

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**

REPLY BRIEF OF APPELLANT

Dennis B. Dubuc (P67316)
Essex Park Law Office, P.C.
12618 10 Mile Rd.
South Lyon, MI 48178
(248) 486-5508

*Counsel for Plaintiff-Appellant
Frank J. Lawrence, Jr.*

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES.	iv
I. INTRODUCTION.	1
II. FEDERAL JURISDICTION GENERALLY ENCOMPASSES JUDICIAL REVIEW OF NON-COERCIVE STATE ADMINISTRATIVE DECISIONS.	3
A. Review of State Administrative Agency Decisions.	3
B. Appellees Failed To Address Appellant’s Argument Concerning His <u>England</u> Reservation.	6
C. Unlike Criminal Or Disciplinary Proceedings, The Appellees’ Licensing Process Is Initiated By The Applicant And It Is Non- Coercive. A Federal District Court Has Jurisdiction To Review Decisions Of Non-Coercive State Administrative Agencies.	7
III. THE CASES CITED BY APPELLEE BERRY IN SUPPORT OF HIS ARGUMENT THAT THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO AWARD EQUITABLE RELIEF, ARE ALL INAPPLICABLE.	9
IV. APPELLANT HAS STANDING AND HIS PROSPECTIVE RELIEF CLAIMS IN COUNT II OF HIS COMPLAINT ARE RIPE, GIVEN THAT LEGAL ISSUES ARE THE FOCUS OF THIS LITIGATION AND DELAYED REVIEW WILL CAUSE HARDSHIP.	11
A. Appellant Has Article III Standing And His Claims Are Ripe.	11
B. Judge Enslen’s Vacated Unpublished Decision in <u>Dubuc</u>	15
V. CLAIM OR ISSUE PRECLUSION DOES NOT BAR APPELLANT’S AS-APPLIED CLAIMS.	18
VI. APPELLEES BAUM, MUSBACH, AND MITHANI ARE NOT ENTITLED TO ABSOLUTE OR QUALIFIED IMMUNITY.	21

A. Appellees Are Not Entitled To Absolute Immunity Because They Are Investigators Who Are Two Administrative Layers Removed From Any “Judicial” Officers.21
B. Appellees Are Not Entitled To Qualified Immunity Because They Violated Appellant’s Clearly Established Right Not To Have His Political Beliefs Used Against Him. A Reasonable State Actor Would Have Known That Such Conduct Is Unconstitutional. . . .	25
VII. THIS COURT SHOULD GRANT INJUNCTIVE RELIEF.	27
CONCLUSION AND RELIEF REQUESTED28
CERTIFICATE OF COMPLIANCE.	30
CERTIFICATE OF SERVICE.	31

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Abbott Laboratories v. Gardner</u> , 387 U.S. 136; 18 L. Ed. 2d 681; 87 S. Ct. 1507 (1967)	11
<u>AmSouth Bank v. Dale</u> , 386 F.3d 763 (6 th Cir. 2005)	9
<u>Antoine v. Byers & Anderson</u> , 508 U.S. 429; 113 S. Ct. 2167; 124 L. Ed. 2d 391 (1993).	23
<u>ASARCO Inc. v. Kadish</u> , 490 U.S. 605; 109 S. Ct. 2037; 104 L. Ed. 2d 696 (1989)	4
<u>Barnes v. McDowell</u> , 848 F.2d 725 (6 th Cir. 1988).	7
<u>Berryman v. Rieger</u> , 150 F.3d 561 (6 th Cir. 1998)	25
<u>Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics</u> , 403 U.S. 388; 91 S.Ct. 1999; 29 L.Ed.2d 619 (1971).	24
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601; 37 L. Ed. 2d 830; 93 S. Ct. 2908 (1973)	20
<u>Brister v. A.W.I., Inc.</u> , 946 F.2d 350 (5 th Cir. 1991).	21
<u>Burns v. Reed</u> , 500 U.S. 478; 114 L. Ed. 2d 547; 111 S. Ct. 1934 (1991).	22, 24
<u>Butz v. Economou</u> , 438 U.S. 478; 57 L. Ed. 2d 895; 98 S. Ct. 2894 (1978).	23
<u>Cate v. Oldham</u> , 707 F.2d 1176 (11 th Cir. 1983)	28
<u>City of Chicago v. Int'l College of Surgeons</u> , 522 U.S. 156; 118 S. Ct. 523; 139 L. Ed. 2d 525 (1997).	3, 4, 5, 6
<u>Cullen v. Fliegner</u> , 18 F.3d 96 (2 nd Cir. 1994)	10
<u>Dean v. Byerley</u> , 354 F.3d 540 (6 th Cir. 2004).	22, 23

<u>DiBlasio v. Novello</u> , 344 F.3d 292 (2d Cir. 2003)25
<u>District of Columbia Court of Appeals v. Feldman</u> , 460 U.S. 462; 75 L. Ed. 2d 206; 103 S. Ct. 1303 (1983).	3
<u>DLX, Inc. v. Kentucky</u> , 381 F.3d 511(6 th Cir. 2004).	7
<u>Doherty v. American Motors Corp.</u> , 728 F.2d 334 (6th Cir. 1982)	18
<u>Dubuc v. Mich. Bd. of Law Examiners</u> , 342 F.3d 610 (6 th Cir. 2003)	7
<u>Dubuc v Parker</u> , 2006 US App LEXIS 2515 (2006).	15
<u>Elam Constr., Inc. v. Regional Transp. Dist.</u> , 129 F.3d 1343 (10th Cir. 1997)	27
<u>Elrod v. Burns</u> , 427 U.S. 347; 49 L. Ed. 2d 547; 96 .S Ct. 2673 (1976)26
<u>Entergy Ark., Inc. v. Nebraska</u> , 210 F.3d 887 (8th Cir. 2000).	10
<u>England v. Louisiana State Bd. of Medical Examiners</u> , 375 U.S. 411; 11 L. Ed. 2d 440; 84 S. Ct. 461 (1967).	6
<u>Fitzgerald v. Peek</u> , 636 F.2d 943 (5th Cir. 1981)	10
<u>Ford v. Wilder</u> , 469 F.3d 500 (6 th Cir. 2006)15
<u>G & V Lounge v. Michigan Liquor Control Comm'n</u> , 23 F.3d 1071 (6th Cir. 1994)	13
<u>Goldstein v. Moatz</u> , 364 F.3d 205 (4th Cir. 2003)24
<u>Homans v. Albuquerque</u> , 264 F.3d 1240 (10th Cir. 2001)27
<u>In re Grand Jury 89-4-72</u> , 932 F.2d 481 (6th Cir. 1991)	25

