UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THOMAS F. LIOTTI, ESQ., on behalf of himself and the Pro Bono Publico Bar Association, Inc.,

Plaintiff,

-against-

THE NASSAU COUNTY BOARD OF ELECTIONS, THE NEW YORK STATE BOARD OF ELECTIONS, THE NASSAU COUNTY REPUBLICAN COMMITTEE, THE NASSAU COUNTY DEMOCRATIC COMMITTEE, THE NASSAU COUNTY CONSERVATIVE PARTY, THE BAR ASSOCIATION OF NASSAU COUNTY, INDEPENDENCE PARTY OF NEW YORK STATE, and WORKING FAMILIES PARTY,

Defendants.

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Case No. 19-cv-4264 (WFK) (LB)

Date of Service: April 30, 2021

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE BAR ASSOCIATION OF NASSAU COUNTY, NEW YORK, INC.'S MOTION TO DISMISS THE AMENDED VERIFIED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff's opposition,[1] which includes little more than unrelated personal anecdotes from Plaintiff's past and political commentary, does nothing to address the legal issues in this case. As set forth in The Bar Association of Nassau County, New York, Inc. s/h/a The Bar Association of Nassau County, Inc.'s (the "Bar Association") initial moving papers, the plain and undisputed reality is that Plaintiff lacks standing to bring a 42 U.S.C. § 1983 claim on behalf of the New York judiciary or voters at large. Additionally, Plaintiff has made no effort to plead, let alone establish, that the Bar Association is a state actor subject to a § 1983 claim. Most critically, even if the Court were to overlook these legal deficiencies in Plaintiff's Complaint, Plaintiff provides no reason why this case should not be dismissed for the identical reasons as the U.S. Supreme Court's decisions in *Lopez Torres* and *Dibbs*, and the Second Circuit's decision in *Jacobson*. Plaintiff wholly fails to even address these critical cases, which are dispositive of all allegations raised in the Amended Verified Complaint (the "Complaint").[2]

Plaintiff's pernicious attempt to equate the New York judicial nominating process with inflammatory images of the political day does not rectify the fact that the Opposition is so barren of relevant argument that it borders on frivolous. Accordingly, for all of the reasons set forth in the Bar Association's initial moving papers, and as set forth below, this action must be dismissed.

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[1] Plaintiff's opposition consists of a Composite Memorandum of Law of Plaintiffs in Opposition to Defendants' Motions to Dismiss, dated March 12, 2021 (the "Opp. MOL"), and a Composite Declaration of Thomas F. Liotti in Opposition to the Defendants' Motion to Dismiss the Amended Verified Complaint, dated March 12, 2021 (the "Opp. Decl.") (referred to collectively as the "Opposition").

[2] A copy of the Complaint (ECF Doc. 35) is annexed to the Declaration of Brett A. Scher, dated January 15, 2021, as Exhibit "A".

ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO CURE HIS LACK OF STANDING

The Bar Association established in its initial moving papers that Plaintiff lacks standing to maintain this action. (*See* Initial Moving MOL,[3] Point I). Specifically, Plaintiff lacks standing because he has failed to allege an injury in fact that is likely to be redressed by a favorable ruling, and has failed to show that there is a likelihood that he will be injured again in a similar way. *See Davis v. Federal Election Com'n.*, 554 U.S. 724, 733 (2008); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992); *Marcavage v. City of New York*, 689 F.3d 98, 103 (2d Cir. 2012).

First, Plaintiff's attempt to establish standing as a member of the judiciary, based upon a claim that he was "victimized" by the Bar Association's prior finding that he was not qualified for a County Clerk judgeship "by a vote of 17 to 3" **in 2011**, (*see* Opp. Decl., ¶ 6), does not confer standing because it has nothing do with the claims asserted in this action. The Complaint at bar seeks to preclude cross-endorsements that purportedly restrict voters' freedom of choice. (*See* Complaint, ¶ 22). Yet, Plaintiff fails to attribute the Bar Association's finding that he was "unqualified at this time" ten years ago to the current cross-endorsement process that he is challenging, in any way. (*See* Opp. Decl., ¶ 6). In addition, Plaintiff does not contend that he, himself, is running for a judicial seat, with or without cross-endorsements, so he has failed to establish "a sufficient likelihood that he will again be wronged in a similar way." *Marcavage*, 689 F.3d at 103.

