Muhammad v. Breen et al

2024 | Cited 0 times | N.D. New York | June 11, 2024

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK _____ JAMIL ABDUL MUHAMMAD, P l a i n t i f f , v. 3:24-CV-0037 (DNH/ML) MICHAEL L. BREEN, Town Justice; SCHOHARIE TOWN COURT; R. GILMAN, New York State Police Trooper; NEW YORK STATE POLICE DEP'T; and MRS. KENNEDY, Court Clerk, Defendants. _____ A P P E A R A N C E S : O F C O U N S E L : JAMIL ABDUL MUHAMMAD Plaintiff, Pro Se 119 Clinton Street, Apartment 5 Binghamton, New York 13905 MIROSLAV LOVRIC, United States Magistrate Judge

ORDER and REPORT-RECOMMENDATION The Clerk has sent this pro se Complaint (Dkt. No. 1) together with an amended application to proceed in forma pauperis ("IFP") (Dkt. No. 7) fi led by Jamil Abdul Muhammad ("Plaintiff") to the Court for re view. For the reasons discussed below, I (1) grant Plaintiff's amended IFP application (Dkt. No. 7), and (2) recommend that Plaintiff's Complaint (Dkt. No. 1) be dismissed (1) in part with leave to amend, and (2) in part without leave to amend.

2 I. BACKGROUND

Liberally construed, 1

Plaintiff's Complaint asserts that his rights were violated by Defendants Michael L. Breen, Schoharie Town Court, R. Gilman, New York State Police Department ("Defendant NYSP"), and Mrs. Kennedy (collectively "Defendants"), who were involved in a traffic infraction charge that was issued to Plaintiff. (See generally Dkt. No. 1.)

The Complaint alleges that on February 17, 2021, Plaintiff was driving on the highway when he was pulled over by Defendant Gilman, who accused Plaintiff of speeding. (Dkt. No. 1 at 6.) Plaintiff alleges that Defendant Gilman made a comment during the traffic stop that "when you hunt[,] you hunt the biggest catch." (Id.)

The Complaint alleges that Plaintiff appeared before Defendant Breen and informed him that he wanted a trial on the traffic ticket. (Dkt. No. 1 at 6.) The Complaint alleges that on December 27, 2023, Plaintiff attended the traffic ticket trial and Defendant Gilman acted as both a witness and the prosecutor. (Id.)

The Complaint alleges that during the trial, Plaintiff questioned Defendant Gilman about his

hunting comment during the traffic stop and Defendant Gilman refused to answer the question. (Dkt. No. 1 at 7.) The Complaint alleges that Defendant Gilman denied being racist and failed to produce body camera footage to Plaintiff. (Id.) The Complaint alleges that Plaintiff moved to dismiss the case for failure to produce Rosario material and Defendant Breen denied Plaintiff's motion. (Id.) Plaintiff alleges that Defendant Gilman admitted, while on the witness stand, that other vehicles were "traveling in the front[,] along side, [and] in the back of [Plaintiff's] vehicle." (Id.) The Complaint alleges that Plaintiff argued the defense of

1 The court must interpret pro se complaints to raise the strongest arguments they suggest. Soto v. Walker, 44 F.3d 169, 173 (2d Cir. 1995) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)).

3 justification but that Defendant Breen denied Plaintiff's second motion seeking dismissal of the charges. (Id.)

The Complaint alleges that Plaintiff informed Defendant Breen that African Americans are pulled over more often than white drivers and again accused Defendant Gilman of using "racist tactics" against Plai ntiff. (Dkt. No. 1 at 7.)

The Complaint alleges that at the conclusion of the trial, Defendant Gilman stated he remembered what he said to Plaintiff during the traffic stop and again repeated that "as a skilled deer hunter[,] I hunt the biggest catch." (Dkt. No. 1 at 8.)

The Complaint alleges that Defendant Breen found Plaintiff guilty of the offense—which resulted in four points attaching to Plaintiff's driver's lic ense—and imposed a fine of $193.00. (Dkt. No.1 at 8.) The Complaint alleges that Plaintiff requested a receipt of the penalty and was provided a document by Defendants Breen and Kennedy that stated "The court has accepted your guilty plea for the charges listed above." (Id.) The Complaint alleges that Defendant Breen "fraudulently ordered [Defendant Kennedy] to forg e an illegal disposition of a court filing . . . [as] having plead[ed] guilty." (Id.)

Based on these factual allegations, the Complaint appears to assert the following four causes of action: (1) a claim that Defendants violated Plaintiff's right to eq ual protection of the law in violation of the Fourteenth Amendment and 42 U.S.C. § 1983; (2) a claim that Defendants violated Plaintiff's right to due process pursuant to the Fourth Amendment and 42 U.S.C. § 1983; (3) a claim that Plaintiff was discriminated against in violation of the Americans with Disabilities Act ("ADA"); and (4) a claim that Defendants violated N.Y. Penal Law § 195.00. (See generally Dkt. No. 1.) In addition, the Complaint mentions the Fifth, Seventh, Eighth, and Ninth Amendments, Plaintiff's "right to travel," Pl aintiff's right to life, liberty, and the pursuit of

4 happiness, and Title VI of the Civil Rights Act of 1964 as having been violated by Defendants. (Id.)

As relief, Plaintiff seeks $100,000,000.00 in damages, a direction that "Internal Affairs" conduct a "full investigation" of Defendants, disb arment of Defendant Breen, and that the fine and surcharge of $193.00 and four points on Plaintiff's driver's license be waived. (Dkt. No. 1 at 8-9.)

On January 19, 2024, Plaintiff filed a "Supplement" to the Complaint, which appears to be the first page of the form complaint for a civil case and contains no additional information or allegations. 2

(Dkt. No. 4.) On February 6, 2024, Plaintiff filed another "Supplement" to the Complaint, which appears to be a page from one of the District's form complaints.

3 (Dkt. No. 5.) This Supplement identifies, among other things, 18 U.S.C. § 241 and the "No-FEAR Act" as bases for relief.

4 (Id.)

On March 15, 2024, Plaintiff filed another "Supplement" to the Complaint.