<u>Independence Public Media, Inc. v. Pennsylvania Public Television Network Com.</u> , 813 F. Supp. 335 (E.D. PA. 1993).	8
<u>Iowa Right to Life Comm'e, Inc. v. Williams</u> , 187 F.3d 963 (8th Cir. 1999)	27
<u>Konigsberg v. State Bar of California</u> , 353 U.S. 252; 77 S. Ct. 722; 1 L. Ed. 2d 810 (1957).	26
<u>Konigsberg v. State Bar of California</u> , 366 U.S. 36; 81 S. Ct. 997; 6 L. Ed. 2d 105 (1963)	26
<u>Lawrence v. Chabot</u> , 2003 U.S. Dist. LEXIS 17894 (W.D. Mich. 2003).	13
<u>Lawrence v. Chabot</u> , 2003 U.S. Dist. LEXIS 17895 (W.D. Mich. 2003).	13
<u>Lawrence v. Chabot</u> , 2006 U.S. App. LEXIS 12191 (6 th Cir. 2006).	1
<u>Levin v. Harleston</u> , 966 F.2d 85 (2d Cir. 1992)	13
<u>Lewellen v. Raff</u> , 843 F.2d 1103 (8th Cir. 1988)	10
<u>Lujan v. National Wildlife Federation</u> , 497 U.S. 871; 891, 111 L. Ed. 2d 695; 110 S. Ct. 3177 (1990)	17
<u>Majors v. Engelbrecht</u> , 149 F.3d 709 (7th Cir. 1998)	7
<u>Middlesex County Ethics Comm. v. Garden State Bar Ass'n</u> , 457 U.S. 423; 102 S. Ct. 2515; 73 L. Ed. 2d 116 (1982).	8
<u>NAACP v. Button</u> , 371 U.S. 415; 83 S. Ct. 328; 9 L. Ed. 2d 405 (1963)	1, 2, 14
<u>New Orleans Pub. Serv., Inc. v. New Orleans</u> , 491 U.S. 350; 105 L. Ed. 2d 298; 109 S. Ct. 2506 (1989)	11

<u>Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.</u> , 477 U.S. 619; 91 L. Ed. 2d 512; 106 S. Ct. 2718 (1986).	8
<u>Palkovic v. Johnson</u> , 451 F. Supp. 2d 448 (N.D. NY. 2006)	4
<u>Park Lake Res. Ltd. Liab. Co. v. USDA</u> , 378 F.3d 1132 (10 th Cir. 2004)	19
<u>Parker v. Turner</u> , 626 F.2d 1 (6 th Cir. 1980).	10
<u>Patsy v. Bd. of Regents</u> , 457 U.S. 496; 102 S. Ct. 2557; 73 L. Ed. 2d 172 (1982).	8
<u>Perry v. Sindermann</u> , 408 U.S. 593; 92 S. Ct. 2694; 33 L.Ed. 2d 570 (1972)	26
<u>Rawe v. Liberty Mut. Fire Ins. Co.</u> , 462 F.3d 521 (6 th Cir. 2006)	18
<u>Rippy v. Hattaway</u> , 270 F.3d 416 (2001).	22
<u>Roe #2 v. Ogden</u> , 253 F.3d 1225 (10 th Cir. 2001)	14
<u>Rooker v. Fidelity Trust Co.</u> , 263 U.S. 413; 68 L. Ed. 362; 44 S. Ct. 149 (1923).	3
<u>Rowe v. Griffin</u> , 676 F.2d 524 (11th Cir. 1982).	10
<u>Scottsdale Ins. Co. v. Detco Indus.</u> , 426 F.3d 994 (4 th Cir. 2005)	9
<u>Sparks v. Character & Fitness Committee</u> , 859 F.2d 428 (6 th Cir. 1988).	22
<u>Suster v. Marshall</u> , 149 F.3d 523 (6th Cir. 1998)	27
<u>Thaddeus-X v. Blatter</u> , 175 F.3d 378 (6th Cir. 1999)	14
<u>Thaddeus X v. Blatter</u> , 175 F.3d 378 (6th Cir. 1999).	14
<u>Tucker v. City of Fairfield</u> , 398 F.3d 457 (6 th Cir. 2005)	28

<u>United States v. Miller</u> , 797 F.2d 336 (6th Cir. 1986)	19
<u>United States v. National Association of Real Estate Boards</u> , 339 U.S. 485; 94 L. Ed. 1007; 70 S. Ct. 711 (1950)	18
<u>Verizon Md., Inc. v. PSC</u> , 535 U.S. 635; 122 S. Ct. 1753; 152 L. Ed. 2d 871 (2002).	4
<u>Wilson v. Thompson</u> , 593 F.2d 1375 (5th Cir.1979)	10
<u>Wilton v. Seven Falls Co.</u> , 515 U.S. 277; 115 S. Ct. 2137; 132 L. Ed. 2d 214 (1995).	9
<u>Wolfe v. Perry</u> , 412 F.3d 707 (6th Cir. 2005)	19
<u>Women's Medical Professional Corp. v. Voinovich</u> , 130 F.3d 187 (6th Cir. 1997).	16, 18, 20
<u>Younger v. Harris</u> , 401 U.S. 37; 27 L. Ed. 2d 669; 91 S. Ct. 746 (1971).	7
<u>Zilich v. Longo</u> , 34 F.3d 359 (6th Cir. 1994)	26

STATE CASES

<u>Griev. Adm'r v. Fieger</u> , 476 Mich. 231; 719 N.W.2d 123 (2006).	20
---	----

FEDERAL RULES OF CIVIL PROCEDURE

FRCP 41(b).	19
---------------------	----

FEDERAL STATUTES

28 U.S.C. § 1257.	3, 6
42 U.S.C. § 1983.	8

28 U.S.C. § 2201. 9

MICHIGAN STATUTES

Michigan Compiled Law §338.41. 20

Michigan Compiled Law §600.922. 3

Michigan Compiled Law §600.934. 20

RULES CONCERNING THE STATE BAR OF MICHIGAN

Rule 15, §1(5)(c)21

I. INTRODUCTION

The Appellees naturally defend the lower court's decision, which resulted in the dismissal of Appellant's lawsuit. In doing so, given what they say or do not say, they help to substantiate the underlying claims presented for adjudication in this appeal.

