

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-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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**STATE DEFENDANTS' MOTION TO DISMISS**

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DEFENDANTS, Hons. Michael L. Bender, Nathan B. Coats, Gregory J. Hobbs, Jr., Rebecca Love Kourlis, Alex J. Martinez, Mary J. Mullarkey, Nancy E. Rice, John W. Suthers, and Friedrich C. Haines (together referred to as "State Defendants"), through their attorney, the Colorado Attorney General, respectfully submit this Motion to Dismiss and in support thereof, state the following:

## I. INTRODUCTION AND STATEMENT OF FACTS<sup>1</sup>

Plaintiff was awarded a Juris Doctor degree from the University of Denver College of Law in 1995. He applied for admission to the Colorado Bar in 1996. The executive director of the Board of Law Examiners recommended that an inquiry panel determine Plaintiff's mental, moral and ethical qualifications for admission to the Bar. The panel ultimately concluded that there was probable cause to believe Plaintiff lacked the mental stability for admission to the Bar and recommended his admission be denied. Plaintiff requested a formal hearing, and the Board of Law Examiners subsequently requested that Plaintiff submit to an independent medical examination (IME). Plaintiff refused to submit to the IME, which caused the hearing to be vacated. The Colorado Supreme Court denied Plaintiff's application for admission to practice law.

At this point, rather than appeal that decision to the United States Supreme Court, Plaintiff began filing lawsuits. The present litigation is the fifth lawsuit filed by Plaintiff related to his failure to be admitted to the Colorado bar. All of the prior lawsuits have been dismissed.

Plaintiff's first lawsuit was *Smith v. Mullarkey, et al*, 00-cv-02225-EWN-OES in which he sued the Justices of the Colorado Supreme Court as well as members of the Board of Law Examiners (*Smith I*). The district court dismissed the complaint, the Tenth Circuit affirmed the dismissal, and the United States Supreme Court denied Plaintiff's "Petition for Writ of Mandamus."

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<sup>1</sup> These facts are summarized from *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005).

Plaintiff's second lawsuit was the identical case but filed in Denver District Court, *Smith v. Mullarkey et al.*, 02-cv-127, and resulted in the Colorado Supreme Court's published decision in *Smith v. Mullarkey, et al.*, 121 P.3d 890 (Colo. 2005) (*Smith II*). The United States Supreme Court denied certiorari. It is the opinion issued by the Colorado Supreme Court in *Smith II* which forms the basis for Plaintiff's claims in the present case.

Plaintiff's third lawsuit was *Smith v. United States Court of Appeals for the Tenth Circuit*, 04-cv-01222-REB-OES (*Smith III*) and involved claims against judges of the Tenth Circuit, the United States District Court, and the Denver District Court, as well as then-Attorney General Ken Salazar. The court dismissed the lawsuit.

Plaintiff's fourth lawsuit was *Smith v. Mullarkey et al.*, 04-cv-01223-REB-OES, in which Plaintiff again sued the members of the Colorado Supreme Court (*Smith IV*). The United States District Court dismissed that case. *Smith III* and *Smith IV* were consolidated on appeal, and the Tenth Circuit affirmed the dismissals. Plaintiff's petition for certiorari is currently pending in the United States Supreme Court.

The only difference in the present lawsuit is that Plaintiff is now also suing the attorneys who represented the members of the Colorado Supreme Court in the previous lawsuits, Attorney General John Suthers and Assistant Attorney General Friederick Haines.

For the reasons explained below, Plaintiff's claims should be dismissed.

### **III. CLAIMS**

In his first claim for relief, Plaintiff asserts claims against the State Defendants pursuant to §1983 for violating his First, Fifth and Fourteenth Amendment rights.

In his second claim for relief, Plaintiff asserts a claim entitled “Denial of access to the courts -- Christopher v. Harbury.”

In the third claim, Plaintiff asserts a §1983 claim for supervisory liability against Defendant Suthers.

In the fourth claim, Plaintiff asserts a cause of action against the United States alleging “primary state liability.”

### **III. ARGUMENT**

#### **A. Standard of Review**

A motion to dismiss under Fed. R. Civ. P. 12(b)(1) challenges a court's subject matter jurisdiction over the action, which may exist despite the sufficiency of the allegations in the complaint. *See KVOS, Inc. v. Associated Press*, 299 U.S. 269 (1936). Under a Rule 12(b)(1) challenge, the court may consider matters outside the pleadings that challenge the averments upon which the court's jurisdiction depends. *Axtell v. United States*, 860 F. Supp. 795, 797 (D.Wyo. 1994). The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266 (6th Cir.1990); *Professional Investors Life Ins. Co. v. Roussel*, 445 F. Supp. 687, 691 (D.Kan.1978).

