SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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

Plaintiffs,

-against-

THE NASSAU COUNTY BD. OF ELECTIONS, THE NEW YORK STATE BD. OF ELECTIONS, THE NASSAU COUNTY REPUBLICAN COMMITTEE; THE NASSAU COUNTY DEMOCRATIC COMMITTEE; THE NASSAU COUNTY CONSERVATIVE PARTY; INDEPENDENCE PARTY OF NEW YORK STATE; and WORKING FAMILIES PARTY,

Defendants.

19-cv-4264 (WFK) (LB)

Date of Service:
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MEMORANDUM OF LAW IN SUPPORT OF THE NEW YORK STATE BOARD OF ELECTIONS' MOTION TO DISMISS THE AMENDED VERIFIED COMPLAINT

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Defendant New York State Board of Elections ("State Board") respectfully submits this memorandum of law in support of its motion to dismiss with prejudice the Amended Verified Complaint ("Am. Compl.") (ECF No. 35).

PRELIMINARY STATEMENT

Plaintiff, an attorney and elected Nassau County Village Justice, brings this action *pro se* purporting to challenge the decisions by several Nassau County political parties to cross-endorse candidates for judicial office. He makes no specific claims against the State Board other than to allege that the State Board fails to "fulfill its mandate under the law by allowing for cross-endorsements which in turn abridges the rights of registered voters to choose among the qualifications of different candidates." Am. Compl. ¶ 13.

The Amended Complaint should be dismissed as against the State Board on several grounds. First, Plaintiff's claims against the State Board, such as they are, should be dismissed because, as a State agency, the State Board has sovereign immunity under the Eleventh Amendment of the United States Constitution.

Second, Plaintiff's claims against the State Board should be dismissed because he lacks standing. Plaintiff brings no specific claims against the State Board and asserts no concrete or particularized injury that could be attributed to the State Board. Further, Plaintiff cannot bring claims to assert the rights of third parties, as he seeks to do by this purported challenge to the cross-endorsement of judicial candidates.

Finally, Plaintiff's claims against the State Board should be dismissed because they fail to state a claim against the State Board. Plaintiff's § 1983 claim fails because the State Board is not a "person" under 42 U.S.C. § 1983. His putative challenge to cross-endorsements fails because the

selection of candidates is a matter for the political parties who cross-endorse their candidates, a practice that has long been approved by courts in the Second Circuit.

STATEMENT OF THE CASE

Plaintiff is an attorney and elected Nassau County Village Justice. Am. Compl. ¶ 31-32. He brings this action *pro se* and purportedly on behalf of the Pro Bono Publico Bar Association, Inc. pursuant to the First, Fourteenth, Fifteenth and Nineteenth Amendments to the United States Constitution, as well as to the Voting Rights Act of 1965, 52 U.S.C. § 10101 *et seq*. and 42 U.S.C. § 1983. Am. Compl. ¶ 1. However, the Pro Bono Publico Bar Association, Inc. is not a party to the action.

Plaintiff purports to challenge the decisions of the Republican, Democratic, Independence and Working Families parties in Nassau County to cross-endorse candidates for judicial office. Plaintiff has also sued the Nassau County Board of Elections, the Nassau County Bar Association and the State Board. Plaintiff alleges that the Defendants "are engaged in the process of approving cross-endorsements, particularly of judicial candidates," which "pollutes freedom of choice by eliminating it," in violation of the Constitution. *Id*. ¶¶ 22, 25. Such cross-endorsements include candidates who have not previously served as judges. *Id*. ¶ 26. Plaintiffs further allege that cross-endorsements promote campaign contributions that amount to "a form of legal bribery," which prejudices his rights as he is unable to financially contribute to the candidacies of those running for judicial office and further disadvantages him because, as a member of the bar, his adversaries who have contributed to judicial campaigns have an unfair advantage over him. *Id*. ¶¶ 29, 31-32. Plaintiff asserts, upon information and belief, that "judicial candidates are required to promise to make contributions to their political Parties in return for receiving their nominations," which amounts to the "purchasing of judicial office." *Id*. ¶¶ 34-35. Plaintiff's "Additional History of

Voters [*sic*] Suppression" further critiques cross-endorsements as fascistic and corrupt. Am. Compl. ¶¶ 39-48. Plaintiffs seek declaratory and injunctive relief, as well as monetary damages. *See* Am. Compl. Prayer for Relief.