In this Court's May 16, 2006 decision, it stated that at an appropriate time Appellant may re-assert his as-applied equitable claims:

Although the district court did not expressly say so, the dismissal of Lawrence's as-applied challenges are [sic] without prejudice. Therefore, if and when Lawrence's claim is ripe (and in all ways suitable for judicial review), he may reassert this claim.

Lawrence v. Chabot, 182 Fed. Appx. 442; 2006 U.S. App. LEXIS 12191 at **34 (6th Cir. 2006) (citation omitted)

Yet, Appellees argue that Appellant's as-applied claims are barred from federal review, while carefully failing to address the above directive of this Court. More troubling, however, is Appellees' argument that the law permits them to deny a license on account of an applicant's speech, because they have a duty to "protect the public" and to require high standards for admission to the Michigan Bar. However, those same arguments were long ago asserted by the Virginia Supreme Court in NAACP v. Button, 371 U.S. 415, 438-439; 83 S. Ct. 328; 9 L. Ed. 2d 405 (1963), and our nation's highest Court appropriately responded:

The second contention is that Virginia has a subordinating interest in the regulation of the legal profession, embodied in Chapter 33, which

justifies limiting petitioner's First Amendment rights. * * * The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.

Id., 371 U.S. at 438-439

One theme that runs continuously throughout Appellees' briefs is that this Court's May 16, 2006 decision in Appellant's prior appeal validated the entire Michigan attorney licensing system, and therefore, Appellant is prohibited from bringing an as-applied challenge. But that is not what this Court said. As noted above, this Court invited Appellant to reassert his as-applied claims when they are fit for adjudication. That is what Appellant is now doing.

In dismissing Appellant's prior action, Magistrate Joseph Scoville, Judge David McKeague and Circuit Judge John Rogers wrote opinions finding that Appellant's fears were "hypothetical" and premised upon "baseless speculation". As such, the federal judiciary placed great faith in the Appellees to safeguard basic constitutional liberties when reviewing Appellant's next application. Appellees thereafter responded with a stunning display of arrogance, the result of which is the exact type of character rejection that Appellant originally feared. The deference

that Appellees now seek from this Court – for the second time – would result in a highly inappropriate consequence to federal authority.

II. FEDERAL JURISDICTION GENERALLY ENCOMPASSES JUDICIAL REVIEW OF NON-COERCIVE STATE ADMINISTRATIVE DECISIONS

A. Review of State Administrative Agency Decisions

The Michigan Legislature, in MCL 600.922, created the Michigan Board of Law Examiners (hereinafter “BLE”), the Michigan administrative agency that rendered the final administrative decision that is the subject of Appellant’s complaint. Appellant’s as-applied challenge to the BLE’s decision is not barred by the Rooker-Feldman doctrine because Appellant has never presented any of his claims to any state court¹.

As Supreme Court of the United States held in City of Chicago v. Int’l College of Surgeons, 522 U.S. 156; 118 S. Ct. 523; 139 L. Ed. 2d 525 (1997), “federal jurisdiction generally encompasses judicial review of state administrative decisions.” 522 U.S. at 169. The Rooker-Feldman doctrine “interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court.”

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).

ASARCO Inc. v. Kadish, 490 U.S. 605, 622; 109 S. Ct. 2037; 104 L. Ed. 2d 696 (1989). As such, the doctrine has no application to Appellant’s complaint.

Here, Appellant’s injuries were caused by a state administrative agency. See, Verizon Md., Inc. v. PSC, 535 U.S. 635, 644 n.3, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002) (“[Rooker-Feldman] has no application to judicial review of executive action, including determinations made by a state administrative agency.”); Palkovic v. Johnson, 451 F. Supp. 2d 448 (N.D. NY. 2006) (“the Rooker-Feldman doctrine applies only to judicial review of state-court judgments, and never to determinations rendered by state administrative agencies”).

City of Chicago involved an adjudication by Chicago's Historical and Architectural Landmarks Commission that two of the respondent's buildings qualified for landmark status under the applicable ordinance. 522 U.S. at 159-60. The respondents filed an action for judicial review under the state administrative review law, alleging that the statute – both on its face and as applied — was unconstitutional and that the proceedings also had violated the constitution. Id. at 160. The complaint also sought relief on purely state-law grounds. Id. The petitioners removed the action on the basis of federal-question jurisdiction, and the district court denied a motion to remand. Id. at 161. The Seventh Circuit reversed, holding that a federal court lacked jurisdiction to engage in deferential review of state agency action. Id. at 162.

The Supreme Court of the United States reversed. First, the Court held that, even though the respondent had invoked a state cause of action, its claims arose under federal law because “a right or immunity created by the Constitution or laws of the United States [was] an element, and an essential one, of the plaintiff’s cause of action.” Id. at 164. Second, the Court held that the district court had supplemental jurisdiction over any claims that arose under state law, Id. at 165-66, for example, the state-law claim that the Chicago Landmarks Commission had misapplied its ordinances.

The Court rejected the argument that the federal court was deprived of jurisdiction because an action for on-the-record review was not a “civil action[]” within the “original jurisdiction” of the district court for purposes of the removal statute: it held that, even if its state claims were not civil actions, its federal claims were². Just as important for present purposes, the Court made clear that an action to secure “judicial review of state administrative decisions” is “generally encompassed” within federal subject matter jurisdiction under § 1331. Id. at 169.

