

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 2007-cv-01924-DME-BNB

KENNETH L. SMITH,

Plaintiff,

v.

HONS. MICHAEL L. BENDER,  
NATHAN B. COATS,  
GREGORY J. HOBBS, JR.,  
REBECCA LOVE KOURLIS,  
ALEX J. MARTINEZ,  
MARY J. MULLARKEY, and  
NANCY E. RICE, in their individual capacities only,  
HON. JOHN W. SUTHERS, and  
FRIEDRICK C. HAINES, in their individual capacities only,  
JOHN DOES 1-99, and  
THE UNITED STATES OF AMERICA,

Defendants.

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**DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS**

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The United States of America, by and through undersigned counsel, hereby moves to dismiss Plaintiff Kenneth L. Smith's claim against Defendant United States of America ("United States") pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). As explained below, the Court lacks subject matter jurisdiction over Plaintiff's claim against the United States, and Plaintiff's claim against the United States does not state a claim for

which relief can be granted. For these reasons, dismissal of the United States is appropriate.

### **FACTUAL BACKGROUND**

1. On September 12, 2007, Plaintiff filed a four-count Complaint in which he named as Defendants the Justices of the Colorado Supreme Court, the Attorney General of Colorado, the Assistant Attorney General of Colorado, 99 John Does, and the United States. *See* Complaint (Doc. 1).

2. As Plaintiff's Complaint admits, Plaintiff filed this suit because Plaintiff does not agree with the disposition of his appeal to the Supreme Court of the State of Colorado in *Smith v. Mullarkey, et al.*, 121 P.3d 890 (Colo. 2005). *See* Complaint, at 2, 5-11.

3. In *Mullarkey*, the Colorado Supreme Court upheld the lower court's dismissal, for lack of subject matter jurisdiction, of Plaintiff's claims brought under 42 U.S.C. § 1983, regarding his being denied admission to the Colorado Bar. *See Mullarkey*, 121 P.3d at 891, 892 (finding that the Colorado Supreme Court has "exclusive and inherent power to admit applicants to the Bar of this state").

4. The court further found that the basis for Plaintiff's denial of admission stemmed from the Board of Law Examiners' inquiry panel finding that "Mr. Smith previously had abused the legal system and exhibited a lack of candor" and that,

after the Colorado Supreme Court's order denying Plaintiff's application to the bar, Plaintiff's appropriate recourse was to seek *certiorari* in the United States Supreme Court. *Id.* at 893.

5. Plaintiff did not seek *certiorari* in the United States Supreme Court and the Colorado Supreme Court's denial of Plaintiff's admission to the bar became final when Plaintiff's time for filing for *certiorari* expired. *Id.* Plaintiff has since filed a series of lawsuits since his denial of admission to the bar. *Id.* at 891.

6. Plaintiff's sole allegation against Defendant United States in the present action is that the United States failed to take "affirmative action to ensure that Plaintiff's fundamental right of access to the courts would be protected." *See* Complaint, at 15.

7. Plaintiff does not specify what "affirmative action" the United States was required to take to ensure his access to the courts or how his bringing his underlying case in state court did not constitute "access to the courts." *See* Complaint.

8. Plaintiff seeks only monetary damages for his claim against the United States. *See* Complaint, at 15, 16.

9. Plaintiff concedes in his Complaint that he has named the United States as a Defendant only as a "potential part[y]." *See* Complaint, at 15 n.6.

## STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) attacks the existence of jurisdiction rather than the allegations of the complaint. Dismissal of an action is appropriate when the district court lacks subject matter jurisdiction over the action. Fed. R. Civ. P. 12(b)(1).

The Court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, “a district court may not presume the truthfulness of the complaint’s factual allegations . . . and has wide discretion to look to affidavits, other documents, and [may even hold] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).” *Id.*

The party invoking federal jurisdiction bears the burden of proof as to jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Sac & Fox Nation v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999). When the question at issue is one involving the jurisdiction of a federal court, jurisdiction must be shown by the plaintiff affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it. *Sac & Fox*, 193 F.3d at 1168. “It is to be presumed that a cause lies outside [the court’s] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen v. Guardian Life Ins.*

*Co. of America*, 511 U. S. 375, 377 (1994) (citations omitted).