On a motion to dismiss under Fed.R.Civ.P. 12(b)(6), well-pleaded factual allegations of the Complaint are assumed to be true. *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10<sup>th</sup> Cir. 2007). However, “the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations.” *Hall v. Bellmon*, 935 F.2d

1106, 1110 (10<sup>th</sup> Cir.1991). “Conclusory allegations without supporting factual averments are insufficient to base a claim upon which relief can be based.” *Id.* Until recently, a motion to dismiss under Rule 12(b)(6) was granted only if “it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, in *Bell Atlantic Corp. v. Twombly*, \_\_U.S.\_\_, 127 S.Ct. 1955 (2007), the Supreme Court put the *Conley v. Gibson* standard to rest, stating that it “has earned its retirement” and “is best forgotten.” *Id.* at 1969. The new inquiry to use in considering a motion under Rule 12(b)(6) is whether the complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic*, 127 S.Ct. at 1974. “Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.” *Ridge at Red Hawk, L.L.C.*, 493 F.3d at 1177 (italics in original).

Although Plaintiff is proceeding *pro se*, this Court has no duty to assume the role of his advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10<sup>th</sup> Cir. 1991). Nor is the Court required to construct a legal theory on Plaintiff’s behalf. *Peterson v. Shanks*, 149 F.3d 1140, 1143 (10<sup>th</sup> Cir. 1998). “[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based.” *Hall*, 935 F.2d at 1110.

#### **B. Plaintiff’s Claims Are Barred By the Rooker-Feldman Doctrine**

As the United States Supreme Court has held, the Rooker-Feldman doctrine bars “cases brought by state-court losers complaining of injuries caused by state-court judgments

rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corporation v. Saudi Basic Industries Corporation*, 125 S. Ct. 1517, 1521-1522 (2005). In other words, the doctrine precludes “a party losing in state court ... from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party’s claim that the state judgment itself violates the loser’s federal rights.” *Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994); *Anderson v. Colorado*, 793 F.2d 262, 263 (10th Cir. 1986). Under the doctrine, a federal district court cannot review matters actually decided by a state court, or provide relief that is “inextricably intertwined” with the state court decision. *See Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1108 (10th Cir. 2000). “This rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights.” *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Doe v. Pringle*, 550 F.2d 596, 599 (10th Cir. 1976); *see also Anderson*, 793 F.2d at 263 (where a constitutional issue could have been reviewed on direct appeal by the state appellate courts, a litigant may not seek to reverse or modify the state court judgment by bringing a constitutional claim under 42 U.S.C. §1983).

A claim is “inextricably intertwined” if the federal claims succeed only to the extent that the state court wrongly decided the issues before it, *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995), or if the federal claim requires the federal district court to “go beyond mere review of the state rule as promulgated, to an examination of the rule as applied by the state court.” *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1432-33 (10th Cir.

1984). “In other words, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its ruling.” *Charchenko*, 47 F.3d at 983.

In this case, Plaintiff’s claims against the State Defendants seek review of the Colorado Supreme Court’s decision in a prior lawsuit, *Smith II*. Plaintiff is clearly a state-court loser who is complaining of injuries caused by a state-court judgment, rendered before this proceeding commenced, and who is inviting review and rejection of the state-court judgment. Yet, Plaintiff’s sole avenue for review on such a claim is to petition for certiorari in the United States Supreme Court, which that Court denied. *Feldman*, 460 U.S. at 486; *Facio v. Jones*, 929 F.2d 541, 543-44 (10th Cir. 1991); *Razatos*, 746 F.2d at 1432-33. Thus, Plaintiff’s claim in this action is barred pursuant to the Rooker-Feldman doctrine and should be dismissed with prejudice for lack of subject matter jurisdiction.

**C. Plaintiff’s Claims Against the Justices Must be Dismissed Based on Absolute Judicial Immunity.**

“State judges are entitled to absolute immunity from damages for their judicial acts.” *Stepanek v. Delta County*, 940 P.2d 364, 368 (Colo. 1997). Judges acting in their judicial capacity are absolutely immune unless the judge was acting without any colorable claim of jurisdiction, or was not performing an act that was “judicial” in nature. *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). Whether an act is judicial in nature is determined by “the nature of the act itself; *i.e.*, whether it is a function normally

performed by a judge, and to the expectations of the parties; *i.e.*, whether they dealt with the judge in his judicial capacity.” *Mireles v. Waco*, 502 U.S. 9, 12 (1991).

Judicial immunity applies “however erroneous the act may have been, and however injurious in its consequences it may have been proved to the plaintiff.” *Cleavinger v. Saxner*, 474 U.S. 193, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985). Immunity applies even if the act was in excess of authority or taken with malicious intent. *Stump*, 98 S.Ct. at 1105.