City of Chicago makes clear that Rooker-Feldman is inapplicable to the circumstances presented here. The doctrine applies to situations where a state court renders a final judgment; in such circumstances, Congress intends that the

² In contrast, Appellant here has only brought federal constitutional claims. He has not invoked the district court’s supplemental or pendent jurisdiction to adjudicate any state claims. Thus, there is even a stronger basis for federal jurisdiction in the matter sub judice.

sole avenue into federal court should be a petition for certiorari invoking the explicit authority of the Supreme Court to review the judgments of “the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257(a). But § 1257 makes no mention of administrative agencies, and City of Chicago itself involved administrative determinations made pursuant to established standards; both the determinations and the standards were said to violate the federal constitution. Whether or not administrative action involves an adjudicative function, and whether or not such action is subject to review in state court, a federal forum is available for claims that such administrative action has violated federal law.

Because the only legal issues presented here are matters of federal law, forcing Appellant to litigate these issues in state court “would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts.” England v. Louisiana State Board of Med. Examiners, 375 U.S. 411, 415; 84 S. Ct. 461; 11 L. Ed. 2d 440 (1964).

B. Appellees Failed To Address Appellant’s Argument Concerning His England Reservation

The conclusion that the exercise of federal jurisdiction is appropriate is even clearer in this case than it was in City of Chicago for one additional reason. Here, Appellant asserted a reservation of federal claims and defenses. However, both

sets of counsel for Appellees failed to brief or address Appellant’s argument that an England 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, this Court should consider Appellant’s arguments conceded by virtue of Appellees’ silence on the matter. Interestingly, the district court’s opinion is silent on this matter, as well.

C. Unlike Criminal Or Disciplinary Proceedings, The Appellees’ Licensing Process Is Initiated By The Applicant And It Is Non-Coercive. A Federal District Court Has Jurisdiction To Review Decisions Of Non-Coercive State Administrative Agencies.

It is a misleading statement for Appellees to allege that their functions are “judicial in nature”, and are thus immune from federal district court review. First, it is clear that Appellees “are not judges” Dubuc v. Mich. Bd. of Law Examiners, 342 F.3d 610, 620, fn.4 (6th Cir. 2003). Second, administrative proceedings are “judicial in nature” only when they are coercive. Majors v. Engelbrecht, 149 F.3d 709, 712 (7th Cir. 1998).

Nowhere in Appellees’ briefs do they contest the obvious fact that their process is non-coercive in nature. An applicant begins the Michigan licensing process by filling out an application, the applicant always bears the burden of proof, and the applicant may withdraw from the process at any time. This type of administrative structure is unlike the coercive ones where the Supreme Court of the United States used the abstention doctrine found in Younger v. Harris, 401 U.S.

37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), to force the federal plaintiff to seek state judicial review of agency action. See, e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986) (coercive state administrative proceeding required federal plaintiff to seek state judicial review). For example, the district court judge in Independence Public Media, Inc. v. Pennsylvania Public Television Network Com., 813 F. Supp. 335 (E.D. PA. 1993), correctly stated:

In summary, I believe that when read together, Dayton and Patsy limit the application of the Younger principle in a section 1983 case to those circumstances where the federal plaintiff is seeking relief from a coercive state proceeding. A different conclusion would do great harm to the right of citizens of this country to vindicate their constitutional rights in the federal courts without first completely exhausting their administrative remedies.

Independence Public Media, 813 F. Supp. at 342-343

Applying these principles to the present case, it becomes clear that Appellant's circumstances are akin to the situation found in Patsy v. Board of Regents, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982), while by contrast, Michigan Bar *disciplinary* proceedings are akin to those in Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982) or Dayton, supra. Therefore, the comity and deference the U. S. Supreme Court has provided to *coercive* state proceedings that are "judicial in nature" are completely inapplicable to the matter sub judice.

III. THE CASES CITED BY APPELLEE BERRY IN SUPPORT OF HIS ARGUMENT THAT THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO AWARD EQUITABLE RELIEF, ARE ALL INAPPLICABLE.

Appellee Berry argues that this Court has discretion to dismiss an action under the Declaratory Judgment Act, 28 U.S.C. §2201, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. Appellee Berry cites two cases in support of this proposition, Wilton v. Seven Falls Co., 515 U.S. 277, 132 L. Ed. 2d 214, 115 S. Ct. 2137 (1995) and AmSouth Bank v. Dale, 386 F.3d 763 (6th Cir. 2005). In Wilton the Supreme Court held that a federal district court has discretion to determine whether to exercise jurisdiction in a declaratory judgment action. Id., 515 U.S. at 282-90. The Wilton Court, however, expressly limited its holding to those instances **in which parallel proceedings are pending in state court**, stating that it was “not attempting at this time to delineate the outer boundaries of [the district court's] discretion in other cases, for example, cases raising issues of federal law or cases in which there are no parallel state proceedings.” Id. at 290. See also, Scottsdale Ins. Co. v. Detco Indus., 426 F.3d 994, 996, 998 (4th Cir. 2005), which noted “Wilton does not apply when there are no parallel state court proceedings” and cited the Sixth Circuit’s decision in Scottsdale Ins. Co. v. Rounph, 211 F.3d 964 (6th Cir. 2000). The second case cited by Appellee Berry, AmSouth Bank, rests upon the same conclusion. Id., 386 F.3d at 788. Therefore, because there are no pending parallel state proceedings in

this case, Appellee Berry's argument does not apply here. The same can be said for Parker v. Turner, 626 F.2d 1 (6th Cir. 1980). In Parker, the concurring opinion of Senior Judge Gilbert Merritt stated "Here it seems to me that the relief sought would affect pending state cases". The underlying premise of the cases cited by Appellee Berry all share the same common denominator: they all could have affected cases presently *pending* in state courts. Here, there is no pending action in state court and Appellee Berry has failed to allege that a decision by this Court would affect any *pending* state court actions. Therefore, because there is no *pending* state court proceeding, this Court does not possess the power to dismiss this action under the Declaratory Judgment Act.