In deciding a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the court must accept all well-pleaded factual allegations in the complaint as true and view them “in the light most favorable to the nonmoving party.” *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006) (citing *Sutton v. Utah State Sch. for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir.1999)). “But merely conclusory allegations in a complaint do not constitute well-pleaded factual allegations.” *Joseph v. Shepherd*, 211 Fed. Appx. 692, 695 (10th Cir. 2006) (citing *Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006)). Moreover, to survive a motion to dismiss, the complaint must “plead enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) (overruling the standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that a claim “should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

## **ARGUMENT**

To the extent Plaintiff is asserting a claim for damages against the United States, that claim fails because Plaintiff has not identified an applicable waiver of sovereign immunity. *See Aviles v. Lutz*, 887 F.2d 1046, 1048 (10th Cir. 1989). In addition, to the

extent Plaintiff's claim is that the United States has denied him access to the courts, that claim would necessitate an act of Congress to protect Plaintiff from the harms alleged, and the political question doctrine prevents the Court from granting such relief. *See People of Colo. ex rel. Suthers v. Gonzales*, 2007 WL 2788603, at \*2 (D. Colo. 2007) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). And where jurisdiction does not exist, *jus cogens* does not require Congress to create jurisdiction. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7<sup>th</sup> Cir. 2001).

Alternatively, because Plaintiff does not state a plausible claim for relief against the United States, any such claim must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007).

**I. PLAINTIFF'S CLAIM MUST BE DISMISSED BECAUSE THERE HAS BEEN NO WAIVER OF SOVEREIGN IMMUNITY**

The United States, as well as its agencies and officers, may not be sued without its consent. *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963); *Sierra Club v. Lujan*, 972 F.2d 312, 314 (10th Cir. 1992). The United States is presumed to be immune from suit unless it expressly waives its sovereign immunity or consents to suit. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); *see also Dahl v. United States*, 319 F.3d 1226, 1228 (10th Cir. 2003).

Waivers of sovereign immunity cannot be implied; they must be express and unequivocal. *Lane v. Pena*, 518 U.S. 187, 192 (1996) (noting that a waiver of sovereign immunity “must be unequivocally expressed in the statutory text . . . and will not be implied.”). Only Congress can waive the United States’ sovereign immunity. *Governor of the State of Kansas v. Kempthorne*, 505 F.3d 1089, 1097 (10th Cir. 2007); *Merrill Lynch v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992). A waiver of sovereign immunity “must be ‘unequivocally expressed’ by Congress, [and] ‘[o]fficers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court.’” *United States v. Murdock Machine & Engineering Co.*, 81 F.3d 922, 931 (10th Cir. 1996) (quoting *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 660 (1947)).

Sovereign immunity is jurisdictional in nature. *Meyer*, 510 U.S. at 475. Without a clear waiver of sovereign immunity, a court has no jurisdiction over a claim against the United States, its agencies, or its officers. *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

Plaintiff seeks monetary damages for the United States’ alleged denying Plaintiff “access to the courts.” See Complaint, at 15, 16. This claim stems from Plaintiff’s assertion that the State of Colorado is a “political subdivision” of the United States, and that the United States, presumably through Congressional legislation, therefore has an

obligation to ensure that Plaintiff has the access that he alleges he was denied. *Id.*

Because Plaintiff has not identified any waiver of sovereign immunity that allows this claim, and because there has been no waiver, the Court lacks jurisdiction to hear his claim for damages against the United States. *See FDIC v. Meyer*, 510 U.S. 471, 473, 486 (1994) (refusing to extend cause of action for damages in “*Bivens*” cases against individual government employees to federal agencies); *Aviles v. Lutz*, 887 F.2d at 1048 (affirming the district court’s dismissal of a *pro se* plaintiff’s suit for damages against the United States because Congress had not authorized such a suit).

## **II. PLAINTIFF’S CLAIM MUST BE DISMISSED BECAUSE THIS COURT LACKS JURISDICTION OVER POLITICAL QUESTIONS**

In the case of *Baker v. Carr*, the Supreme Court set forth scenarios presenting non-justiciable political questions. 369 U.S. 186, 217. These scenarios include, *inter alia*, “a textually demonstrative constitutional commitment of the issue to a coordinate political department” and “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.” *Id.* “The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or . . . the Executive Branch.” *Japan Whaling Ass’n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986).

The Constitution gives Congress the authority “[t]o make all Laws which shall be

necessary and proper for carrying into Execution [Congress's Article I, § 8,] Powers and all other Powers vested by this Constitution in the Government of the United States.”

*Jinks v. Richland County, S.C.*, 538 U.S. 456, 461 (2003) (quoting U.S. Constitution, Art. I, § 8, cl. 18). Thus, Clause 18 of the Constitution provides a “textually demonstrative constitutional commitment” of lawmaking to Congress and the courts’ intrusion into this area would likely result in “lack of the respect due [Congress].” *Baker*, 369 U.S. at 217.

Plaintiff’s claim against the United States, that the United States did not provide an “effective remedy,” is a complaint that the United States, *i.e.*, Congress, failed to provide him with a cause of action for his primary grievances against the other defendants in this action. *See* Complaint, at 15, 16. Plaintiff cites no case law for his allegation that Congress is obligated to provide him such a remedy. Because of the “textually demonstrable constitutional commitment” to Congress in the area of lawmaking, Plaintiff’s allegation raises a political question that is non-justiciable. *See Ex rel Suthers*, 2007 WL 2788603, at \*2 (holding that where “textually demonstrable” commitment exists, the political question doctrine renders the issue non-justiciable) (citing *Baker*, 369 U.S. at 217).