Here, the basis for Plaintiff’s claims against the Justices is the decision issued in *Smith II*. Issuing rulings and opinions is a judicial function. Thus, Plaintiff has conceded in his Complaint that the Justices were performing judicial acts and were therefore clothed with absolute judicial immunity. *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10<sup>th</sup> Cir. 1994). Accordingly, Plaintiff’s claims against the Justices must be dismissed in their entirety.

#### **D. State Defendants Are Entitled to Qualified Immunity**

Under the doctrine of qualified immunity, government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584,592 (10<sup>th</sup> Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In all but the most exceptional cases, qualified immunity protects government officials performing discretionary functions from the burdens of civil trials and from liability for damages. *Harris v. Board of Educ. Of the City of Atlanta*, 105 F.3d 591, 595 (11<sup>th</sup> Cir. 1997) (quoted in *Tonkovich v. Kansas Bd. Of Regents*, 159 F.3d 504, 516 (10<sup>th</sup> Cir. 1998).

The Tenth Circuit uses a two-part framework to analyze the issue of qualified immunity. First, the court determines whether the plaintiff has sufficiently alleged that the defendant violated a statutory or constitutional right. If the answer is yes, the court then determines whether the right was clearly established such that a reasonable person in the defendant's position would have known that his or her conduct violated that right. *Latta v. Keryte*, 118 F.3d 693, 697-98 (10<sup>th</sup> Cir. 1997).

The key to the qualified immunity inquiry is the objective reasonableness of the official's conduct in light of the legal rules that were clearly established at the time the action was taken. *Melton v. City of Oklahoma City*, 879 F.2d 706, 727 (10<sup>th</sup> Cir. 1989), *modified on other grounds*, 928 F.2d 920 (10<sup>th</sup> Cir. 1991). Ordinarily, in order for a plaintiff to demonstrate that a law was clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10<sup>th</sup> Cir. 1992).

A plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant violated it. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10<sup>th</sup> Cir. 1988). A plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity. *Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10<sup>th</sup> Cir. 1995). Where the defense of qualified immunity is asserted, a "heightened pleading" standard applies, requiring "the complaint to 'contain specific, non-conclusory allegations of fact sufficient to allow the district court to

determine that those facts, if proved, demonstrate that the actions taken were not objectively reasonable in light of clearly established law.” *Dill v. City of Edmond*, 155 P.3d 1193, 1204 (10<sup>th</sup> Cir. 1998) (quoting *Breidenbach v. Bolish*, 126 F.3d 1288, 1292 (10<sup>th</sup> Cir. 1997)).

Once a defendant government official raises the defense of qualified immunity, the burden shifts to the plaintiff to demonstrate: (1) the defendant’s conduct violated the law; and (2) the law was clearly established when the alleged violation occurred. *See Workman v. Jordan*, 32 F.3d 475, 479 (10<sup>th</sup> Cir. 1994). “Conclusory, non-specific, and generalized allegations of constitutional deprivations are not sufficient.” *Harris v. Morales*, 69 F.Supp.2d 1319, 1323 (D. Colo. 1999).

Here, Plaintiff cannot demonstrate that any of the State Defendants’ conduct was in violation of the law and even if he could, Plaintiff cannot demonstrate that the law was clearly established when the alleged violations occurred. Furthermore, State Defendants are entitled to qualified immunity for their discretionary actions taken in good faith.

**E. Plaintiff’s Claims Against Haines Must Be Dismissed For Failure to Allege Personal Participation**

Personal participation is an essential element of a claim brought against a state official pursuant to §1983. *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10<sup>th</sup> Cir.1996); *Bennett v. Passic*, 545 F.2d 1260 (10<sup>th</sup> Cir. 1976). Without action by the defendant, he or she cannot be subject to liability under §1983. *Hafer v. Melo*, 502 U.S. 21 (1991).

Plaintiff’s complaint is devoid of allegations against Defendant Haines except that he was the Assistant Attorney General in *Smith II*, Complaint, ¶19, that Haines “knew or

reasonably should have known that his clients had committed clear violations of federal and Colorado law,” *id.* ¶47, and that Haines “knew or had reason to know that, had he taken reasonable steps to alert the United States Supreme Court that a manifest violation of federal law had occurred, the Court would have been likely to have taken appropriate remedial action.” *Id.* ¶48. In other words, Plaintiff contends that Haines is liable under §1983 because he failed to inform the United States Supreme Court of a decision of the Colorado Supreme Court that Plaintiff feels was erroneous. These allegations fall far short of alleging Haines’ personal participation in any alleged constitutional deprivation. Plaintiff’s assertions amount to little more than a statement that Haines represented his clients in *Smith II*. This cannot form the basis for a §1983 claim and, accordingly, the claims against Haines should be dismissed.

