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: January 15, 2021

MEMORANDUM OF LAW IN 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

In this legally and factually deficient case, Plaintiff alleges that some of the political parties' cross-endorsement of judicial candidates in New York, constitutes a violation of the U.S. Constitution and its Amendments, as well as presents a voters' rights issue. Even more tenuously, Plaintiff claims that the Bar Association of Nassau County, New York, Inc. s/h/a The Bar Association of Nassau County, Inc. (the "Bar Association") – whose involvement in the process is limited to opining as to whether judicial candidates are "well qualified" or "not approved at this time" – also is in violation of the Constitution and voters' rights.

Plaintiff's case against the Bar Association should be dismissed, pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for several reasons. First, Plaintiff lacks standing to bring this case, given that Plaintiff has failed to allege a true injury in fact that is not hypothetical. Second, much like the plaintiff in *Jacobson v. Kings Cty. Democratic Cty. Comm.*, 788 F. App'x. 770 (2d Cir. 2019), Plaintiff in this case has failed to allege any conduct by the Bar Association that renders it a state actor subject to constitutional scrutiny. Third, even if the Bar Association is deemed to be a state actor, the judicial nomination process that Plaintiff complains of has already been deemed constitutional by the U.S. Supreme Court in *New York State Bd. of Elections v. Lopez Torres,* 552 U.S. 196 (2008).[1]

For each of these reasons, the Plaintiff's Amended Verified Complaint (the "AVP")[2] must be dismissed.

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[1] Ultimately, this lawsuit appears to be motivated by Plaintiff's own self-perceived inability to not engage in what he calls "legal briberies," claiming that unlike his adversaries in civil lawsuits, he is precluded from contributing to judicial campaigns and ultimately currying favor with individuals who are eventually elected to the judiciary. Though Plaintiff feigns a voters' rights case, this case is not about voters' rights.

[2] A copy of the AVP is annexed to the accompanying Declaration of Brett A. Scher, dated January 15, 2021, as Exhibit "A".

PLAINTIFF'S ALLEGATIONS AGAINST THE BAR ASSOCIATION

In the AVP, Plaintiff alleges that the Nassau County Republican Committee and Nassau County Democratic Committee forged an agreement to cross endorse members of the judiciary who were standing for re-election. Plaintiff claims that, "[s]ome years ago," the Nassau political parties and the Bar Association "agreed that candidates for the judiciary would not be nominated unless first approved as 'qualified' by the [Bar Association's] Judiciary Committee." (AVP ¶¶ 23-24). Plaintiff alleges that at some later time, the political parties "included" cross endorsement of candidates who had not previously served as judges or been elected to the judiciary. (AVP ¶ 26). Plaintiff contends that all of the defendants "conspired and colluded together" to deprive registered voters of a freedom of choice in voting rights as guaranteed by the First, Fourteenth, Fifteenth, and Nineteenth Amendments of the U.S. Constitution…" (AVP ¶ 25). Plaintiff claims that these "policies and actions" deprive voters of choice among judiciary candidates and encourages nepotism. (AVP ¶ 27). Plaintiff alleges that the Bar Association should have "disavow[ed]" the cross-endorsement system and not "approv[ed] of any judicial candidate as 'qualified' if they are or have been cross endorsed by political Parties." (AVP ¶ 44). Plaintiff likens the cross-endorsement system to fascism. (AVP ¶ 46). Plaintiff finally alleges that all defendants, individually and jointly, caused irreparable harm to the democratic form of government by participating in the cross endorsement of judicial candidates, "particularly those with no prior judicial experience." (AVP ¶ 47). Plaintiff also complains about New York's procedures for the nomination and election of judges, contending that since he personally is not allowed to "financially contribute" to the candidacies of judges, he is at an unfair advantage when practicing in Nassau County courts because he cannot engage in the "legal bribery" of elected judges while his adversaries supposedly can. (AVP ¶¶ 29, 32).

THE CLAIMS ALLEGED IN THIS ACTION

The AVP purports to assert claims under 42 U.S.C. § 1983 for the alleged deprivation of rights under the First and Fourteenth Amendments of the U.S. Constitution, as well as the Voting Rights Act of 1965, 52 U.S.C. § 10101.[3]

ARGUMENT

While a complaint "does not need detailed factual allegations" to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a plaintiff cannot rely on a "formulaic recitation of the elements of a cause of action" and must, at a minimum, sufficiently plead the facts underlying the claim "to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). Mere conclusions "are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In order to survive a motion to dismiss, Plaintiffs must "state a claim to relief that is plausible on its face." *Id.* at 678 (citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citations omitted). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Id.* at 681 (internal quotations and citations omitted).

Moreover, a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is "substantially identical," *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003), to the a Rule 12(b)(6) analysis. "On a Rule 12(b)(1) motion, …the party who invokes the Court's jurisdiction bears the burden of proof to demonstrate that subject matter jurisdiction exists …."