Finally, this case is distinguishable from those cited by Appellee Berry because here Appellant is alleging that Appellees have misused the State Bar admission process to discourage the exercise of certain First Amendment rights. Even when ongoing state proceedings exist, federal courts will not abstain when the state proceedings are brought in bad faith. Lewellen v. Raff, 843 F.2d 1103, 1109-1110 (8th Cir. 1988), cert. denied, 489 U.S. 1033 (1989); Wilson v. Thompson, 593 F.2d 1375, 1383 (5th Cir.1979); Fitzgerald v. Peek, 636 F.2d 943, 945 (5th Cir. 1981); Cullen v. Fliegner, 18 F.3d 96, 103-104 (2nd Cir. 1994); Rowe v. Griffin, 676 F.2d 524, 562, fn. 2 (11th Cir. 1982); Entergy Ark., Inc. v. Nebraska, 210 F.3d 887, 899 (8th Cir. 2000).

“Federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred.” New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 358, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989). “Underlying [this] assertion[] is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds.” Id. at 359. This Court should respect Appellant’s choice of a federal forum for the adjudication of his federal claims.

IV. APPELLANT HAS STANDING AND HIS PROSPECTIVE RELIEF CLAIMS IN COUNT II OF HIS COMPLAINT ARE RIPE, GIVEN THAT LEGAL ISSUES ARE THE FOCUS OF THIS LITIGATION AND DELAYED REVIEW WILL CAUSE HARDSHIP

A. Appellant Has Article III Standing And His Claims Are Ripe

As far as Count I of Appellant’s complaint is concerned, this case is clearly ripe because Appellant is challenging the BLE’s final administrative decision. Abbott Laboratories v. Gardner, 387 U.S. 136, 151, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (the case was ripe where the challenge was to a final decision of the FDA). Appellee Smith admitted during the lower court proceedings that Count I was ripe. (R. 45, response brief, Apx. 531).

Appellant’s prospective claims in Count II are equally ripe for federal review. In fact, it is much more than speculative or hypothetical that Appellant’s speech related activities will be the subject of further character hearings.

Incredibly, Appellee Berry explained to the lower court how the State Bar of Michigan is already calculating various ways in which Appellant's recent speech will be used against him during Appellant's reapplication process. Appellees told the lower court that Appellant's character may be called into question because during Appellant's BLE hearing he expressed regret over his speech, but subsequently engaged in additional criticism:

In fact, only five days after the BLE's decision, Lawrence sent letters to the members of the Civil Rights Commission complaining about Linda Parker, the director of the Department of Civil Rights and a member of the BLE [Complaint, ¶ 33]. As part of the evaluation of his post-decision behavior, the State Bar and BLE may have reason to consider whether Lawrence was truthful in his testimony that he would not engage in similar behavior.

R. 35, brief to motion to dismiss, Apx. 304.

Therefore, Appellees cannot be serious when they tell this Court that Appellant's fears of having his speech considered (during his upcoming application process) are speculative or hypothetical. Even if Appellees use a "candor" issue as their basis, clearly Appellant's speech would be the center of attention. Such an inquiry would be nothing more than a subterfuge for the real reason for character rejection, namely, Appellant's repeated public criticism.

And Appellant does not need to subject himself to future, repeated, character rejections in order to have Article III standing. In recommending that Appellant's prior as-applied claims were not justiciable, Magistrate Joseph Scoville noted

“Defendants argue that until plaintiff has submitted himself to the character and fitness process and has actually been denied admission, he lacks standing to challenge the constitutionality of the process and his claims remain hypothetical and unripe for adjudication...”. Lawrence v. Chabot, 2003 U.S. Dist. LEXIS 17894 at * 40 (W.D. Mich., 2003) (emphasis added). Judge David McKeague adopted this reasoning, and in dismissing Appellant’s prior claims, he stated:

Because plaintiff voluntarily withdrew his application and never received a decision on admission to the state bar, plaintiff’s as-applied challenge to the attorney-licensing scheme is not ripe.

Lawrence v. Chabot, 2003 U.S. Dist. LEXIS 17895 at * (W.D. Mich. 2003) (emphasis added)

However, now that Appellant has been denied admission in a final administrative decision, Appellees are disavowing their prior litigation statements and they are alleging herein that Appellant still lacks standing and his claims are still not ripe. This is not advocacy, it is deception.

Appellees essentially ignore Appellant’s First Amendment claim that he is experiencing a chilling effect. It is well-settled that a chilling effect on one’s constitutional rights constitutes a present injury in fact. G & V Lounge v. Michigan Liquor Control Comm’n, 23 F.3d 1071, 1076 (6th Cir. 1994); Levin v. Harleston, 966 F.2d 85, 89-90 (2d Cir. 1992) (holding that a merely implicit threat to fire a professor for his controversial views chilled the professor’s First Amendment rights

sufficiently to confer standing); NAACP v. Button, 371 U.S. 415, 433, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963) (“The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions.”). The hardship on Appellant here could be no less than that found by the Tenth Circuit to create ripeness in a prospective relief Bar admission case brought by students who had not yet taken the Bar Examination. Roe #2 v. Ogden, 253 F.3d 1225, 1231-1232 (10th Cir. 2001). Further, the law has never required a party to completely cease his constitutionally protected conduct in First Amendment cases in order to demonstrate a “chilling effect”. Appellant has truthfully stated that his First Amendment rights have been chilled, and the fact that he has continued to criticize Appellees does not mean that he has not suffered such an injury. Thaddeus-X v. Blatter, 175 F.3d 378, 396 (6th Cir. 1999) (en banc). Appellant is not the first applicant to have his speech used as a basis for character rejection, and without federal assistance, he will not be the last. The State Bar has admitted that “The bar has had several applicants who exercised free speech in a fashion that contributed to a recommendation of denial.” (R. 34, exhibit to motion, Apx. 331-332)

Delayed federal adjudication of these issues would create immense hardship. For six years now, Appellant and Appellees have been at odds over these issues, the past four of which have been in federal litigation. If this Court continues to

find that Appellant’s claims are not ripe, or that he does not have standing, this litigation is destined to go on forever. The BLE’s decision makes it clear that but for Appellant’s speech – and only his speech – Appellant would have received his license to practice law (R. 1, exhibit to complaint, Apx. 37). This Court should order Appellee Smith to provide Appellant his license, or in the alternative, grant the prospective relief requested in Count II of Appellant’s complaint.