5 (Dkt. No. 8.) This "Supplement" is difficult to decipher and largely contains jargon. (Id.)

Plaintiff also filed an amended application to proceed IFP. (Dkt. No. 7.)

2 Pursuant to Fed. R. Civ. P 15(d) "[o]n mo tion and reasonable notice, the court may . . . permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Plaintiff failed to file a motion to supplement. In addition, the "Supplement" fi led by Plaintiff does not relate to events that occurred after the Complaint was filed on January 9, 2024. 3 See, supra, note 2. 4 Notification and Federal Employee Antidiscrimination and Retaliation Act "(No Fear Act"), 5 U.S.C. § 2301 et seq. 5 See, supra, note 2.

5 II. PLAINTIFF'S AMENDED A PPLICATION TO PROCEED IN FORMA

PAUPERIS When a civil action is commenced in a federal district court, the statutory filing fee, currently set at $405, must ordinarily be paid. 28 U.S.C. § 1914(a). A court is authorized, however, to permit a litigant to proceed IFP status if a party "is unable to pay" the standard fee for commencing an action. 28 U.S.C. § 1915(a)(1). 6

After reviewing Plaintiff's amended IFP application (Dkt. No. 7), the Court finds that Plaintiff meets this standard. Therefore, Plaintiff's amended application to proceed IFP is granted. 7

(Id.) III. LEGAL STANDARD FOR INITIAL REVIEW OF COMPLAINT

"Notwithstanding any filing fee, or any porti on thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action . . . (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).

In determining whether an action is frivolous, the court must consider whether the complaint lacks an arguable basis in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989). Dismissal of frivolous actions is appropriate to prevent abuses of court process as well as to discourage the waste of judicial resources. Neitzke, 490 U.S. at 327; Harkins v. Eldridge, 505 F.2d 802, 804 (8th Cir. 1974); see Fitzgerald v. First East Seventh Street Tenants Corp., 221

6 The language of that section is ambiguous because it suggests an intent to limit availability of IFP status to prison inmates. See 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses"). The courts have construed that section, however, as making IFP status available to any litigant who can meet the governing financial criteria. Hayes v. United States, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); Fridman v. City of N.Y., 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002). 7 Plaintiff is reminded that, although his IFP application has been granted, he is still required to pay fees that he may incur in this action, including copying and/or witness fees.

6 F.3d 362, 364 (2d Cir. 2000) (a district court "may dismiss a frivolous complaint sua sponte even when the plaintiff has paid the required filing fee[.]"); see also Pflaum v. Town of Stuyvesant, Columbia Cnty., N.Y., 11-CV-0335, 2016 WL 865296, at *1, n.2 (N.D.N.Y. Mar. 2, 2016) (Suddaby, C.J.) (finding that the Court had the power to address and dismiss additional theories of the plaintiff's retaliation claim sua sponte because those theories were so lacking in arguable merit as to be frivolous). In order to state a claim upon which relief can be granted, a complaint must contain, inter alia, "a short and plain statement of the claim showi ng that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The requirement that a plaintiff "show" that he or she is entitled to relief means that a complaint "must contain sufficient f actual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (emphasis added) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 [2007]). "Determining whether a complaint states a plausible claim for relief . . . requires the . . . court to draw on its judicial experience and common sense. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not shown–that the pleader is entitled to relief." Iqbal, 556 U.S. at 679 (internal citation and punctuation omitted). "In reviewing a complaint . . . the court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in the plaintiff's favor." Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994) (citation omitted). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.

7 Courts are "obligated to construe a pro se complaint liberally." Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009); see also Nance v. Kelly, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (reading the plaintiff's pro se complaint "broadly, as we must" and holding that the complaint sufficiently raised a cognizable claim). "[E]xt reme caution should be exercised in ordering sua sponte dismissal of a pro se complaint before the adverse party has been served and [the] parties . . . have had an opportunity to respond." Anderson v. Coughlin, 700 F.2d 37, 41 (2d Cir. 1983). IV. ANALYSIS

In addressing the sufficiency of a plaintiff's complaint, the court must construe his pleadings liberally. Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008). Having reviewed Plaintiff's Complaint with this principle in mind, I recommend that the Complaint be dismissed in its entirety.

A. Claims Seeking Criminal Charges Plaintiff's claims pursuant to 18 U.S.C. § 241 and N.Y. Penal Law § 195.00 cannot proceed.

There is no private right of action to enforce state or federal criminal statutes. See generally Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); see also Walker v. CIBC Ltd., 20-CV-1337, 2021 WL 3518439, at *5 (N.D.N.Y. Apr. 13, 2021) (Hummel, M.J.) ("It appears plaintiff is either seeking the criminal prosecution of an individual or individuals or a law enforcement investigation, which is beyond this Court's jurisdiction."), report- recommendation adopted by 2021 WL 3204860 (N.D.N.Y. July 29, 2021) (McAvoy, J.); McFadden v. Ortiz, 12-CV-1244, 2013 WL 1789593, at *3 (N.D.N.Y. Apr. 26, 2013)

8 (D'Agostino, J.) (holding that "there is no private right of action to enforce either state or federal criminal statutes.").

As a result, I recommend dismissal of Plaintiff's claims that are premised on alleged violations of federal or state criminal laws. See Polinski v. Oneida Cnty. Sheriff, 23-CV-0316, 2023 WL 2988753, *4 (N.D.N.Y. Apr. 18, 2023) (Lovric, M.J.) (citing inter alia, Hall v. Sampson, 21-CV-4839, 2022 WL 2068248, at *2 n.2 (E.D. Pa. June 8, 2022) (holding that the plaintiff cannot bring criminal charges against the defendants through a private lawsuit and that claims pursuant to 18 U.S.C. § 241 do not give rise to a civil cause of action); Walthour v. Herron, 10-01495, 2010 WL 1877704, at *2 (E.D. Pa. May 6, 2010) (recognizing no private right of action under 18 U.S.C. § 241)) (recommending dismissal of the plaintiff's claims pursuant to the New York State Penal Law and 18 U.S.C. § 241), report and recommendation adopted by, 2023 WL 3344060 (N.D.N.Y. May 10, 2023) (Hurd, J.), appeal dismissed by 2023 WL 8357375 (2d Cir. Oct. 12, 2023).