[3] While Plaintiff also appears to allege that his claims arise from the Fifteenth and Nineteenth Amendments, these Amendments are flatly inapplicable because Plaintiff does not allege to have been denied the right to vote on the basis of his race, color, previous condition of servitude, or sex.

Gonzalez v. Option One Mortg. Corp., 2014 WL 2475893, at *2 (D. Conn. Jun. 3, 2014) (*citing Lerner*, 318 F.3d at 128).

POINT I

PLAINTIFF LACKS STANDING

A motion to dismiss for lack of standing is properly brought pursuant to Fed. R. Civ. P. 12(b)(1). *See Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Carter v. HealthPort Techs., Inc.*, 822 F.3d 47, 54 (2d. Cir. 2016). In the Second Circuit, the burden of establishing standing rests with the plaintiff. *See Carter*, 822 F.3d at 55.

To establish standing, Plaintiff must show "an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Federal Election Com'n.*, 554 U.S. 724, 733, 128 S.Ct. 2759 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992)). The "'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-735, 92 S.Ct. 1361 (1972)). Plaintiff bears the burden of pleading sufficient factual allegations to establish each of these elements. *Lujan,* 504 U.S. at 561.

"To obtain prospective relief, such as a declaratory judgment or an injunction, a plaintiff must show, *inter alia*, 'a sufficient likelihood that he [or she] will again be wronged in a similar way.'" *Marcavage v. City of New York*, 689 F.3d 98, 103 (2d Cir. 2012) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660 (1983)). "That is, a plaintiff must demonstrate a certainly impending future injury." *Id.* (internal quotation marks omitted).

Plaintiff lacks standing to maintain the instant action. Plaintiff's claims are entirely hypothetical. Plaintiff fails to allege that he ever sought to become a judicial candidate as part of

New York's election process and that he was denied the endorsement of the political parties named as defendants herein, or, alternatively, that he ran an unsuccessful campaign without a party endorsement.

To the extent Plaintiff attempts to fashion a voters' rights claim, it still fails because Plaintiff has failed to assert any cognizable way in which his vote is impaired. *See Lujan, supra; see also, Baker v. Carr,* 369 U.S. 186 (1962) (voters had standing to challenge as unconstitutional a Tennessee statute that debased their votes where apportionment of state representatives and senators was not based on a constitutional formula). Plaintiff utterly fails to allege any actual impairment of his vote for any reason, much less one where his preferred candidate was unavailable due to cross-endorsement. Plaintiff's vague, unspecified allegation that cross-endorsement "pollutes freedom of choice" fails to present a concrete, particularized, and actual or imminent" injury necessary to establish standing. Moreover, New York's current scheme of party endorsements of Supreme Court justices has already been determined to be constitutional by the U.S. Supreme Court, so no impairment could have occurred. *See New York State Bd. Of Elections v. Lopez Torres*, 552 U.S. 196, 128 S.Ct. 791 (2008).

Accordingly, because Plaintiff has utterly failed to establish standing to bring the alleged causes of action, the AVP must be dismissed.

POINT II

THE BAR ASSOCIATION IS NOT A STATE ACTOR

Even if Plaintiff successfully established standing, his claim against the Bar Association still fails because the Bar Association is not a state actor, nor is it alleged to have been engaged in state action. *See Harrison v. New York*, 95 F. Supp. 3d 293, 321 (E.D.N.Y. 2015) (quoting *Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010)) ("[t]o successfully prosecute a claim under 42 U.S.C. §

1983, the alleged constitutional deprivation must have been "committed by a person acting under the color of state law").

The issue of whether an organization can be deemed a state actor with respect to opining on whether a judicial candidate is "well qualified" has already been litigated and decided by the Second Circuit. *See Jacobson v. Kings Cty. Democratic Cty. Comm.*, Case No. 16-cv-04809 (LDH) (RML), 2018 WL 10228395 (Sept. 29, 2018), *aff'd*, 788 F. App'x. 770 (2d Cir. 2019). In *Jacobson*, the plaintiff sought re-nomination as a New York State Supreme Court Justice but was found to be "not qualified" by the Judicial Screening Committee for the Democratic Party in and for Kings County (the "Screening Committee"). 2018 WL 10228395, at *1. The plaintiff sued the Kings County Democratic County Committee ("KCDCC") and the Judicial Screening Committee, which aided the KCDCC in selecting their candidates to appear on the general election ballot for Supreme Court Justice vacancies, claiming, *inter alia*, violations of her Fourteenth Amendment rights and conspiracy to violate her rights under the Fourteenth Amendment. *Id.* at *3. The Second Circuit held that because the Screening Committee only aided the KCDCC to conduct its internal party affairs, which have no direct relation to the electoral process, the Screening Committee was not acting as a state actor:

> To allege that the [Screening Committee] engages in state action, however, Jacobson must allege that the [Screening Committee] performs a public electoral function connected to state law, rather than a function related to the internal management and business of the KCDCC. … Jacobson's complaint offers only conclusory allegations that the [Screening Committee's] screening process performs a public electoral function. … The Amended Complaint concedes that the [Screening Committee] functions to prevent the KCDCC's Executive Committee from endorsing a candidate who the [Screening Committee] determines is not qualified. Jacobson makes no allegation that the screening process is akin to the selection of a candidate to fill a vacant position or run in a special election. … Instead the screening process functions solely to assist

> the KCDCC in 'structur[ing] their internal party processes and to select the candidate of the party's choosing.'

