Amendment, views and beliefs are immune from Bar Association inquisitions designed to lay a foundation for barring an applicant from the practice of law.)

Finally, the district court erred by refusing to grant Appellant's motion for preliminary injunctive relief. In determining whether to grant preliminary injunction, a district court is required to consider: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 578 (6th Cir. 2006). All four of these elements were met in this case. Any injury to First Amendment rights constitutes

irreparable loss, Elrod v Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed. 2d 547 (1976), and this Court should immediately grant Appellant’s request for an injunction.

STANDARD OF REVIEW

Because this case involves “constitutional facts,” the highest standard of review must be provided to the matter sub judice. See, Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 192 (6th Cir. 1997) (“[a]n appellate court is to conduct an independent review of the record when constitutional facts are at issue.”); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984).

The district court’s dismissal of Appellant’s complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo. Marks v. Newcourt Credit Group, Inc., 342 F.3d 444, 451 (6th Cir. 2003). This Court should accept all the Appellant’s factual allegations as true and construe the complaint in the light most favorable to Appellant. See Id. at 451-52. This Court should not affirm the district court’s order dismissing Appellant’s complaint “unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [his] claim[s] which would entitle [him] to relief.” Id. at 452 (internal quotation marks and citation omitted).

ARGUMENT

- I. **THE ROOKER-FELDMAN DOCTRINE DOES NOT BAR APPELLANT’S CIVIL RIGHTS CLAIMS IN COUNT I OF HIS COMPLAINT, WHICH CONSIST OF AN AS-APPLIED CHALLENGE TO A FINAL ADMINISTRATIVE DECISION OF THE MICHIGAN BOARD OF LAW EXAMINERS, A STATE ADMINISTRATIVE AGENCY THAT WAS CREATED BY THE MICHIGAN LEGISLATURE.**

ALTERNATIVELY, ASSUMING ARGUENDO THAT THE ROOKER-FELDMAN DOCTRINE DOES APPLY TO SUCH ADMINISTRATIVE DECISIONS, APPELLANT’S NOTICE OF RESERVATION OF FEDERAL CLAIMS AND DEFENSES PURSUANT TO England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411; 84 S. Ct. 461; 11 L. Ed. 2d 440 (1967), WHICH APPELLANT ASSERTED AT THE ONSET OF HIS STATE ADMINISTRATIVE PROCEEDINGS, PRECLUDES APPLICATION OF THE ROOKER-FELDMAN DOCTRINE IN THIS CASE.

The BLE is an administrative agency that performs non-coercive administrative functions. (R. 1, complaint, ¶¶ 5, 17, Apx. 11). Appellee Smith admitted in his lower court brief that “the Board of Law Examiners is a state administrative agency” (R. 27, motion to dismiss, Apx. 113), and the district court’s opinion also refers to the Appellees’ agencies as “state administrative agencies”. The Rooker-Feldman doctrine, does not apply to administrative decisions, only state court judgments. On March 30, 2005, because “the doctrine ha[d] sometimes been construed to extend far beyond the contours of the Rooker

and Feldman cases” the Supreme Court of the United States clarified how the doctrine should be applied:

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**.

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284; 125 S. Ct. 1517; 161 L. Ed. 2d 454 (2005) (double emphasis added)

Appellant has not presented his claims to any Michigan court. Accordingly, this case is unlike Feldman, and the Rooker-Feldman doctrine cannot apply. Also, Appellant was not required to seek state judicial review. This is supported by Patsy v. Board of Regents, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982) and this Circuit’s decision in Norfolk & W. R. Co. v. Public Utilities Com., 926 F.2d 567, 572 (6th Cir. 1990), which cited Thomas v. Texas State Bd. of Medical Examiners, 807 F.2d 453 (5th Cir. 1987).

Assuming arguendo that the Rooker-Feldman doctrine is applicable to administrative decisions, the doctrine would still be inapplicable here because of Appellant’s reservation of federal claims and defenses. (R. 1, complaint, ¶¶ 22, 29, 46, Apx. 18). A valid reservation precludes application of the Rooker-Feldman doctrine. DLX, Inc. v. Kentucky, 381 F.3d 511, 523 fn.9 (6th Cir. 2004); Barnes v. McDowell, 848 F.2d 725, 732 (6th Cir. 1988).