**F. Plaintiff’s Third Claim, Against Suthers, Must Be Dismissed for Failure to State a Claim**

Under §1983, government officials are not vicariously liable for the misconduct of their subordinates. “[T]here is no concept of strict supervisor liability under § 1983.” *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir.1996); *see also Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir.1999) (“Liability ... must be based upon more than a mere right to control employees.”). “This does not mean that a supervisor may not be liable for the injuries caused by the conduct of one of his subordinates. It does mean that his liability is not vicarious, that is, without fault on his part.” *Scull v. New Mexico*, 236 F.3d 588, 600 (10th Cir.2000) (citation omitted).

Supervisors are only liable under §1983 for their own culpable involvement in the violation of a person's constitutional rights. To establish supervisor liability under § 1983, “it is not enough for a plaintiff merely to show a defendant was in charge of other state actors who actually committed the violation. Instead, ... the plaintiff must establish ‘a deliberate, intentional act by the supervisor to violate constitutional rights.’ ” *Jenkins*, 81 F.3d at 994-95 (quoting *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir.1992)). In short, the supervisor must be personally “involved in the constitutional violation,” and a “sufficient causal connection” must exist between the supervisor and the constitutional violation. *Rios v. City of Del Rio*, 444 F.3d 417, 425 (5th Cir.2006).

In order to establish a §1983 claim against a supervisor for the unconstitutional acts of his subordinates, a plaintiff must first show the supervisor's subordinates violated the constitution. Then, a plaintiff must show an “affirmative link” between the supervisor and the violation, namely the active participation or acquiescence of the supervisor in the constitutional violation by the subordinates. *Holland v. Harrington*, 268 F.3d 1179, 1187 (10th Cir.2001); *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir.1997). Because “mere negligence” is not enough to hold a supervisor liable under § 1983, a plaintiff must establish that the supervisor acted knowingly or with “deliberate indifference” that a constitutional violation would occur. *Green*, 108 F.3d at 1302.

As a threshold matter, Plaintiff cannot establish that Suthers’ subordinate, Haines, engaged in any misconduct. Moreover, the sum total of Plaintiff’s allegations regarding Suthers is that Suthers was Defendant Haines’ supervisor, Complaint, ¶18, and that he was

apprised, by Plaintiff, that Haines refused to remedy the Colorado Supreme Court's actions in *Smith II. Id.*, ¶¶49-50. These allegations do not demonstrate that Suthers was personally involved with the alleged misconduct, or that he participated in it. There is no affirmative link between Suthers' conduct and any constitutional violation. Accordingly, this claim should be dismissed.

**G. Plaintiff's Claims Against the State Defendants are Barred by the Statute of Limitations**

State law regarding general personal injury claims provides the applicable statute of limitations for §1983 claims. *E.g. Wilson v. Garcia*, 731 F.2d 640 (10th Cir. 1984). Under Colorado law, the applicable statute of limitations for §1983 claims is two years. Colo. Rev. Stat. §13-80-102(g); *Blake v. Dickason*, 997 F.2d 749 (10th Cir. 1993).

Here, Plaintiff complains that on August 18, 2005, the Justices accepted jurisdiction over the case from the Colorado Court of Appeals, complaint, ¶29, and contends that the Justices "knew or reasonably should have known that they did not have colorable legal authority to usurp the statutory jurisdiction of the Colorado Court of Appeals over the appeal of the District Court's dismissal of Smith's complaint." Complaint, ¶40. Thus, according to Plaintiff's own allegations, the statute of limitations for his §1983 claims ran on August 18, 2007, two years after the Colorado Supreme Court accepted jurisdiction. Plaintiff, however, did not file the present lawsuit until September 12, 2005. (Dkt. # 1).

While the Colorado Supreme Court did not issue its opinion until October 17, 2005, the extant lawsuit clearly attacks the Court's acceptance of jurisdiction as a wrongful act.

Complaint, ¶40. Thus, Plaintiff's first, second and third claims for relief should be dismissed.

### III. CONCLUSION

For the foregoing reasons and on the foregoing authorities, State Defendants request that this Court dismiss Plaintiff's Complaint with prejudice and that it grant such additional relief as it deems appropriate under the circumstances, including an award of costs and reasonable attorneys' fees.

Respectfully submitted this 17<sup>th</sup> day of December 2007,

JOHN W. SUTHERS  
Attorney General

*s/Christine K. Wilkinson*

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 17, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that I have mailed or served the document of paper to the following non CM/ECF participants in the manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

Kenneth L. Smith  
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*s/ Christine K. Wilkinson*