B. Judge Enslin’s Vacated Unpublished Decision in Dubuc.

“Vacatur clears the path for future relitigation by eliminating a judgment the loser was stopped from opposing on direct review.” Ford v. Wilder, 469 F.3d 500, 505 (6th Cir. 2006). Nevertheless, Appellee Smith cites as authority Judge Enslin’s vacated district court decision in Dubuc v. Michigan Board of Law Examiners, docket No. 1:04-CV-77 (June 17, 2004) (Enslin) (R. 29, opinion, Apx. 196). Before being vacated by this Court in Dubuc v. Parker, 2006 US App LEXIS 2515 (2006) (unpublished) (R. 29, opinion, Apx. 190), Judge Enslin’s decision in Dubuc held that Mr. Dubuc’s claims were not ripe and that he did not have standing.

While that decision is impossible to reconcile with existing federal law, an important distinction between this case and Dubuc demonstrates why this case should proceed. In this case, Appellant is promising to continue engaging in the same conduct that resulted in his first denial, (R. 1, complaint, ¶ 33, Apx. 21), and

the BLE's decision indicates that until Appellant ceases those speech-related activities, Appellant is ineligible for a license to practice law in Michigan.

Additionally, Appellant's as-applied claims can be further distinguished from those found in Dubuc. In Dubuc, Appellee Berry stated to the district court:

At the outset, it is critical to emphasize that Dubuc asserts a facial challenge to the bar admission process. Without question, a bar application could not be denied because the SBM, BLE or Michigan Supreme Court disagrees with the content of an individual's expressive speech or conduct. 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. **If an application was [sic] denied simply because of what an individual says or believes, there would a compelling as-applied challenge.**

But, this is not a case challenging the reasons for denying a specific application for admission. Instead, Dubuc asserts a broad facial challenge to the manner by which Michigan determines that individuals have the character and fitness necessary to practice law.

(R. 39, brief in Dubuc case, Apx. 473-474) (emphasis added)

Appellees confuse the important distinction between the present as-applied challenges and the prior facial challenges that were the subject of this Court's May 16, 2006 decision. "If a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances." Women's Med. Prof'l Corp. v.

Voinovich, 130 F.3d 187, 193 (6th Cir. 1997). Consequently, “a plaintiff’s burden in an as-applied challenge is different from that in a facial challenge”. Id. This lawsuit is an as-applied dispute in which Appellant “contends that application of the statute in the particular context *in which he has acted, or in which he proposes to act*, would be unconstitutional.” Id. at 193. (emphasis added). Further, now the Appellees have misused the Michigan “good moral character” statute and licensing rules to retaliate against Appellant for his First Amendment activities, this as-applied challenge is ripe for review because: (1) the facts here are not in material dispute; (2) there has been concrete action by the Appellees applying the challenged statute to the Appellant’s situation in a fashion that harms and threatens to harm him; and (3) the Appellees’ application of the statute and rules requires Appellant to adjust his conduct immediately. Lujan v. National Wildlife Federation, 497 U.S. 871, 891, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990).

Therefore, according to Appellee Berry’s own admission, “there would a compelling as-applied challenge” if a particular applicant could show that he had been denied admission to the Bar on account of “what [he] says” (R. 39, brief in Dubuc case, Apx. 474). Here, it is not open to dispute that Appellant was denied for what he said. Had Appellant contacted Appellees Baum’s or Mithani’s associates to say positive things, Appellant would have received his license to

practice law. (R. 1, plaintiff's complaint, ¶54, Apx. 28). It was the *content* of Appellant's speech that resulted in his character rejection.

V. CLAIM OR ISSUE PRECLUSION DOES NOT BAR APPELLANT'S AS-APPLIED CLAIMS

Appellees' argument that Appellant's as-applied claims are barred by preclusion is incorrect for the following four reasons:

First, res judicata does not apply for the reason that "res judicata does not apply to claims that were not ripe at the time of the first suit". Rawe v. Liberty Mut. Fire Ins. Co., 462 F.3d 521, 525 (6th Cir. 2006). The dismissal of Appellant's prior as-applied claims "does not prospectively immunize the defendant from liability for future actionable conduct for bad faith." Id. at 530.

Second, any argument that this action is barred by collateral estoppel lacks merit for the reason that "a plaintiff's burden in an as-applied challenge is different from that in a facial challenge", Women's Medical Professional Corp. v. Voinovich, 130 F.3d 187, 193 (6th Cir. 1997), and the distinctly different standards of proof between a facial challenge and an as-applied challenge render the doctrine inapplicable. Doherty v. American Motors Corp., 728 F.2d 334, 338 (6th Cir. 1982) citing United States v. National Association of Real Estate Boards, 339 U.S. 485, 492-93, 94 L. Ed. 1007, 70 S. Ct. 711 (1950). As a general rule, issue preclusion "may be defeated by shifts in the burden of persuasion or by changes in

the degree of persuasion required.” 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4422 (2d ed. 2002).

Third, a dismissal on jurisdictional grounds does not constitute a judgment on the merits for purposes of issue preclusion. Park Lake Res. Ltd. Liab. Co. v. USDA, 378 F.3d 1132, 1136-1137 (10th Cir. 2004); see also Fed. R. Civ. P. 41(b) (“a dismissal . . . other than a dismissal for lack of jurisdiction . . . operates as an adjudication upon the merits.”) (emphasis added). Park Lake recognizes the undisputed principle that, although a dismissal on jurisdictional grounds is not a final adjudication on the merits, “dismissals for lack of jurisdiction preclude relitigation of the issues determined in ruling on the jurisdiction question” Id. Here, Appellant’s as-applied claims are distinct and do not rest upon issues already determined by the Sixth Circuit “on the jurisdictional question”. Park Lake correctly states that “No more need be done than await maturity, satisfy the precondition, or switch to a different substantive theory that does not depend on the same precondition... [when] the change in circumstances that cures the jurisdictional defect [occurs] subsequent to the prior litigation”. Id. at 1137. Indeed, this is such a case.

Fourth, collateral estoppel does not apply unless the issue presented “was necessary and essential to” the prior judgment. Wolfe v. Perry, 412 F.3d 707, 716 (6th Cir. 2005); United States v. Miller, 797 F.2d 336, 341 (6th Cir. 1986).