The decision of the BLE cannot be characterized as “judicial” in nature, given the Michigan Supreme Court’s recent decision in Griev. Adm’r v. Fieger, 476 Mich. 231, 253-254; 719 N.W.2d 123 (2006), which disallows licensing applicants to raise constitutional challenges to licensing rules during state administrative proceedings. The district court erred by applying the Rooker-Feldman doctrine to Count I of Appellant’s complaint.

II. APPELLANT’S AS-APPLIED PROSPECTIVE RELIEF CLAIMS, WHICH PERTAIN TO HIS FUTURE REAPPLICATION PROCESS, ARE RIPE FOR JUDICIAL REVIEW AND APPELLANT HAS STANDING TO RAISE THOSE CLAIMS, GIVEN THAT HE HAS ALREADY BEEN DENIED ADMISSION IN A FINAL ADMINISTRATIVE DECISION, DUE TO THE LICENSING OFFICIALS’ DISAPPROVAL OF HIS STATEMENTS ABOUT CERTAIN STATE OFFICIALS, AND APPELLANT’S COMPLAINT STATES THAT HE INTENDS TO CONTINUE ENGAGING IN THOSE SAME, OR SUBSTANTIALLY SIMILAR, ACTIVITIES IN THE FUTURE.

Appellant’s free speech related activities used by Appellee Smith to deny Appellant a law license were openly and honestly held views and could not be used as a basis to deny a government-issued license. This issue was squarely addressed in Konigsberg v. State Bar of California, 353 U.S. 252, 268-269; 77 S. Ct. 722; 1 L. Ed. 2d 810 (1957), wherein a bar applicant wrote a series of editorials for a local newspaper where he “severely criticized ... this Court’s decisions in Dennis and

other cases.” Id. at 268. In addressing the bar applicant’s “severe” criticism of public officials, our nation’s highest Court stated:

We do not believe that an inference of bad moral character can rationally be drawn from these editorials. Because of the very nature of our democracy such expressions of political views must be permitted. Citizens have a right under our constitutional system to criticize government officials and agencies. Courts are not, and should not be, immune to such criticism. Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining "moral character," than if it should be attempted directly.

Id. at 269.

Therefore, if Konigsburg’s “severe” public criticism of the Supreme Court could not be considered evidence of bad moral character, there is no possible way that Appellee Smith’s administrative decision is in compliance with constitutional standards. 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

Further, because Appellee Smith uses protected speech as a basis for the denial of a government-issued license, his practices violate the rule of Perry v. Sindermann, 408 U.S. 593, 597; 33 L. Ed. 2d 570; 92 S. Ct. 2694 (1972), as

articulated above. Appellant had every right to engage in the conduct that resulted in his BLE denial. That same continuing conduct will most assuredly result in the denial of his next application, since he has been warned to cease his criticism of the State Bar of Michigan. The “freedom to criticize public officials and expose their wrongdoing is at the core of First Amendment values, even if the conduct is motivated by personal pique or resentment.” Barrett v. Harrington, 130 F.3d 246, 263 (6th Cir. 1997) (emphasis added). In the district court, Appellee Berry repeatedly referred to Appellant’s speech as an “attack” on Appellees Mithani and Baum, but the Supreme Court has said “debate on public issues should be uninhibited, robust and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”. New York Times Co. v. Sullivan, 376 U.S. 254, 270, 11 L. Ed. 2d 686 , 84 S. Ct. 710 (1964). In Texas v. Johnson, 491 U.S. 397, 414, 105 L. Ed. 2d 342, 109 S. Ct. 2533 (1989), Justice Brennan wrote for the Court, “if there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Justice O'Connor has remarked “the hallmark of the protection of free speech is to allow free trade in ideas--even ideas that the overwhelming majority of people might find distasteful or discomforting.” Virginia v. Black, 538 U.S. 343, 358, 155 L. Ed. 2d 535, 123 S. Ct. 1536 (2003).

The district court was incorrect in holding that a favorable decision granting prospective relief would “necessarily imply that the hearing panel’s decision was improper and forbidden by the constitution”. This is contrary to this Court’s decision in Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610, 618 (6th Cir. 2003), where this Court approved of a similar prospective relief action. The district court also attempted to distinguish this case from Dubuc by stating that it is dissimilar to Dubuc’s specific rule challenge. This is incorrect. In Dubuc, this Court remanded the case to consider issuing “... declaratory and injunctive relief allowing him to reapply immediately for admission to the Bar and prohibiting defendants from considering First Amendment activity when considering applications for admission to the Bar.” (emphasis added). There is nothing about the Rooker-Feldman doctrine that precludes Appellant’s prospective claims, especially since “proof for the claim necessitating relief can be based on historical facts, and most often will be”. Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 898 (8th Cir. 2000); Edelman v. Jordan, 415 U.S. 651, 39, Ed. 2d 662, 94 S. Ct. 1347 (1974).