788 F. App'x. at 773 (quoting *Lopes Torres*, 552 U.S. at 203); *see also Max v. Republican Comm. of Lancaster County*, 587 F.3d 198 (3d Cir. 2009) *cert denied* 560 U.S. 925, 130 S.Ct. 3328 (2010) (Republican County Committee was not a state actor merely because it endorsed candidates); *Neuman v. Ocean County Democratic County Comm.*, CV 16-2701 (FLW), 2017 WL 396443 (D.N.J. Jan. 30, 2017) (Democratic County Committee's candidate selection process did not constitute state action); *Valenti v. Pennsylvania Democratic State Comm.*, 844 F. Supp. 1015, 1016-18 (M.D.Pa. 1994).

At bar, where the Bar Association is even further removed from the electoral process then the Screening Committee was in *Jacobson*, there is no viable claim that the Bar Association was a state actor. The Bar Association is only alleged to render an opinion as to whether judicial candidates are "qualified" in order to aid the political parties in their internal efforts to determine which judicial candidates to "nominate[]." (AVP ¶¶ 24, 26). Plaintiff does not – and cannot – allege that the Bar Association's opinion whether a candidate is "qualified" rises to the level of selecting a candidate to fill a vacant position or run in a special election. *See Jacobson*, 788 F. App'x. at 773.

Accordingly, Plaintiff has failed to allege that the Bar Association is a state actor.

POINT III

PLAINTIFF'S CLAIM IS PRECLUDED BY *LOPEZ TORRES*

Even if the Bar Association could be held to be a state actor with respect to the election of judicial candidates, the U.S. Supreme Court has already held that New York State's judicial election process is constitutional. *See New York State Bd. Of Elections v. Lopez Torres*, 552 U.S.

196, 128 S.Ct. 791 (2008). As such, the Bar Association's limited involvement in a process that has already been held to be constitutional obviously cannot be unconstitutional.

In *Lopez Torres*, the plaintiffs, all judicial candidates who failed to secure the nominations of their parties, challenged the process for getting on the ballot by claiming that the nomination process violated their First Amendment rights. *See Lopez Torres*, 552 U.S. at 201. The plaintiffs argued, much like Plaintiff in the case at bar, that New York's election system "deprived voters and judicial candidates of their rights to gain access to the ballot and to associate in choose their party's candidates." *Id.*

The Supreme Court summarized the judicial candidates' position succinctly – that New York's judicial nomination process did not offer them a "fair shot" without party nomination. However, the Supreme Court held that because each "political party has a First Amendment right … to choose a candidate selection process that will in its view produce the nominee who best represents its political platform," the New York scheme for nomination of judicial candidates is constitutional. *Id.* at 202, 206-207; *see also California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989) (state statute prohibiting party leaders from endorsing candidates in primary elections and dictating the makeup of party committees deemed unconstitutional); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The dismissal in *Lopez Torres* on First Amendment grounds has been expanded to include related challenges on equal protection and due process claims. *See Dibbs v. Mazzarelli,* 470 F. App'x 34, 35 (2d Cir. 2012), *cert. denied*, 568 U.S. 1213, 133 S.Ct. 1494 (2013) (dismissing §1983, equal protection and due process claims challenging judicial nomination process).

Plaintiff's attempt to attack the Bar Association's First Amendment right to render an opinion on the qualification of judicial candidates is even more tenuous than the claims rejected in *Lopez Torres* and *Dibbs*. Most critically, there is no requirement that a judicial candidate secure a party nomination, let alone a determination from the Bar Association that they are "well qualified" before seeking to run.[4] As the Supreme Court observed:

> "One who seeks to be a justice of the New York Supreme Court may qualify by a petition process. The petition must be signed by the lesser of (1) 5 percent of the number of votes last cast for Governor in the judicial district or (2) either 3,500 or 4,000 voters (depending on the district). This requirement has not been shown to be an unreasonable one .... True, the candidate who gains ballot access by petition does not have a party designation; but the candidate is still considered by the voters.

Lopez Torres, 552 U.S. at 210 (concurring opinion).

Accordingly, the AVP fails because the New York judicial candidate nomination process in place is constitutional and the Bar Association's rendering of an opinion as to whether a candidate is "well qualified" can hardly be deemed to be violative of Plaintiff's constitutional rights or any voters' rights.

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[4] Plaintiff's argument that the Bar Association should have disavowed cross endorsements by not approving judicial candidates if they "are to be or have been cross-endorsed" (AVP, ¶44) is plainly illogical, because as Plaintiff concedes the Bar Association's opinion as to a judicial candidate's qualifications comes *before* any alleged cross-endorsement by the political parties. (AVP, ¶¶24).

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, 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
January 15, 2021

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