Appellant’s prior allegations that Appellees “have too much discretion” under MCL 600.934(1) and 338.41(1) were made in connection with a facial challenge, which “is manifestly strong medicine that has been employed by the court sparingly and only as a last resort.” Broadrick v. Oklahoma, 413 U.S. 601, 613, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). The doctrine of collateral estoppel does not preclude Appellant from now alleging that MCL 338.41(1) provides Appellees too much discretion in connection with his as-applied claims. Nor does the doctrine of collateral estoppel block this Court from reviewing Appellant’s argument that there is an inadequate opportunity for state judicial review, given the Michigan Supreme Court’s historic practice of refusing to issue opinions (R. 1, complaint, ¶ 16, fn.1, Apx. 15), and given the very recent clarification of Michigan law brought about by Griev. Adm’r v. Fieger, 476 Mich. 231, 253-254; 719 N.W.2d 123 (2006) (R. 38, brief, Apx. 453-455), and (R. 39, brief, Apx. 465-467).

These distinctions are evident in the “relief requested” portion of Appellant’s complaint. In this action, Appellant is not seeking to invalidate the entire statute, but rather, Appellant “contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.” Women's Medical Professional Corp, supra, 130 F.3d at 193. If Appellant prevails in this lawsuit, “the State may continue to enforce the statute in different circumstances where it is not unconstitutional”. Id. Therefore, issues

presented here were not necessary and essential to this Court's May 16, 2006 decision. See also, Brister v. A.W.I., Inc., 946 F.2d 350, 354 & n.1 (5th Cir. 1991) (even when issues are stated in "nearly identical language," collateral estoppel is unavailable when there are disparate policies underlying each inquiry which result in definite differences in application and result).

In ruling on the "jurisdictional question", the Sixth Circuit Court of Appeals only held that Appellees do not have enough discretion to warrant invalidating the entire statute. Appellant is not precluded from claiming that the lack of suitable guidelines, or the existence of too much discretion, aided Appellees in their as-applied misuse of the "good moral character" statute.

Additionally, since this is an as-applied challenge where a successful outcome would result in a situation where "the State may continue to enforce the statute in different circumstances where it is not unconstitutional", any hardship on the Appellees and the Michigan licensing system is minimal.

VI. APPELLEES BAUM, MUSBACH, AND MITHANI ARE NOT ENTITLED TO ABSOLUTE OR QUALIFIED IMMUNITY

A. Appellees Are Not Entitled To Absolute Immunity Because They Are Investigators Who Are Two Administrative Layers Removed From Any "Judicial" Officers.

Appellees Baum, Musbach and Mithani are State Bar investigators who operate pursuant to Rule 15, Section 1(5)(c) of the Rules Concerning the State Bar

of Michigan (R. 37, SBM rules, Apx. 322). Importantly, Appellees admit that the BLE is an “administrative agency”, and thus, it is impossible to discern Appellees’ argument that they are making recommendations to “judicial officers”, as in Rippy v. Hattaway, 270 F.3d 416 (2001). Appellees do not make recommendations to any member of the judiciary, only a volunteer Standing Committee of the State Bar of Michigan (SBM Standing Committee on Character and Fitness) that only has the power to issue a second recommendation to the BLE.

The United States Supreme Court has emphasized that “the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.” Burns v. Reed, 500 U.S. 478, 486, 114 L. Ed. 2d 547, 111 S. Ct. 1934 (1991). And here, Appellees have not done much to carry that burden. There are a host of cases that Appellees cite, such as Sparks v. Character & Fitness Comm. of Ky., 859 F.2d 428 (6th Cir. 1988) for the proposition that they are entitled to absolute immunity. However, those same cases (or their progeny) were already cited to this Court when the State Bar’s former Regulation Counsel, Thomas Byerley, was sued and because Byerley was not engaged in an *adjudicative function*, he was denied absolute immunity. This Court accurately stated:

The cases cited by Byerley in his appellate brief are relevant to the scope of Byerley's immunity in this action, but they do not support his assertion that he is entitled to the defense of absolute immunity. * *

* First, the court must consider whether the function is normally

performed by an adjudicator. * * * Second, the court must consider whether the plaintiff dealt with the defendant in the defendant's adjudicative capacity. * * * Because Byerley has failed to demonstrate in any way that he was engaged in an adjudicative function when he allegedly retaliated against Dean, Byerley is not entitled to summary judgment based upon the defense of absolute immunity.

Dean v. Byerley, 354 F.3d 540, 555-557 (6th Cir. 2004) (emphasis added)

During the entire time that Appellant's application to practice law was in the hands of Appellees Baum, Musbach and Mithani, the application had never reached any *adjudicate* stage. The application was exclusively in the *investigative* stage. Common law did not provide absolute immunity for investigative functions. The Appellees do not engage in duties 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 function at issue here clearly does not involve substantial discretion, a key feature of the tasks sheltered by absolute immunity. Nor does the function involve, to the slightest degree, the resolution of disputes between parties, as required in Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 435-36, 124 L. Ed. 2d 391, 113 S. Ct. 2167 (1993). Therefore, absolute immunity should not shield Appellees Baum, Musbach and Mithani from their unconstitutional investigative conduct.

Appellees Baum, Musbach and Mithani argue that because their duties relate to the ultimate decision whether or not an applicant is fit to be licensed, they

should enjoy absolute immunity. However, an analogous argument was rejected by the Supreme Court in Burns, supra:

Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive.

Burns, 500 U.S. at 495

In Goldstein v. Moatz, 364 F.3d 205 (4th Cir. 2003), a patent attorney brought a Bivens³ action against officials of the Patent and Trademark Office for their conduct in an attorney disciplinary investigation. The Fourth Circuit Court of Appeals concluded that the officials, who conducted a pre-probable cause investigation, should enjoy no more protection than qualified immunity. In denying absolute immunity to the Director of the Office of Enrollment and Discipline, a staff attorney, and the General Counsel of the Patent and Trademark Office, the Fourth Circuit Court of Appeals stated:

In the circumstances presented, Moatz, Anderson, and Toupin acted merely as investigators and are therefore not entitled to absolute immunity. Most significantly, there has been no probable cause assessment or determination, as required to initiate formal disciplinary charges against Goldstein. In fact, the Defendants do not make a probable cause determination--that task, under the applicable regulations, belongs to the Committee.