The lower court misapplied the ripeness and standing doctrines to this matter. The lower court’s record contains sworn evidence that “it is a certainty” that Appellant will reapply for a law license (R. 4, affidavit, ¶ 5, Apx. 93), that Appellant has engaged and will continue to engage in the same conduct that

resulted in his first denial (R. 1, complaint, ¶¶ 33, 61 and exhibit to complaint, Apx. 21, 59), that Appellant must immediately change his conduct to be eligible for a law license in the future (R. 1, exhibit to complaint, Apx. 37), and that a future denial for the same conduct would be a violation of the First Amendment (R. 1, complaint, ¶¶ 38, 51, 64-65, Apx. 23). Appellant is suffering continuing, present adverse effects because Appellees are unwilling to provide him a license to practice law until Appellant ceases protected First Amendment activities – activities that Appellant refuses to cease.

If this Court finds that it is proper to delay review, the hardship to Appellant would be manifest. He graduated from law school and passed the Bar Exam six years ago. Appellant has been denied a license to practice law in Michigan since that time. The (former) president of the Michigan Board of Law Examiners, William Rheume, specifically noted in his concurring June 2006 opinion that with regard to Appellant's first application, the Bar admission process was used in an attempt to get Appellant to dismiss litigation involving (former) State Bar President Thomas Ryan. (R. 1, exhibit to complaint, Apx. 56). When the State Bar called Thomas Ryan as a witness to discuss this topic, Board President Rheume found Mr. Ryan's testimony to be incredulous. *Id.* Also, Appellant has alleged a chilling effect on his First Amendment rights, which the law deems as an

“irreparable” injury. Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed. 2d 547 (1976). An irreparable injury constitutes hardship.

Appellees alleged in the lower court that any hardship is de minimus because Appellant need only wait until June, 2007 to reapply. The fact that the BLE applied a shortened period of ineligibility does not affect, in any way, the hardship involved because any future application would be subject to the same improper scrutiny of protected rights that is at the core of this lawsuit. See, Fieger v. Ferry, ___F.3d ___ (6th Cir. 2006); 2006 U.S. App. LEXIS 31745 (6th Cir. 2006). Appellee Smith and the BLE knew that their reasons for character rejection were illegitimate and unconstitutional, but a message had to be sent to Appellant that public criticism of those involved in the admission process is not allowed. Further, it will most likely be years before Appellant’s application reaches the BLE. When Appellant reapplied for a law license in August 2004, the SBM used delay as a retaliation tool. It took the SBM 12 months to refer his application to Appellees Baum, Mithani and Musbach for an investigative informal interview. Once the SBM sent Appellees Baum’s, Mithani’s and Musbach’s investigative report to the BLE, it took Appellee Smith an additional eight months to hold a hearing, and another two months to issue its decision. This 22-month delay was on top of the 19-month delay (that was the subject of Appellant’s prior damages action discussed in this Court’s May 16, 2006 decision). If this Court delays

review, it will be granting permission to Appellees to continue improperly using delay as a form of retaliation. "The Supreme Court . . . has found hardship when enforcement of a statute or regulation is inevitable and the sole impediment to ripeness is simply a delay before the proceedings commence." Kardules v. City of Columbus, 95 F.3d 1335, 1344 (6th Cir. 1996).

III. INDIVIDUALS WHO PERFORM "INVESTIGATIVE" FUNCTIONS PURSUANT TO MICHIGAN LAW, AND WHO HAVE NO AUTHORITY TO APPROVE OR DENY AN APPLICANT'S APPLICATION TO PRACTICE LAW, ARE NOT ENTITLED TO ABSOLUTE IMMUNITY FROM SUIT.

ALTERNATIVELY, APPELLANT'S COMPLAINT PLEADED SUFFICIENT FACTS AND LAW TO OVERCOME A PRE-ANSWER MOTION TO DISMISS BASED UPON QUALIFIED IMMUNITY.