B. Claims Pursuant to the ADA The ADA "forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations,

which are covered by Title III." Tennessee v. Lane, 541 U.S. 509, 516-17 (2004). In addition, "Title V of the ADA, sometimes referred to as the 'retaliation provi sion,'" prohibits retalia tion against individuals "engaged in activity protected by the ADA." Griffiths v. Saint Josephs Hosp., 22-CV-0199, 2022 WL 1271533, at *3 n.5 (N.D.N.Y. Apr. 5, 2022) (Dancks, M.J.) (citing Chiesa v. New York State Dep't of Labor , 638 F. Supp. 2d 316, 323 (N.D.N.Y. 2009) (Hurd, J.)), report and recommendation adopted, 2022 WL 1265761 (N.D.N.Y. Apr. 28, 2022) (Hurd, J.).

9 "[T]here is no individual liability under the ADA." Gomez v. N.Y.C. Police Dep't, 191 F. Supp. 3d 293, 302–03 (S.D.N.Y. 2016). As a result, I recommend that Plaintiff's ADA claim against Defendants Breen, Gilman, and Kennedy, be dismissed with prejudice.

With respect to Plaintiff's ADA claim ag ainst Defendants Schoharie Town Court and NYSP, I recommend that it be dismissed for failure to state a claim upon which relief may be granted. 8

To establish a prima facie violation under Title II of the ADA . . . , a plaintiff must show: "that 1) he is a qualified individual with a disability; 2) [defendants are] entit[ies] subject to the acts; and 3) he was denied the opportunity to participate in or benefit from [defendants'] services, programs, or activities or [defendants] otherwise discriminated against him by reason of his disability." Rivera v. Quiros, 23-CV-0227, 2024 WL 363193, at *6 (D. Conn. Jan. 31, 2024) (quoting Wright v. New York State Dep't of Corr. , 831 F.3d 64, 72 (2d Cir. 2016)). There are "three available theories" of discrimin ation that can be used to establish the third prong of an ADA claim: "(1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." Fulton v. Goord, 591 F.3d 37, 43 (2d Cir. 2009).

8 Based on the facts alleged, Plaintiff could not proceed with a claim under Title I of the ADA, which addresses employment discrimination, because he has not alleged that he was employed by Defendants. 42 U.S.C. § 12117; see Mary Jo C. v. New York State and Local Retirement Sys., 707 F.3d 144, 169 (2d Cir. 2013) ("Title I of the ADA expressly deals with th[e] subject of employment discrimination . . . .") (c itation and internal quotation marks omitted). Title III of the ADA is "not appl icable to public entities" and t hus, is inapplicable here where Defendants NYSP and Schoharie Town Court are public entities. Morales v. New York, 22 F. Supp. 3d 256, 266-67 (S.D.N.Y. 2014) (citing cases). Moreover, Title IV of the ADA does not appear to be applicable to Plaintiff's claims because Title IV prohibits disability discrimination in telecommunications. See Genco v. Sargent & Collins LLP, No. 18-CV-0107, 2018 WL 3827742, at *3, n.5 (W.D.N.Y. June 4, 2018). Lastly, Title V of the ADA, sometimes referred to as the "retaliation provision," also does not app ear applicable because Plaintiff does not allege that he engaged in activity protected by the ADA, that Defendants were aware of that activity, or any causal connection between the allegedly adverse actions that Defendants took against him and the protected activity. See Chiesa v. New York State Dep't of Labor, 638 F. Supp. 2d 316, 323 (N.D.N.Y. 2009) (Hurd, J.).

10 Assuming, without deciding, that Plaintiff adequately alleged that he is a qualified individual with

a disability and Defendants Schoharie Town Court and NYSP are entities subject to the acts, Plaintiff has failed to sufficiently plead that Defendants "denied [him] the opportunity to participate in or benefit from public services, programs, or activities, or has otherwise discriminated against him, by reason of his disability rather than a legitimate nondiscriminatory reason." Tsuma v. Costello, 22-CV-0067, 2022 WL 1036819, at *8 (D. Conn. Apr. 6, 2022). More specifically, Plaintiff has not alleged facts plausibly suggesting that Defendants Schoharie Town Court and NYSP discriminated against him on the basis of his disability. See Franks v. Eckert, 18-CV-0589, 2020 WL 4194137, at *4 (W.D.N.Y. July 21, 2020) ("Although [the p]laintiff has alleged he was denied some of his requested reasonable accommodations, there are no facts in the Amended Complaint to suggest that [the d]efendants refused to allow [the p]laintiff to participate in any program or activity because of his disability"); see also Rosado v. Herard, 12-CV-8943, 2014 WL 1303513, at *6 (S.D.N.Y. Mar. 25, 2014) (dismissing ADA claims where the plaintiff failed to "plead[ ] facts demonstrati ng that he was denied access to therapeutic group sessions because of a disability") . Instead, the Complaint asserts that Plaintiff informed Defendant Breen he is a recipient of "Medical S.S.I. Disability" and Defendant Breen granted Plaintiff over one month to pay the imposed fine. (Dkt. No. 1 at 8.) The Complaint fails to allege that he was mistreated because of his physical disabilities. See Moran v. Deamelia, 17-CV-0422, 2017 WL 2805160, at *3 (N.D.N.Y. Apr. 20, 2017) (Hummel, M.J.) ("Although [the] defendants may have been aware of [the] plaintiff's alleged disabilities because his underlying discrimination complaint against his former employer filed with the NYSDHR appears to have been based, in part, on his disabilities, he offers not even a scintilla of proof that the alleged misconduct was 'motivated' by his majo r depressive disorder and ADHD."), report and

11 recommendation adopted, 17-CV-0422, 2017 WL 2804941 (N.D.N.Y. June 28, 2017) (McAvoy, J.). Indeed, there are no facts to suggest that Defendants were even aware of what Plaintiff's disability was. See, e.g., Costabile v. New York Dist. Council of Carpenters, 17-CV-8488, 2018 WL 4300527, at *5 (S.D.N.Y. Sept. 10, 2018) (dismissing the plaintiff's discrimination claim under the ADA because he failed to allege that the defendants were aware of his disability, and, thus, "fail[ed] to plead even a barebones claim of disability discrimination"). Moreover, Plaintiff does not identify what public services, programs, or activities he was denied the opportunity to participate in or benefit from. See Cordero v. Semple, 696 F. App'x 44, 45 (2d Cir. 2017) (summary order) (affirming the dismissal of an ADA claim because the plaintiff "d id not allege that his conditions prevented him from participating in any programs or activities"). It is, therefore, recommended that Plaintiff's ADA claim against Defendants Schoharie Town Court and NYSP be dismissed for failure to state a claim upon which relief may be granted.