Goldstein, 364 F.3d at 215

³ Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)

Here, by analogy, Appellees Baum, Musbach and Mithani “acted merely as investigators” and the determination “belongs to the Committee”, or more precisely in this case, the BLE. They are not entitled to absolute immunity. In re Grand Jury 89-4-72, 932 F.2d 481, 487 (6th Cir. 1991) (Michigan bar administrative hearings before a panel of private attorneys and laypersons, funded by a private organization, with limited discretionary review to the Michigan Supreme Court, are not judicial proceedings within the meaning of Rule 6(3)(c)(i) of the Federal Rules of Criminal Procedure.); See also, DiBlasio v. Novello, 344 F.3d 292 (2d Cir. 2003) (holding that New York medical officials were not entitled to absolute immunity from radiologist's due process claims). Therefore, this Court should deny Appellees absolute immunity in this matter.

B. Appellees Are Not Entitled To Qualified Immunity Because They Violated Appellant’s Clearly Established Right Not To Have His Political Beliefs Used Against Him. A Reasonable State Actor Would Have Known That Such Conduct Is Unconstitutional.

Appellees attempt to justify their conduct by improperly bringing their own version of the facts into this matter and by falsely claiming that Appellant’s work history, financial affairs, and apathy for his brother were the reasons behind Appellees’ actions. These arguments, however, are inappropriate at this stage of the litigation. See, Berryman v. Rieger, 150 F.3d 561, 562 (6th Cir. 1998). Here, Appellant’s complaint alleges that Appellees retaliated against Appellant on

account of his political 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’ argument that Appellant did not have a clearly established right not to have his political beliefs used against him is belied by the Supreme Court’s decision in Konigsberg v. State Bar of California, 353 U.S. 252, 268-269; 77 S. Ct. 722; 1 L. Ed. 2d 810 (1957). That case made it clear that denial of a license to practice law due to an applicant’s “severe” criticism of the court system is not rational, Id. at 26, and contrary to Appellees Baum’s Musbach’s and Mithani’s suggestion, the subsequent decision in Konigsberg v. State Bar of California, 366 U.S. 36; 81 S. Ct. 997; 6 L. Ed. 2d 105 (1963) did nothing to change that. The Supreme Court has found that political beliefs and associations are clearly established, fundamental rights protected by the First Amendment. Elrod v. Burns, 427 U.S. 347, 356, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); Perry v. Sindermann, 408 U.S. 593, 597; 92 S. Ct. 2694; 33 L. Ed. 2d 570 (1972); Zilich v. Longo, 34 F.3d 359 (6th Cir. 1994) (discussing First Amendment retaliation claim where plaintiff, a political opponent of one defendant, alleged he was threatened with physical violence, harassed and vandalized because of his political beliefs; court denied qualified immunity). The state of the law at the time of Appellees’ actions

gave them fair warning that Appellant's political beliefs were off limits. Appellees' argument to the contrary is unconvincing, given the SBM's own acknowledgement that "Admission cannot be denied because the applicant ... is critical of the judicial system or individual judges" (R. 39, Berry's response brief in Dubuc case, Apx. 473-474).

VIII. THIS COURT SHOULD GRANT INJUNCTIVE RELIEF

Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles. See Homans v. Albuquerque, 264 F.3d 1240, 1244 (10th Cir. 2001) ("We believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression."); Iowa Right to Life Comm'e, Inc. v. Williams, 187 F.3d 963, 970 (8th Cir. 1999) (finding a district court did not abuse its discretion in granting a preliminary injunction because "the potential harm to independent expression and certainty in public discussion of issues is great and the public interest favors protecting core First Amendment freedoms"); Suster v. Marshall, 149 F.3d 523, 530 (6th Cir. 1998) (holding candidates for judicial office were entitled to preliminary injunction of expenditure limit given likelihood of success on the merits, irreparable harm and lack of public interest in enforcing a law that curtailed political speech); Elam Constr., Inc. v. Regional Transp. Dist., 129 F.3d 1343, 1347 (10th Cir. 1997)

(stating, in context of a request for injunctive relief, that “the public interest ...favors plaintiffs' assertion of their First Amendment rights”); Cate v. Oldham, 707 F.2d 1176, 1190 (11th Cir. 1983) (holding the “strong public interest in protecting First Amendment values” favored preliminary injunctive relief). Because the public interest is in favor of granting the relief Appellant seeks, this Court should vindicate Appellant’s First and Fourteenth Amendment rights. Tucker v. City of Fairfield, 398 F.3d 457 (6th Cir. 2005) (“the public interest is served by preventing the violation of constitutional rights”).

For the reasons set forth above, Appellant’s likelihood of success is strong and he is entitled to the injunctive relief sought.

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: April 25, 2007

Respectfully submitted:

Dennis B. Dubuc (P67316)
Counsel for Appellant
Essex Park Law Office, P.C.
12618 10 Mile Rd
South Lyon, MI 48178
(248) 486-5508

CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief is in compliance with FRAP 32(a)(7)(C) and it contains 6,875 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.

Dated: April 25, 2007

Respectfully submitted:

Dennis B. Dubuc (P67316)
Counsel for Appellant
Essex Park Law Office, P.C.
12618 10 Mile Rd
South Lyon, MI 48178
(248) 486-5508

CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of April, 2007, pursuant to Fed. R. App.

P. 25, I have caused this Reply Brief of Appellant and this Certificate of Service to be served by United States Mail, postage prepaid, on the following:

John R. Oostema (P26891)
Richard Kraus (P27553)
Smith, Haughey, Rice & Roegge, P.C.
250 Monroe Avenue, NW, Suite 200
Grand Rapids, MI 49503
(616) 774-8000

Denise C. Barton (P41535)
Assistant Attorney General
Public Employment, Elections
& Tort Division
P.O. Box 30736
Lansing, MI 48909-8236
(517) 373-6434

Dated: April 25, 2007

Respectfully submitted:

Dennis B. Dubuc (P67316)
Counsel for Appellant
Essex Park Law Office, P.C.
12618 10 Mile Rd
South Lyon, MI 48178
(248) 486-5508