Absolute immunity from civil liability is appropriate only in exceptional circumstances. Butz v. Economou, 438 U.S. 478, 507, 57 L. Ed. 2d 895, 98 S. Ct. 2894 (1978). The Supreme Court has held that courts should be "quite sparing" in endorsing absolute immunity, refuse to expand it beyond what is justified, and require government officials to bear the burden of establishing that such immunity is appropriate on a case-by-case basis. Id. The "presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." Burns v. Reed, 500 U.S. 478, 486-87, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991) (emphasis added).

The district court failed to articulate the specific functions that Appellees Baum, Musbach and Mithani perform, which are specified in Michigan Supreme Court Rule 15, §(1)(5)(c). Had it done so, it would have been clear that Appellees are non-adjudicative investigators with no power to grant or deny applications.

Appellees argue that because they perform duties at the behest of the Michigan Supreme Court, then it necessarily follows that they perform “judicial” functions. After the SBM was successful with this same argument in front of Judge David McKeague (in Appellant’s prior action), the appealed result in this Court was different: the SBM defendants were only awarded qualified immunity. Lawrence v. Chabot, 2006 U.S. App. LEXIS 12191 at ** 21 (6th Cir. 2006). During oral argument on February 2, 2006, when the two SBM employees argued to Sixth Circuit Judge John Rogers that they perform judicial functions, and thus, are entitled to absolute immunity, Judge Rogers responded “...it’s the Court telling them to do it rather than the executive branch telling them to do it. But that’s a formal organizational chart difference, that isn’t a function of what-you-do difference.” (R. 39, response brief, Apx. 461).

Judge Rogers’ statement was an accurate representation of the law. Courts must take a functional approach in determining whether absolute immunity is appropriate. See, Forrester v. White, 484 U.S. 219, 224, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1988); Cleavinger v. Saxner, 474 U.S. 193, 201, 88 L. Ed. 2d 507, 106 S.

Ct. 496 (1985). Title or identity is an insufficient basis upon which to confer absolute immunity; instead, whether absolute immunity ought to be afforded must be determined by the nature of the responsibilities of the official in question. See Forrester, 484 U.S. at 224 (“We examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted”); Cleavinger, 474 U.S. at 201. Here, Appellees are not adjudicative decision-makers, but rather, investigators who, at most, have the power to issue a *recommendation* to an administrative body (the SBM Standing Committee on Character and Fitness) that, at most, only has the power to issue a *second recommendation* to the Michigan Board of Law Examiners. The interviews conducted by Appellees lack key elements of a true adversarial proceeding, such as a neutral *decision maker* and formal evidentiary rules. Appellees are not in the business of dispute resolution, or of authoritatively adjudicating private rights. Therefore, they are not the types of state actors whom the Supreme Court of the United States has found to be entitled to absolute immunity.

Appellant noted in the district court that Appellees’ motion to dismiss completely failed to address the three factors that guide a court in making a determination of whether absolute immunity should be awarded, as outlined in Mitchell v. Forsyth, 472 U.S. 511, 521-23, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (R. 42, Lawrence response brief, Apx. 518). Therefore, there was no way

that they could have met their burden. Also, the district court erred by relying upon Sparks v. Character & Fitness Comm. of Ky., 859 F.2d 428 (6th Cir. 1988) because Sparks pre-dated the Supreme Court's clear and subsequent pronouncements in Buckley, supra, that investigative functions are not covered by absolute immunity. Spark's applicability to investigative functions, if any, was nullified by that 1993 Supreme Court decision.

The district court also cited this Circuit's decision in Rippy v. Hattaway, 270 F.3d 416 (2001) in support of its decision to grant Appellees absolute immunity. There are two distinct reasons why Rippy is inapplicable here.

First, unlike the defendants in Rippy, who made child welfare recommendations *directly to the court*, the Appellees in this case are far removed from any Court or phase of any *judicial proceedings*. Rather, Appellees make investigative recommendations to a volunteer standing committee of a Bar association (SBM Standing Committee on Character and Fitness) that only at most has the power to make a second recommendation to the Michigan Board of Law Examiners (an administrative agency created by the Michigan legislature) (R. 42, response, Apx. 516). Therefore, unlike Rippy, Appellees here are insulated, by two administrative layers, from any "judicial" officers or proceedings.