C. Claims Pursuant to 42 U.S.C. § 1983 For the reasons set forth below, I recommend that Plaintiff's claims pursuant to 42 U.S.C. § 1983 be dismissed.

1. Claims Against Defendant Breen Judges are absolutely immune from suit for claims seeking damages for any actions taken within the scope of their judicial responsibilities. See Mireles v. Waco, 502 U.S. 9, 11-12 (1991). Generally, "acts arising out of, or related to, individual cases before [a] judge

are considered judicial in nature." Bliven v. Hunt, 579 F.3d 204, 210 (2d Cir. 2009). "[E]ven allegations of bad faith or malice cannot overcome judicial immunity." Bliven, 579 F.3d at 209. Judicial immunity does not apply when a judge takes action outside his or her judicial capacity, or when a judge takes action that, although judicial in nature, is taken "in the complete absence of all

12 jurisdiction." Mireles 502 U.S. at 11-12; see also Bliven, 579 F.3d at 209-10 (describing actions that are judicial in nature). However, "the scope of [a] judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." Stump v. Sparkman, 435 U.S. 349, 356 (1978).

Plaintiff asserts claims that appear to arise from the efforts of Defendant Breen in his capacity as a judge in Schoharie Town Court. (Dkt. No. 1 at 2.) Defendant Breen is therefore immune from suit under the doctrine of judicial immunity. As a result, I recommend that Plaintiff's claims against Defendant Breen in his individual capacity be dismissed based on the doctrine of judicial immunity.

Moreover, I recommend that Plaintiff's claims against Defendant Breen in his official capacity be dismissed pursuant to the Eleventh Amendment. See Sundwall v. Leuba, 28 F. App'x 11, 12 (2d Cir. 2001) (citing K & A Radiologic Tech. Servs., Inc. v. Comm'r of the Dep't of Health, 189 F.3d 273, 278 (2d Cir. 1999)) (holding that "s tate officers, if sued in their official capacities, are immunized from suit by private citizens under the Eleventh Amendment."); King v. New York State, 23-CV-3421, 2023 WL 5625440, at *4 (E.D.N.Y. Aug. 31, 2023) (citing Thomas v. Martin-Gibbons, 857 F. App'x 36, 37 (2d Cir. 2021) (affirming dismissal of pro se Section 1983 claims against the State of New York and a state court judge in his official capacity based on Eleventh Amendment immunity)) ("Elev enth Amendment immunity extends to state officials acting in their official capacities, including state court judges."); Aron v. Becker, 48 F. Supp. 3d 347, 366-67 (N.D.N.Y. 2014) (McAvoy, J.) (dismissing the plaintiff's claims against a state court judge in his official capacity based on the doctrine of Eleventh Amendment immunity).

13 2. Claims Against Defendant Schoharie Town Court New York State is immune from suits pursuant to 42 U.S.C. § 1983 seeking either legal or equitable relief, under the Eleventh Amendment. Papasan v. Allain, 478 U.S. 265, 276 (1986); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98-100 (1984); see Ognibene v. Niagara Cnty. Sheriff's Dep't, 03-CV-0678, 2003 WL 24243989, at *3 (W.D.N.Y. Dec. 1, 2003) ("To the extent th e plaintiff names various state courts as defendants and seeks either legal or equitable relief against them under § 1983, they are immune from such suit under the Eleventh Amendment."). As an agency or arm of the State of New York, Defendant Schoharie Town Court is immune from suit under the Eleventh Amendment. See Kentucky v. Graham, 473 U.S. 159, 166 (1985); Bonilla v. Connerton, 15-CV-1276, 2016 WL 2765287, at *4 (N.D.N.Y. Apr. 14, 2016) (Peebles, M.J.) (recommending dismissal of the claims to the extent that they seek monetary damages against the "Binghamton City Court" as barred by the Eleventh Amendment), report and recommendation adopted by, 2016 WL 2760373 (N.D.N.Y. May 12, 2016) (Kahn, J.); see also Mercado v. Town of Goshen, 20-CV-5399, 2020 WL 5210949, at *3 (S.D.N.Y. Aug. 28, 2020) ("Plaintiff sues the 'Orange County Court,' which is part of the New York State Unified Court System. The

Court therefore dismisses Plaintiff's § 1983 claims against this Defendant under the doctrine of Eleventh Amendment immunity and because these claims are frivolous."); Curto v. Palisades Collection, LLC, 07-CV-529S, 2008 WL 11357852, at *4 (W.D.N.Y. Mar. 10, 2008) (dismissing the plaintiff's claims against the "New York State Unified Court System, 8th Judici al District Buffalo City Court" as barred by the Eleventh Amendment); Saint-Fleur v. City of New York, 99-CV-10433, 2000 WL 280328, *2 (S.D.N.Y., Mar. 14, 2000) (collecting cases) ("State courts, as arms of the State, are entitled to Eleventh Amendment immunity from suit in federal court."); Fields v. Walthers, 94-CV-1659,

14 1997 WL 204308 at *2 (N.D.N.Y. April 5, 1997) (Pooler, J.) ("For Eleventh Amendment purposes, governmental entities of the state that are considered 'arms of the state' receive Eleventh Amendment immunity.").