Second, even if these deficient allegations are deemed factually sufficient, they are time-barred. Plaintiff waited eight (8) years, well outside of the three (3) year statute of limitations, to

[3] All references to the Bar Association's Memorandum of Law in Support of its Motion to Dismiss, dated January 15, 2021 are made as "Initial Moving MOL".

sue. *See Jaghory v. New York State Dept. of Educ.*, 131 F.3d 326, 331-32 (2d Cir. 1997) (§ 1983 claim brought more than three years after the plaintiff knew of the injury failed to confer standing); *see also Lujan*, 504 U.S. at 561 (the injury must be one likely to be "redressed by a favorable decision") (internal citation and quotations omitted).

Third, Plaintiff's secondary attempt to establish standing by claiming that voters are being "disenfranchised" and "denied their freedom of choice" due to cross endorsements, (Opp. Decl. ¶ 2; Opp. MOL, pp. 2-3, 4), utterly fails as a matter of law.[4] This is because Plaintiff does not allege that **his** vote (or the vote of any other identified individual) has been impaired in any "distinct and palpable" way. *See Jaghory*, 131 F.3d at 330 (internal citation and quotation omitted). Rather, Plaintiff's arguments inappropriately rest upon unspecified, conclusory, and conjectural claims of unidentified third parties. *See Warth v. Seldin*, 422 U.S. 490 (1975) (a party must have a "personal stake in the outcome of the controversy") (internal citation and quotation omitted); *see also Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991); *McCall v. Pataki*, 232 F.3d 321, 322 (2d Cir. 2000) ("[a] *pro se* litigant, however, is not empowered to proceed on behalf of anyone other than himself").

Thus, because Plaintiff has failed to establish standing, the Complaint must be dismissed.

[4] Plaintiff attempts to establish "deception" of voters based upon **his own subjective interpretation** of the well-known cases of *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that segregation laws are unconstitutional), *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that separate but equal statutes are not unconstitutional, overruled by *Brown*), and *Roe v. Wade*, 410 U.S. 113 (1973) (striking down as unconstitutional a Texas statute that only permitted abortions that were medically necessary). (*See* Opp. MOL, pp. 3-4). He does not, however, bother to explain how the cross-endorsement of judges on New York's ballot is, in any way, comparable to these landmark decisions.

POINT II

THE PLAINTIFF HAS FAILED TO REFUTE THAT THE BAR ASSOCIATION IS NOT A STATE ACTOR

Plaintiff has also failed to dispute – or even address – that the Bar Association is not a state actor, as set forth in the Bar Association's initial moving papers. (*See* Initial Moving MOL, Point II). Plaintiff's Opposition is silent with respect to the Second Circuit's recent holding, in a case remarkably similar to the one at bar, that a judicial screening committee's determination of whether a judicial candidate is qualified or not qualified, in an effort to aid a political party's internal efforts to "select the candidate of the party's choosing," is not state action subject to a § 1983 claim. *See Jacobson v. Kings Cty. Democratic Cty. Comm.*, 788 F. App'x. 770, 773-774 (2d Cir. 2019). In this case, the Bar Association's conduct is even further removed from the electoral process than the Judicial Screening Committee for the Democratic Party in and for Kings County in *Jacobson* (which was part of the political party itself), so it cannot be said to be a state actor for the same reasons. *Id.*