Second, Rippy acknowledged "The investigation of a social worker that precedes the filing of a complaint or petition is not necessarily a judicial act

covered by absolute immunity” and it cited Achterhof v. Selvaggio, 886 F.2d 826, 830 (6th Cir. 1989) for this proposition. The important distinction between Rippy and the present case is that Appellees here perform *statutory non-coercive and non-adversarial functions*, which removes this from the types of situations where absolute immunity was found to be appropriate. In Achterhof, this Court said at 866 F.2d at 830:

Despite the possibility that criminal prosecution might have resulted from Selvaggio's investigation, his decision to "open a case" was not entitled to absolute immunity. This decision was only investigatory or administrative in nature, not prosecutorial, judicial or otherwise intimately related to the judicial process. Selvaggio did not initiate any court action in the role of a prosecutor, nor did he sit as a judge in an adversary proceeding. His work was investigatory. Indeed, it was investigatory work of the most ordinary kind since it was mandated by the statute. (emphasis added)

Similarly, pursuant to Michigan court rules, all Michigan attorney licensing applicants are subjected to an investigation, either by SBM staff or by district committee investigators. Here, Appellees performed statutorily mandated *investigative* functions similar to those described in Achterhof, supra, and they are not entitled to absolute immunity from suit.

Qualified Immunity. Although a federal civil rights plaintiff need not anticipate a qualified immunity defense to state a claim, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 165-68, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993), Appellant’s Complaint did so, and Appellant

articulated why a potential defense of qualified immunity would fail. (R. 1, complaint, ¶¶ 64-68, Apx. 31-32). Appellant’s factual allegations, accepted as true, could result in a finding that Appellees’ actions were not objectively reasonable and that they violated Appellant’s clearly established right to hold the belief “that it is really the Federal courts that are the guardians of the constitution, and that, in contrast, the state court system fails adequately to protect individuals’ constitutional rights” (R. 1, complaint, ¶ 24, Apx. 18).

Appellees’ lower court arguments that they were justified in their conduct is irrelevant to the issue of qualified immunity in this case because: (1) Appellant alleged that Appellees’ conduct was retaliatory; and (2) “an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.” Bloch v. Ribar, 156 F.3d 673, 681-682 (6th Cir. 1998). Also, Appellees disingenuously asserted that Appellant did not have a clearly established right to be free from retaliation on account of his beliefs about the state court system. However, the SBM mistakenly overlooked the fact that in the Dubuc case, it already admitted that it was aware of this clearly established right:

Admission cannot be denied because the applicant is a member of a disfavored political association or a strong advocate of controversial positions, or more directly, because he or she exercises the right to redress grievances through litigation or **is critical of the judicial system or individual judges**.

[R. 39, Berry's response in Dubuc case, Apx. 473-474] (emphasis added)

However, in an attempt to disavow its prior litigation statements, the SBM claimed to the district court below *in this case* that reasonable state officials would *not* have known that they were violating Appellant's constitutional rights.

When determining whether a right is "clearly established," a court looks "first to decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits." Daugherty v. Campbell, 935 F.2d 780, 784 (6th Cir. 1991). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). As the Supreme Court explained, however, "this is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. (citations omitted). The Appellees contended in the lower court that it was not "clearly established" at the time of Appellant's investigative interview that First Amendment activities were off-limits during a character and fitness evaluation. Such an argument, however, misstates the relevant inquiry for the Court in this case. Rather, Appellant's damages claim rested upon a retaliation theory. The right to hold the belief, free from such retaliation, that the state courts of Michigan do not adequately protect

constitutional rights was clearly established at the time of Appellant’s investigative interview. See Perry v. Sindermann, 408 U.S. 593, 597; 33 L. Ed. 2d 570; 92 S. Ct. 2694 (1972); Baird v. State Bar of Arizona, 401 U.S. 1; 91 S. Ct. 702; 27 L. Ed. 2d 639 (1969); Thaddeus-X v. Blatter, 175 F.3d 378, 394-95 (6th Cir. 1999) (en banc).

Finally, the lower court’s decision that Appellant failed to allege enough facts to overcome qualified immunity is untrue and Appellant urges this Court to review the allegations in his Verified Complaint, particularly those that pertain to Appellees motives for retaliation. (R. 1, complaint, ¶¶ 21, 64, 67, Apx. 17, 23). Since the SBM has already admitted that an applicant cannot be denied a license for being “critical of the judicial system or individual judges”, (R. 39, response in Dubuc case, Apx. 473-474), one can only infer a retaliatory motive by the Appellees, who obviously knew better.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT’S MOTION FOR A PRELIMINARY INJUNCTION.