3. Claims Against Defendant Gilman To the extent that the Complaint is construed against Defendant Gilman in his official capacity, I recommend that it be dismissed based on the doctrine of immunity set forth in the Eleventh Amendment. A claim against Defendant Gilman in his official capacity is essential a claim against Defendant NYSP. See Kentucky v. Graham, 473 U.S. 159, 166 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."); Reynolds v. Giuliani, 506 F.3d 183, 191 (2d Cir. 2007)("An official capacity suit against a public servant is treated as one against the governmental entity itself."). For the reasons set forth below in Part IV.D.4., I find that Defendant Gilman, in his official capacity, is immune from a suit for damages pursuant to 42 U.S.C. § 1983, and thus, recommend dismissal.

To the extent that the Complaint is construed against Defendant Gilman in his individual capacity, I recommend that it be dismissed.

a. Equal Protection Plaintiff alleges that Defendant Gilman violated his Fourteenth Amendment right to equal protection. A successful equal protection claim requires a plaintiff to "allege facts showing that the plaintiff was treated differently from similarly situated individuals and that the reason for the different treatment was based on 'i mpermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" Morgan v. Semple, 16-CV-0225, 2020 WL 2198117, at *19 (D. Conn. 2020) (quoting

15 Diesel v. Town of Lewisboro, 232 F.3d 92, 103 (2d Cir. 2000)); accord Mitchell v. Martin, 23-CV-0902, 2023 WL 8114344, at *7 (D. Conn. Nov. 22, 2023).

There are two avenues for pursing an equal protection claim: (1) a selective enforcement claim, and (2) a class of one claim.

In order to sustain a selective treatment claim a plaintiff must show that: (1) compared with others

similarly situated, they were selectively treated; and (2) "such treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Crowley v. Courville, 76 F.3d 47, 52–53 (2d Cir. 1996).

Absent a suspect classification, a plaintiff may proceed under a "class of one" theory by "alleg[ing] that [he] has been in tentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Fortress Bible Church v. Feiner, 694 F.3d 208, 222 (2d Cir. 2012) (quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)).

The Complaint fails to allege facts plausibly suggesting that Plaintiff was treated differently based on his race (or any other suspect classification). (See generally Dkt. No. 1.) Instead, the Complaint implies 9

that there is a history of racism against Black people dating back to slavery and because Plaintiff was pulled over and issued a speeding ticket, it must have been because he is Black. (Dkt. No. 1 at 6.) These allegations are insufficient to plausibly suggest an equal protection claim. Although Plaintiff alleges that there were other vehicles traveling around him when he was pulled over, the Complaint fails to allege that those vehicles were traveling at

9 The Complaint does not clearly make this connection but construing all reasonable inferences in Plaintiff's fa vor, it could be inferred.

16 the same rate of speed as he was and—perhap s more significantly—it fa ils to allege facts plausibly suggesting the race of the individuals operating those vehicles. (See generally Dkt. No. 1.) Moreover, Plaintiff fails to present any comparators who are " prima facie identical" to him and who were treated differently. Conquistador v. Corcella, 22-CV-0992, 2023 WL 3006806, at *2 (D. Conn. Apr. 19, 2023) (quoting Hu v. City of New York, 927 F.3d 81, 92 (2d Cir. 2019)

As a result, I recommend that Plaintiff's equa l protection claim be dismissed for failure to state a claim upon which relief may be granted.

b. Due Process The Due Process Clause protects procedural and substantive rights. 10

Page v. Cuomo, 478 F. Supp. 3d 355, 370 (N.D.N.Y. 2020) (Hurd, J.). Procedural due process requires that "a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

"To assert a violation of pro cedural due process rights, a plaintiff must first identify a property right, second show that the state has deprived him of that right, and third show that the deprivation was effected without due process." Ferreira v. Town of E. Hampton, 56 F. Supp. 3d 211, 225 (E.D.N.Y.

2014) (citation omitted). "Notice and an opportunity to be heard are the hallmarks of due process." Ferreira, 56 F. Supp. 3d at 225.

10 To the extent Plaintiff's Complaint might be understood to raise a substantive due process claim, I recommend that it also be dismissed. Substantive due process protects against government action that is "arbitr ary, conscience shocking, or oppressive in a constitutional sense," but not against offici al conduct that is merely "incorrect or ill-advised." Page v. Cuomo, 478 F. Supp. 3d 355, 371 (N.D.N.Y. 2020) (Hurd, J.) (citation omitted). In other words, "substantive due process rights are violated on ly by conduct 'so outrageously arbitrary as to constitute a gross abuse of governmental authority.'" Puckett v. City of Glen Cove, 631 F. Supp. 2d 226, 237 (E.D.N.Y. 2009) (quoting Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999)). There is no such outrageous conduct alleged here.

17 The crux of Plaintiff's due process claim against Defendant Gilman appears to be Plaintiff's belief that Defendant Gilman—as a po lice officer—was unqualified to also serve as the prosecutor during the traffic infraction trial. However, in New York State "the prosecution of petty crimes or offenses may be delegated to subordinates or other public or administrative officers and even to private attorneys." People v. Soddano, 86 N.Y.2d 727, 728 (N.Y. 1995) (citing People v. DeLeyden, 10 N.Y.2d 293, 294 (N.Y. 1961) (prosecution by deputy sheriff who made the speeding charge); People v. Czajka, 11 N.Y.2d 253, 254 (N.Y. 1962) (prosecution of traffic offense by deputy town attorney)).

Plaintiff was permitted to raise his concerns regarding the delegation of prosecutorial authority to Defendant Gilman during his traffic infraction prosecution. Matter of Jeffryes v. Vance, 58 Misc. 3d 185, 189 (N.Y. Sup. Ct. New York Cnty. 2017) (citing Cayuga Indian Nation of N.Y. v. Gould, 14 N.Y.3d 614, 633-34 (N.Y. 2010); Matter of Morgenthau v. Erlbaum, 59 N.Y.2d 143, 147 (N.Y. 1983); Matter of Steingut v. Gold, 42 N.Y.2d 311, 315 (N.Y. 1977); Hurrell-Harring v. State of New York, 15 N.Y.3d 8, 16 (N.Y. 2010)). Moreover, since Plaintiff was convicted of the traffic infraction, he was permitted to appeal that adverse determination. Matter of Jeffryes, 58 Misc. 3d at 189 (citing Cayuga Indian Nation of N.Y., 14 N.Y.3d at 634; Matter of Dondi v. Jones, 40 N.Y.2d 8, 13-14 (N.Y. 1976)). Further, if, after conviction, the New York Appellate Term reversed the conviction, Plaintiff could bring an Article 78 proceeding to determine Defendant Gilman's liability and seek damages. Id. at 189-90 (citing N.Y. C.P.L.R. 7806; Morgenthau, 59 N.Y.2d at 147-48; Dondi, 40 N.Y.2d at 14; Matter of Gross v. Perales, 72 N.Y.2d 231, 236 (N.Y. 1988); Hughes Vill. Rest., Inc. v. Vill. Of Castleton-on-Hudson, 46 A.D.3d 1044, 1047 (N.Y. App. Div. 3d Dep't 2007); Metropolitan Taxicab Bd. of