### III. PLAINTIFF’S CLAIM MUST BE DISMISSED BECAUSE THE NORMS OF *JUS COGENS*, IF APPLICABLE, DO NOT REQUIRE CONGRESS TO CREATE JURISDICTION WHERE NONE EXISTS

Plaintiff’s claim against the United States asserts that the United States is obligated under “*jus cogens* international law” to provide Plaintiff with an “effective remedy” for the “willful deprivation of [Plaintiff’s] fundamental human rights.” *See* Complaint, at 15, 16. Black’s defines *jus cogens* as: “1. A mandatory or peremptory norm of general international law accepted or recognized by the international community as a norm from which no derogation is permitted,” and “2. [in civil law] A mandatory rule of law that is not subject to the disposition of the parties, such as an absolute limitation on the legal capacity of minors below a certain age.” *Black’s Law Dictionary* 876 (8<sup>th</sup> ed. 2004).

Plaintiff’s allegation that he has been denied access to the courts, even if true, does not fall within international human rights *jus cogens*. Only egregious acts of human rights violations rise to the level of *jus cogens*. *See, e.g.*, Restatement (Third) of Foreign Relations, § 702 (stating that the Customary International Law of Human Rights forbids genocide, slavery, murder, torture, arbitrary detention, racial discrimination, and consistent gross violations of internationally recognized human rights); *see also Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002) (imposition of death penalty for crimes committed when a juvenile is not violation of *jus cogens*). In addition, although Plaintiff refers to the United States’ status as a signatory to the International Covenant on Civil

and Political Rights (ICCPR) as a basis for his claim, *see* Complaint, at 16 n.7, “it is clear that the ICCPR is not binding on the federal courts.” *Hain*, 287 F.3d at 1243 (citations omitted).

Moreover, “*jus cogens* norms do not require Congress . . . to create jurisdiction.” *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1152 (7<sup>th</sup> Cir. 2001); *see also* *Yousuf v. Samantar*, 2007 WL 2220579, at \*14 (E.D. Va. 2007). Thus, even assuming that the norms of *jus cogens* apply, that does not overcome Congress’s non-waiver of sovereign immunity and the corresponding lack of jurisdiction.

#### **IV. PLAINTIFF’S CLAIM MUST BE DISMISSED BECAUSE IT DOES NOT STATE A PLAUSIBLE CLAIM**

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court upheld the district court’s dismissal of Plaintiff’s complaint for failure to state a claim where the complaint merely asserted “legal conclusions” rather than factual allegations. 127 S. Ct. 1955, 1966, 1970 (re-affirming that Rule 8(a)(2) requires that the “plain statement possess enough heft to show that the pleader is entitled to relief”) (internal quotations omitted). Plaintiff’s claim in the present case suffers the same flaw—it alleges the legal conclusion that the United States did not provide an “effective remedy” but provides no facts regarding how the United States failed to provide such a remedy. *See* Complaint, at 15, 16. In considering the requisite plausibility that a complaint must possess to survive a motion to dismiss, mere descriptions of actionable conduct, rather than independent allegations of actual

actionable activity, “come[] up short.” *Id.* at 1969, 1970 (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957)). Thus, the Court in *Twombly* ruled that “[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” *Id.* at 1974.

In the present case, Plaintiff claims that the United States has denied him access to the courts. *See* Complaint, at 15-16. Such a claim is not plausible, however, based on the fact that Plaintiff’s underlying case was filed in and decided by the Denver District Court and reviewed by the Colorado Supreme Court, and that Plaintiff had the option of seeking *certiorari* to the United States Supreme Court for his denial of admission to the bar. *See Mullarkey*, 121 P.3d at 891-93. Plaintiff’s bringing his case in state court provided him the very opportunity that he now claims he lacked. In fact, Plaintiff’s demonstrated access to the state court system provided him the best possible access to the courts because, unlike federal courts which have limited jurisdiction, state courts are courts of general jurisdiction. *See Rawson v. Sears, Roebuck & Co.*, 822 F.2d 908, 921 n.23 (10th Cir. 1988) (noting that state courts are not as constrained to imply remedies as are federal courts). Plaintiff’s dissatisfaction with his results in state court does not mean that he did not have access to those courts. Like the plaintiffs in *Twombly*, Plaintiff has failed to allege facts supporting a plausible claim, and therefore his claim against the United States should be dismissed.

## CONCLUSION

For the reasons stated above, Plaintiff's claim against the United States must be dismissed.

DATED this 17th day of December, 2007.

Respectfully Submitted,

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s/Marc A. Bonora

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on December 17, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF and sent by U.S. mail the foregoing to:

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s/ Marc A. Bonora  
For the United States Attorney's Office