This Court reviews the grant or denial of a preliminary injunction “for an abuse of discretion, but questions of law are reviewed de novo.” Detroit Free Press v. Ashcroft, 303 F.3d 681, 685 (6th Cir. 2002). In determining whether to grant preliminary injunctive relief, a district court is required to consider: (1) the plaintiff’s likelihood of success on the merits; (2) whether the plaintiff may suffer

irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. Yolton v. El Paso Tenn. Pipeline Co., 435 F.3d 571, 578 (6th Cir. 2006).

In First Amendment cases “the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits” because “the issues of the public interest and harm to the respective parties largely depend on the constitutionality” of the state action. Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 888 (6th Cir. 2002). Here, the district court should have found that the likelihood of Appellant’s success is high because it is beyond any reasonable dispute that the BLE’s decision is an affront of protected First Amendment rights, Perry, supra, Konigsberg, supra, and Baird v. State Bar of Arizona, 401 U.S. 1, 8; 91 S. Ct. 702; 27 L. Ed. 2d 639 (1971). Once the Supreme Court of the United States held that “severe” criticism of the Court itself does not authorize character rejection, Konigsberg, 353 U.S. at 269, there can be no doubt that Appellee Smith’s denial of Appellant’s character approval, due to Appellant’s verbal and public criticisms of state licensing officials, is wrong and unconstitutional. Further, Appellee Smith’s decision has had a chilling effect on Appellant and it would deter a person of ordinary firmness from engaging in federally secured

freedoms. Any injury to First Amendment rights constitutes irreparable loss. Elrod v Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed. 2d 547 (1976).

It is expected that a federal court will enforce federal law upon state actors who have injured constitutional rights. In this respect, no harm will come to the public if injunctive relief is granted in this case because the public has an interest in being protected from state actors who fail to abide by the U.S. Constitution. Indeed, a state administrative decision that punishes a person for stating *his opinion* about constitutional infirmities within state government is dangerously self-serving. There is no conceivable harm that would result if this Court grants the relief requested herein.

In Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427, 436 (6th Cir. 2004), the Sixth Circuit noted, “the public interest is served by preventing the violation of constitutional rights”. Therefore, if this Court determines that Appellee Smith’s and Berry’s practices violate the Constitution, then the public would be well-served if this Court granted the injunctive relief requested.

The lower court concluded that equitable relief would not be appropriate because “These are not circumstances concerning which an injunction could be meaningfully crafted or enforced.” This is highly inaccurate. An injunction could be easily crafted which prohibits Appellees from placing the burden of proof on

applicants to show that their First Amendment activities do not merit character rejection. It would be equally simple to require Appellees to cease considering an applicant's protected First Amendment activities when evaluating his or her moral character. Any enforcement of such an injunction would be enforceable in the same manner as any other injunction issued by a federal court.

The Supreme Court has made it clear:

The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial.

Patsy v. Board of Regents, 457 U.S. 496, 503, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). This Court should exercise its authority to restrain Appellees' unconstitutional action and interpose itself as a guardian in this case.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, Appellant prays that this Court grant the following relief:

1. reverse the district court's decision to dismiss Appellant's claims;
2. reverse the district court's denial of Appellant's request for a preliminary injunction;
3. grant an injunction before remanding this case to the district court, that would prohibit the Appellees' future use of protected First Amendment activities as a basis for the assessment of the moral

character and fitness of applicants and as a basis for denying character certification to attorney applicants;

4. in the alternative, issue an injunction wherein Appellees will be required to conduct their decision-making in a way that ensures that they will assess whether an applicant's speech-related acts are substantially protected by law, and, when they evaluate such a matter, the Appellees should have the burden in showing that the speech is unprotected;
5. remand this case back to the district court for further proceedings; and
6. grant any other relief that is just and appropriate under the circumstances. 28 U.S.C. §2106.

Dated: January 22, 2007

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CERTIFICATE OF COMPLIANCE

I certify that this final brief is in compliance with FRAP 32(a)(7)(C) and it contains 11,094 words (14 point, Times New Roman font, MS Word application), excluding the Table of Authorities, Designation of the Contents of the Joint Appendix, if any, and this Certificate.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of January, 2007, pursuant to Fed. R. App. P. 25, I have caused this Final Brief of Appellant and this Certificate of Service to be served by Federal Express, postage prepaid, on the following:

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