18 Trade v. New York City Taxi & Limousine Comm'n , 115 A.D.3d 521, 522 (N.Y. App. Div. 1st Dep't 2014)).

"It is well established that the availabili ty of Article 78 proceedings . . . provide meaningful post-deprivation remedies sufficient to defeat a due process claim." Mathurin v. Broome Cnty., 20-CV-0515, 2020 WL 4194415, at *5 (N.D.N.Y. June 25, 2020) (Lovric, M.J.), report and

recommendation adopted by, 2020 WL 4192522 (N.D.N.Y. July 21, 2020) (Sharpe, J.).

As a result, I recommend that Plaintiff's due process claim against Defendant Gilman based on his role during Plaintiff's traffic infraction trial be dismissed for failure to state a claim upon which relief may be granted.

4. Claims Against Defendant NYSP The Eleventh Amendment to the United States Constitution bars federal courts from exercising subject matter jurisdiction over claims against a state or one of its agencies absent their consent to such a suit or an express statutory waiver of immunity. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 90-100 (1984). Congress did not abrogate the Eleventh Amendment immunity granted to the states when it enacted 42 U.S.C. § 1983 because it is well- settled that states are not "persons" under section 1983. See Quern v. Jordan, 440 U.S. 332, 240-41 (1979); see also Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (citation omitted).

The Eleventh Amendment's immunity extends to the New York State Police as an agency of the State of New York. See, e.g., Riley v. Cuomo, 17-CV-1631, 2018 WL 1832929, *4 (E.D.N.Y. Apr. 16, 2018) (holding that the New York State Police, as a division in the executive department of the State, is immune from claims under § 1983); Finkelman v. New York State Police, 06-CV-8705, 2007 WL 4145456, *3 (S.D.N.Y. Nov. 15, 2007) (holding that the Eleventh

19 Amendment barred the plaintiff's suit seeking monetary damages under § 1983 against New York State Police).

As a result, I recommend that Plaintiff's cl aims pursuant to 42 U.S.C. § 1983 against Defendant NYSP seeking monetary damages be dismissed.

5. Claims Against Defendant Kennedy Absolute immunity extends to nonjudicial officers who perform acts that "are integrally related to an ongoing judicial proceeding." Mitchell v. Fishbein, 377 F.3d 157, 172-73 (2d Cir. 2004). Plaintiff's Complaint identifies Defendant Kennedy as "Court Clerk" of Defendant Schoharie Town Court. (Dkt. No. 1 at 2, 8.) Quasi-judicial immunity protects court clerks from suit "for performance of tasks whic h are judicial in nature and an integral part of the judicial process." Garcia v. Hebert, 08-CV-0095, 2013 WL 1294412, at *12 (D. Conn. Mar. 28, 2013) (quoting Rodriguez v. Weprin, 116 F.3d 62, 66 (2d Cir. 1997)), aff'd, 594 F. App'x 26 (2d Cir. 2015) (summary order), cert. denied, No. 14-9720 (Oct. 5, 2015).

As a result, I recommend that Plaintiff's claims against Defendant Kennedy in her individual capacity be dismissed, because she is immune from suit. See Leftridge v. Judicial Branch, 22-CV-0411, 2023 WL 4304792, at *9 (D. Conn. June 30, 2023) (dismissing the plaintiff's claims against the state court clerks of court based on the doctrine of quasi-judicial immunity where "their alleged actions arose out of or related to [plaintiff]'s child support and child custody proceedings."); Braithwaite v. Tropea, 23-CV-1431, 2023 WL 4207907, at *4 (E.D.N.Y. June 27, 2023) (citing Jackson v.

Pfau, 523 F. App'x 736, 737-38 (2d Cir. 2013) (affirming dismissal pursuant to Section 1915(e)(2)(B) of pro se plaintiff's Section 1983 claims against the Chief Clerks of several state courts based on the doctrine of judicial immunity)) (dismissing as frivolous the plaintiff's claims against the clerk of the court because he was

20 entitled to absolute immunity); Mendez v. Johnson, 22-CV-6811, 2022 WL 3587600, at *2 (S.D.N.Y. Aug. 22, 2022) (citing inter alia, Chmura v. Norton, Hammersley, Lopez & Skokos Inverso PA, 17-CV-2164, 2018 WL 2138631, at *2 (D. Conn. May 9, 2018) (extending judicial immunity to a clerk of court); Manko v. Ruchelsman, 12-CV-4100, 2012 WL 4034038, at *2 (E.D.N.Y. Sept. 10, 2012) (same)) (noting that courts have routinely granted judicial immunity to "government officials, includ ing clerks of court and other court employees, for their acts that assist a judge in the performance of his or her judicial duties.").

Moreover, I recommend that Plaintiff's claims against Defendant Kennedy in her official capacity as Court Clerk of the Schoharie Town Court be dismissed because the Schoharie Town Court is an arm of the New York state court system and New York State is immune from suit pursuant to the Eleventh Amendment. Braithwaite, 2023 WL 4207907, at *4 (collecting cases) (holding that the plaintiff's claims against the Chief Clerk of the Suffolk County Court in his official capacity are barred by the Eleventh Amendment).

D. Additional Legal Grounds Listed The Complaint also mentions the Fifth Amendment, Seventh Amendment, Eighth Amendment, Ninth Amendment, Title VI of the Civil Rights Act, the "right to travel," the "right to life, liberty, and the pursuit of happiness," an d the No Fear Act as bases for relief. Based on my review, the Complaint fails to allege facts plausibly suggesting any claims pursuant to these legal bases.