The Opposition utterly ignored this point,[5] so Plaintiff has conceded that the Bar Association is not a state actor subject to a § 1983 claim. *See, e.g., Dangelo v Client Services, Inc.*, 19-CV-1915 (SJF) (ARL), 2020 WL 5899880, at *4 (E.D.N.Y. June 11, 2020), *report and recommendation adopted*, 19-CV-1915(SJF) (ARL), 2020 WL 4187903 (E.D.N.Y. July 21, 2020) (where plaintiff failed to respond to Rule 12(b)(6) argument, the "claims are deemed abandoned"); *Felske v. Hirschmann*, No. 10 Civ. 8899 (RMB), 2012 WL 716632, at *3 (S.D.N.Y. Mar. 1, 2012) ("A Plaintiff effectively concedes a defendant's arguments by his failure to respond to them"); *Canas v. Whitaker*, No. 6:19-CV-06031-MAT, 2019 WL 2287789, at *6 (W.D.N.Y. May 29,

[5] Plaintiff's contention that "Action Unit #4 was not supported by the [Bar Association] or other local bar associations," (Opp. MOL, pp. 8-9), is simply irrelevant and in no way distinguishes this case from *Jacobson*.

2019) ("It is well settled in this Circuit that '[a] plaintiff effectively concedes a defendant's arguments by his failure to respond to them'").

Accordingly, the Complaint must be dismissed.

POINT III

PLAINTIFF HAS FAILED TO DISTINGUISH CONTROLLING CASE LAW HOLDING NEW YORK'S JUDICIAL ELECTION PROCESS CONSTITUTIONAL

Even if Plaintiff was able to establish standing and that the Bar Association is a state actor (he cannot), Plaintiff has failed to distinguish – or even address – the controlling U.S. Supreme Court decisions in *New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 128 S.Ct. 791 (2008) and *Dibbs v. Mazzarelli*, 470 F. App'x 34, 35 (2d Cir. 2012), *cert. denied*, 568 U.S. 1213, 133 S.Ct. 1494 (2013) (expanding the *Lopes Torres* holding to include related challenges on equal protection and due process grounds). As set forth in the Bar Association's moving papers, the U.S. Supreme Court has already indisputably held that New York's current judicial nomination process is constitutional. *See Lopez Torres*, 552 U.S. at 206. Plaintiff has offered literally no explanation as how his case is any different than *Lopez Torres.* As Plaintiff makes no effort to oppose this argument, he has conceded it. *See Dangelo, supra; Felske, supra; Canas, supra.*

Nor does Plaintiff dispute that the Bar Association, further removed from the judicial nomination process than the political parties, possesses the same First Amendment rights to render an opinion as to the qualification of judicial candidates, like the screening committee who assists the political party in Jacobson. *See Lopez Torres*, 552 U.S. at 203; *Jacobson*, 788 Fed App'x at 773.

Plaintiff's references to various individuals that either won or lost their judicial elections and then went on to judicial "fame" or "infamy", bear no relevance to arguments at bar. (Opp. MOL, pp. 5-8).

Likewise, Plaintiff's citation to *Jackson v. Nassau County Bd. Of Supervisors*, 818 F. Supp. 509, 535 (E.D.N.Y. 1993) (holding that Nassau County's weighted voting system in place in 1993 violated the one person, one vote principle encompassed by the Equal Protection Clause in the Fourteenth Amendment) and *Goosby v. Town Bd. of the Town of Hempstead, N.Y.*, 956 F. Supp 326, 329 (E.D.N.Y. 1997), *aff'd sub nom. Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (2d Cir. 1999), *cert. denied* 528 U.S. 1138 (2000) (holding that the Town of Hempstead's at-large voting practice to elect councilmembers caused voter dilution of the voting strength of the minority population therein), (Opp. MOL, pp. 9-12), are completely irrelevant to the seminal issue in the Complaint -- the constitutionality of New York's judicial nomination process, (*see* Complaint, ¶ 22).

Dismissal of Plaintiff's case is warranted under both U.S. Supreme Court and Second Circuit precedent.

CONCLUSION

WHEREFORE, the defendant Bar Association of Nassau County, New York, Inc. respectfully requests that the Court issue an Order: (i) dismissing all causes of action in the Complaint, as alleged against the Bar Association; and (ii) granting such other and further relief as the Court deems just under the circumstances.

Dated: Woodbury, New York
April 30, 2021

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