Plaintiff makes no direct claims against the State Board, but merely alleges that the State Board "fails to fulfill its mandate under the law by allowing cross-endorsements." *Id.* ¶ 13. As Plaintiff states, the State Board is a bipartisan agency. Its powers and duties are set forth in Article 3 of New York's Election Law.

STANDARD OF REVIEW

The State Board moves to dismiss the Amended Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. On a motion under Rule 12(b)(1), Plaintiff has the burden of demonstrating by a preponderance of the evidence that jurisdiction exists. *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008), *aff'd,* 561 U.S. 247 (2010). The court accepts all factual allegations as true, but "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir. 2003). In determining a Rule 12(b)(1) motion, therefore, the court "has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." *Id.* at 627.

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter [] to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A defendant bears the burden of showing that the plaintiff has failed to state a claim and the court must accept as true all of the factual allegations contained in the complaint. However, the court is not required to credit

conclusory allegations or legal conclusions. *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014).

Although Plaintiff is a *pro se* litigant who would ordinarily be given special solicitude, it is well-settled that a lawyer who, as in this case, is representing himself receives no such solicitude. *Tracy v. Freshwater*, 623 F.3d 90, 102 (2d Cir. 2010) (citing *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 82 n.4 (2d Cir. 2001)); *see also Ning Ye v. New York State Bd. of Elections*, 20 Civ. 11072 (JPC), 2021 WL 37575, at *3 (S.D.N.Y. Jan. 5, 2021).

ARGUMENT

I. PLAINTIFF'S CLAIMS AGAINST THE STATE BOARD ARE BARRED BY THE ELEVENTH AMENDMENT

The Eleventh Amendment of the United States Constitution states that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced by or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Constitution, amend. XI. The Eleventh Amendment has long been interpreted to bar suits against non-consenting States brought by its own citizens unless Congress has expressly abrogated that immunity. *See Feng Li v. Rabner*, 643 Fed App'x 57, 58 (2d Cir. 2016) (affirming dismissal of injunctive relief claim); *Iwachiw v. New York City Bd. of Elections*, 217 F. Supp. 2d 374, 379 (E.D.N.Y. 2002), *aff'd*, 126 F. App'x 27 (2d Cir. 2005) (citing *Bd. of Trs. Of Univ. Of Alabama v. Garrett*, 531 U.S. 356, 363 (2001)). "[T]his jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Murawski v. New York State Bd. of Elections*, 285 F. Supp. 3d 691, 695 (S.D.N.Y. 2018).

The Eleventh Amendment also bars suits against the State's agencies, as they are "effectively, arms of the state." *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 236 (2d Cir. 2006) (citing *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429

(1997)). It has long been recognized that the State Board is a state agency, entitled to immunity under the Eleventh Amendment. *See McMillan v. New York State Bd. of Elections*, 449 F. App'x 79, 80 (2d Cir. 2011) (affirming dismissal of claims against the State Board as barred by the Eleventh Amendment) (citing *Iwachiw v. N.Y.C. Bd. of Elections*, 126 F. App'x 27, 28 (2d Cir. 2005)).

Thus, to the extent that Plaintiff asserts claims against the State Board pursuant to § 1983, those claims require dismissal. It is well-settled that Congress did not abrogate the States' sovereign immunity by enacting § 1983 and that New York has not waived its immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996); *Aponte v. Fischer*, No. 14-CV-3989 (KMK), 2018 WL 1136614, at *8 (S.D.N.Y. Feb. 28, 2018) (citing cases). The State Board is a state agency entitled to sovereign immunity. *Iwachiw*, 126 F. App'x at 28; *Sloan v. Michel*, No. 15-Civ. 6963 (LGS), 2016 WL 1312769, at *4 (S.D.N.Y. April 4, 2016); *McMillan v. N.Y. State Bd. of Elections*, No. 10 Civ. 2502 (JG) (VVP), 2010 WL 4065434, at *3 (E.D.N.Y. Oct. 15, 2010), *aff'd*, 449 F. App'x at 80. Therefore, all claims against the State Board should be dismissed.