"The Fifth Amendment protects against com pulsory self-incrimination by forbidding the introduction of coerced statements into evidence at trial." Harris v. Doe, 24-CV-0151, 2024 WL 1344697, at *3 (D. Conn. Mar. 29, 2024). The Complaint fails to allege facts plausibly

21 suggesting that Plaintiff made any self-incriminating statements or that such statements were introduced as evidence during his trial.

The Seventh Amendment preserves "the right to trial by jury " for certain cases brought in federal court. U.S. Const. amend. VII. Since the federal judiciary determines the extent to which a litigant in federal court may try his or her case before a jury, see e.g., Messa v. Goord, 652 F.3d 305 (2d Cir. 2011), persons acting under the color of state law (i.e., those persons who may be named as defendants in a § 1983 action) generally lack the capacity to violate the Seventh Amendment. See Kampfer v. Argotsinger, 18-CV-0007, 2020 WL 906274 at *10 (N.D.N.Y. Feb. 25, 2020) (The Seventh Amendment does not "provide a [. . .] cause of action cognizable under § 1983." (citati on and quotation omitted)). As a result, I recommend that "'Plaintiff's citation to the Seve nth Amendment

[be construed] as support for h[is] request for a civil jury trial,' rather than as an independent basis for relief." Kampfer, 2020 WL 906274, at *10 (citing White v. City of New York, 13-CV-7156, 2014 WL 4357466, at *8 n.13 (S.D.N.Y. Sept. 3, 2014)).

"[T]he Eighth Amendment applies only to convicted prisoners." Simpson v. Town of Warwick Police Dep't ., 159 F. Supp. 3d 419, 443 (S.D.N.Y. 2016) (citing City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)). The Complaint fails to allege facts plausibly suggesting that Plaintiff was incarcerated after conviction of the traffic infraction.

"The Ninth Amendment cannot serve as the basis for a § 1983 claim." Rodriguez v. Burnett, 22-CV-10056, 2024 WL 1466880, at *7 (S.D.N.Y. Apr. 4, 2024) (citing Lloyd v. Lee, 570 F. Supp. 2d 556, 566 (S.D.N.Y. 2008)).

"Title VI does not provide for individual liability." Sherman v. Yonkers Pub. Schs., 21- CV-7317, 2023 WL 137775, at *7 (S.D.N.Y. Jan. 9, 2023) (citing Bayon v. State Univ. of N.Y. at

22 Buffalo, 98-CV-0578, 2001 WL 135817, at *2 (W.D.N.Y. Feb. 15, 2001)). Hence, I recommend that Plaintiff's Title VI claim against Defendants Breen, Gilman, and Kennedy, be dismissed with prejudice. Moreover, to the extent that the Complaint is construed as asserting a claim pursuant to Title VI against Defendants Schoharie Town Court and NYSP, I recommend that it be dismissed. Plaintiff's conclu sory allegation—that "[a]s an A frican American we as a people were hunted as slaves and hung , shot raped , and murdered for over 400 years , with sham courts acquitting racist white men , police,judges , sheriffs, and numerous highly ranked officials complicit and in collusion were at that time lawfull , legal killings of African American people" (Dkt. No. 1 at 6 [errors in original])—is insufficient to plausi bly suggest that Plaintiff was discriminated against on the basis of race. See Grillo v. N.Y.C. Transit Auth., 291 F.3d 231, 235 (2d Cir. 2002) ("Even if [plain tiff's] highly dubious claim that he was unfairly singled out for punishment by the instructors is credited, [plaintiff] has done little more than cite to his alleged mistreatment and ask the court to conclude that it must have been related to his race."); Varughese v. Mount Sinai Med. Ctr., 12-CV-8812, 2015 WL 1499618, at *42 (S.D.N.Y. Mar. 27, 2015) ("fallacy" for the plaintiff to conclude: "I belong to a protecte d class; something bad happened to me at work; therefore, it must have occurred because I belong to a protected class"); Rissman v. Chertoff, 08-CV-7352, 2008 WL 5191394, at *4 (S.D.N.Y. Dec. 12, 2008) ("In essence, plaintiff alleges that because he was yelled at [by his supervisors], this must have been because [of his protected status]. Such conclusory and speculative statements are insufficient.").

"As the Supreme Court has explai ned, the 'right to travel' is something of a constellation of rights:

The 'right to travel' discu ssed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for

23 those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." Weisshaus v. Cuomo, 512 F. Supp. 3d 379, 391 (E.D.N.Y. Jan. 11, 2021) (quoting Saenz v. Roe, 526 U.S. 489, 500 (1999)). The Complaint fails to allege facts plausibly suggesting a claim pursuant to any of these components of the "right to travel." (See generally Dkt. No. 1.) Moreover, "[t]o the extent Plainti ff means to argue that traffic enforcement violates his right to travel, that claim [should be] dismissed as frivolous." Johnson El v. Bird, 19-CV-5102, 2020 WL 5124920, at *5 n.8 (S.D.N.Y. Aug. 31, 2020) (citing Annan v. State of N.Y. Dep't of Motor Vehicles, 15-CV-1058, 2016 WL 8189269, at *5 (E.D.N.Y. Mar. 2, 2016), aff'd , 662 F. App'x 85 (2d Cir. 2016) (summary order)).

Claims that Defendants deprived Plaintiff of his "right to life, liberty, and the pursuit of happiness" are not cognizab le under 42 U.S.C. § 1983. Bones v. Cnty. of Monroe, 23-CV-6201, 2023 WL 8809732, at *4 n.3 (W.D.N.Y. Dec. 20, 2023) (citing Nguyen v. Ridgewood Sav. Bank, 66 F. Supp. 3d 299, 307 (E.D.N.Y. 2014) (rejecting Section 1983 claim premised on the "vague invocation of the right to life, liberty and the pursuit of happiness")) (rejecting the plaintiff's claim that her "right to liberty" was violated because it "is not a cognizable claim, and the Court accordingly does not address it.").