II. PLAINTIFF LACKS STANDING TO ASSERT CLAIMS AGAINST THE STATE BOARD.

Article III of the Constitution "limits the federal courts' power to the resolution of 'Cases' and 'Controversies.'" *Dhinsa v. Krueger*, 917 F.3d 70, 77 (2d Cir. 2019) (citing U.S. Const. art. III, § 2). A litigant who invokes federal jurisdiction therefore "must demonstrate standing to sue," consisting of three elements: "the individual initiating the suit 'must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Id*. (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). Standing "evaluates a litigant's personal stake as of the outset of litigation." *Id*. (internal quotation omitted).

The injury in fact requirement may only be satisfied by an injury that is "concrete, particularized, and actual or imminent[.]" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal citation omitted). Where "there is no actual harm, . . . its imminence (though not its precise extent) must be established." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992). The "threatened injury must be *certainly impending* to constitute injury in fact," and, thus, "[a]llegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (internal quotation marks and citations alterations omitted) (emphasis in original). Nor may a plaintiff proceed based on allegations that rely on an "attenuated chain of inferences necessary to find harm[.]" *Clapper*, 568 U.S. at 414. The plaintiff "bear[s] the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm," and may not "rely on speculation about 'the unfettered choices made by independent actors not before the court.'" *Id*. (quoting *Lujan*, 504 U.S. at 562).

Here, Plaintiff fails to satisfy these standing requirements. The Amended Complaint asserts no specific claims against the State Board but merely alleges that the State Board "fails to fulfill its mandate under the law by allowing for cross-endorsements," which is alleged to "abridge[] the rights of registered voters." Am. Compl. ¶ 13. This conclusory assertion appears to be premised on Plaintiff's generalized description of the State Board's responsibilities but falls far short of the requirement that Plaintiff will imminently suffer an injury in fact that is traceable to the State Board.[1] For that reason, the Amended Complaint should be dismissed as to the State Board.

[1] The only allegation in the Amended Complaint regarding the Pro Bono Publico Bar Association, Inc is that its "purpose is to engage in strategic litigation involving public policies" and that it is located at the same address as Plaintiff Liotti. Am. Compl. ¶ 10. The only actual plaintiff in this action is Plaintiff Liotti. Even if the Pro Bono Publico Bar Association were a plaintiff, however, there are no allegations as to any injury that the association has suffered or that it meets the requirements for associational standing. *See Knife Rights, Inc. v. Vance*, 802 F.3d 377, 388 (2d Cir. 2015); *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011).

The actual basis for Plaintiff's claims appears to be an alleged conspiracy between various Nassau County political parties and other Nassau County entities to "engage[] in the process of approving cross-endorsements" of judicial candidates to Plaintiff Liotti's detriment. Am. Compl. ¶¶ 22, 25, 31-32. None of these allegations refer to the State Board and no reasonable inference can be drawn that the State Board is somehow involved in the purported conspiracy to purchase judicial offices and violate voters' rights that is alleged here. Plaintiff simply has not alleged any injury to that is fairly traceable to conduct by the State Board.

Moreover, Plaintiff's attempt to assert claims on behalf of voters generally, and in particular, of "[t]he poor, women and minorities," Am. Compl. ¶¶ 25, 30, also fails. Standing to assert the alleged rights of third parties is a question of prudential standing that includes "'the general prohibition on a litigant's raising another person's legal rights'" and "'the rule barring adjudication of generalized grievances more appropriated addressed in the representative branches [of government].'" *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 39 (2d Cir. 2015) (quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S.1, 12 (2004)). It is Plaintiff's burden to establish such standing "by establishing (1) a close relationship to the injured party and (2) a barrier to the injured party's ability to assert its own interests." *Id*. at 41 (quoting *Smith v. Hogan*, 794 F.3d 249, 255 (2d Cir. 2015)). *See also Salu v. Miranda*, 830 F. App'x 342, 349 n.4 (2d Cir. 2020) (rejecting similar allegations of harm to third parties). Here, Plaintiff asserts no facts to support having a "close relationship" to the allegedly injured voters or the "poor, women and minorities" who are unable to make campaign contributions. Am. Compl. ¶¶ 25, 30. Therefore, to the extent that Plaintiff seeks to assert the rights of third parties, particularly under the Voting Rights Act or the Fifteenth and Nineteenth Amendments, such claims should be dismissed for lack standing to do so.

III. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE STATE BOARD

Plaintiff purports to bring claims against the State Board pursuant to 42 U.S.C. § 1983. However, Plaintiff's § 1983 claim fails at the outset because § 1983 does not provide an independent basis for liability. *See Jimenez v. City of New York*, 18 Civ. 7273 (LGS), 2020 WL 1467371, at *3 (S.D.N.Y. Mar. 26, 2020) ("'Section 1983 itself creates no substantive rights,' but 'provides only a procedure for redress for the deprivation of rights established elsewhere.'" (quoting *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir. 1999)). Plaintiff's § 1983 claims fail for the additional reason that the State Board is not a "person" under § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("neither a State nor its officials acting in their official capacities are 'persons' under §1983"); *Spencer v. Doe*, 139 F.3d 107, 111 (2d Cir. 1998) ("[n]either a state nor one of its agencies ... is a 'person' under §1983"). As a result, courts in this jurisdiction have uniformly dismissed § 1983 claims asserted against state agencies on these grounds. See, e.g., *Harris v. New York State Dep't of Health*, 202 F. Supp. 2d 143, 178 (S.D.N.Y. 2002) (dismissing § 1983 claims asserted against state agency because "neither the State nor its agencies qualify as 'persons' under § 1983 ...[and] are not subject to suit under that statute."). Therefore, Plaintiff's claims pursuant to § 1983 must be dismissed.

Plaintiff's purported challenge to the cross-endorsement of judicial candidates in Nassau County also fails on the merits. Cross-endorsements have long been countenanced in New York. *See United Ossining Party v. Hayduck*, 357 F. Supp. 962 (S.D.N.Y. 1971) (enjoining enforcement of a law that allowed cross-endorsements between parties but not between independent bodies and parties). *See also Patton v. Democrat Town Committee of Wilmington*, 253 F. App'x 129 (2d Cir. 2007) (rejecting challenge to alleged "party merger" due to cross-endorsements). Moreover, the selection of candidates is solely a matter for the political parties, as it is the parties who choose to

cross-endorse their candidates. This principle of deference to a political party's decisions with respect to its selection of candidates was made clear in the Supreme Court's decision in *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203-04 (2008), in which the Supreme Court upheld New York's Election Law against a challenge to its provisions requiring parties to select their judicial candidates by a convention composed of delegates elected by party members. *See* N.Y. Elec. Law §§ 6-124, 6-126.

Plaintiff's attempt to distinguish *Lopez-Torres* from their purported challenge to cross-endorsements is unavailing. Am. Compl. ¶¶ 21-22. Plaintiff claims that he does not seek to "inveigle [himself] in the internal affairs or the First Amendment rights of an individual political Party's right to freely associate or decide who it will permit to be among its members, or to be delegates at judicial nominating conventions or to enter its primary elections." *Id*. ¶ 21. But that is precisely what he seeks to do concerning the cross-endorsement of judicial candidates. In *Lopez-Torres*, the Supreme Court rejected the argument that the judicial convention process in New York deprived plaintiffs of a "fair shot" at winning a nomination. *Id.* at 206. Although Plaintiff makes no such complaint here, his general complaints are that cross-endorsements lead to voter suppression. As such, the same concerns apply here as those addressed in *Lopez-Torres* with respect to the selection of judicial candidates, which the Supreme Court held are a matter for the political parties who cross-endorse their candidates. *Id*. at 203-04; *Patton*, 253 F. App'x at 131. Moreover, as set forth in Point II supra, Plaintiff lacks standing to assert the rights of voters generally.

CONCLUSION

For all the foregoing reasons, Defendant New York State Board of Elections, respectfully requests that the Court dismiss the Amended Complaint as against it, with prejudice, and grant such other relief that the Court deems necessary and appropriate.

Dated: January 15, 2021
New York, New York

Respectfully submitted,

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