Finally, to the extent that the Complaint and Supplements are construed as asserting a claim pursuant to the No Fear Act, I recommend that it be dismissed. The No Fear Act is a law to protect federal employees from workplace discrimination and is not applicable to Plaintiff's case where he does not allege to be a federal employee. Moreover, "[o]f the few courts that have considered claims made under the No Fear Act, none have found that the Act provides a private cause of action[.]" Zietek v. Pinnacle Nursing and Rehab Ctr., 21-CV-5488, 2024 WL 243436, at *5 (S.D.N.Y. Jan. 23, 2024) (citing Baney v. Mukasey, 06-CV-2064-L, 2008 WL 706917, at

24 *6 (N.D. Tex. Mar. 14, 2008); see also Lee v. Saul, 19-CV-6553, 2022 WL 1051216, at *12 (S.D.N.Y. Feb. 10, 2022); Glaude v. United States, 2007-5125, 2007 WL 2682957, at *2 (Fed. Cir. Sept. 7, 2007); Pedicini v. U.S., 480 F. Supp. 2d 438, 459 (D. Mass. 2007); Mills v. Barreto, 03-CV-0735, 2004 WL 3335448, at *3 (E.D. Va. Mar. 8, 2004)). V. OPPORTUNITY TO AMEND

Generally, a court should not dismiss claims contained in a complaint filed by a pro se litigant without granting leave to amend at least once "when a liberal reading of the complaint gives any indication that a valid claim might be stated." Branum v. Clark, 927 F.2d 698, 704-05 (2d Cir. 1991); see also Fed. R. Civ. P. 15(a)(2) ("The c ourt should freely give leave when justice so requires."). An opportunity to ame nd is not required, however, where "the problem with [the plaintiff's] causes of action is substantive" such that "better pleading will not cure it." Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000); see also Cortec Indus. Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991) ("Of course, where a plaintiff is unable to allege any fact sufficient to support its claim, a complaint should be dismissed with prejudice."). Stated differently, "[w]here it a ppears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend." Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993); accord, Brown v. Peters, 95-CV-1641, 1997 WL 599355, at *1 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.). 11

11 See also Carris v. First Student, Inc., 132 F. Supp. 3d 321, 340-41 n.1 (N.D.N.Y. 2015) (Suddaby, C.J.) (explaining that the standard set forth in Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999)—that th e Court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would be successful in stating a claim"—is likely not an accurate recitation of the governing law after Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)), rev'd on other grounds , 682 F. App'x 30.

25 Here, better pleading could not cure the deficiencies described above with respect to the following claims: (1) claims pursuant to N.Y. Penal Law § 195.00 and 18 U.S.C. § 241; (2) ADA claim against Defendants Breen, Gilman, and Kennedy; and (3) claims pursuant to 42 U.S.C. § 1983 against (a) Defendant Breen, (b) Defendant Schoharie Town Court, (c) Defendant Gilman in his official capacity, (d) Defendant NYSP, and (e) Defendant Kennedy. As a result, I recommend that those claims be dismissed without leave to replead.

Out of an abundance of caution and in deference to Plaintiff's pro se status, the undersigned recommends that Plaintiff be granted leave to amend the following claims to cure the defects as stated above: (1) ADA claim against Defendants NYSP and Schoharie Town Court; and (2) Section 1983 claims against Defendant Gilman in his individual capacity.

If Plaintiff chooses to avail himself of an opportunity to amend, such amended pleading must set forth a short and plain statement of the facts on which he relies to support any legal claims asserted. Fed. R. Civ. P. 8(a). In addition, the amended complaint must include allegations reflecting how the individual(s) named as Defendant(s) are involved in the allegedly unlawful activity. Finally, Plaintiff is informed that any amended complaint will replace the existing Complaint, and must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the Court. See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) ("It is well established that an amended complaint ordinarily supersedes the original, and renders it of no legal effect." (internal quotation marks omitted)). ACCORDINGLY, it is ORDERED that Plaintiff's amended IFP application (Dkt. No. 7) is GRANTED; and it is further respectfully

26 RECOMMENDED that the Court DISMISS WITH LEAVE TO AMEND the Complaint (Dkt. No. 1) to the extent that it asserts the following claims: (1) an ADA claim against Defendants NYSP and Schoharie Town Court; and (2) Section 1983 claims against Defendant Gilman in his individual capacity, for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e); and it is further respectfully

RECOMMENDED that the Court DISMISS WITHOUT LEAVE TO AMEND the Complaint (Dkt. No. 1) to the extent that it asserts the following claims: (1) claims pursuant to N.Y. Penal Law § 195.00 and 18 U.S.C. § 241; (2) ADA claim against Defendants Breen, Gilman, and Kennedy; and (3) claims pursuant to 42 U.S.C. § 1983 against (a) Defendant Breen, (b) Defendant Schoharie Town Court, (c)

Defendant Gilman in his official capacity, (d) Defendant NYSP, and (e) Defendant Kennedy, because it seeks relief from individuals who are immune from such relief, and is otherwise frivolous pursuant to 28 U.S.C. § 1915(e); and it is further

ORDERED that the Clerk of the Court shall file a copy of this Order and Report- Recommendation on Plaintiff, along with copies of the unpublished decisions cited herein in accordance with the Second Circuit's decision in Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009) (per curiam).

27 NOTICE: Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report. 12

Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW. 28 U.S.C. § 636(b)(1) (Supp. 2013); Fed. R. Civ. P. 6(a), 6(d), 72; Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993) (citing Small v. Sec'y of Health and Human Servs., 892 F.2d 15 (2d Cir. 1989)).

Dated: June __, 2024

Binghamton, New York

12

If you are proceeding pro se and served with this report, recommendation, and order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C).

Footnotes 1 Although Plaintiff is currently proceeding pro se, the Court notes that he had counsel when preparing his

response to Defendant's motion for summary judgment. Accordingly, no need exists to construe Plaintiff's response with the special solicitude ordinarily afforded to pro se litigants. 2 The Court notes that, while it did not previously (i.e., in its prior decisions) liberally construe Plaintiff's

retaliation claim as arising under three separate theories, it does so now. The Court further notes that it has the power to address these two additional theories for each of two alternative reasons: (1) because Defendants moved for dismissal of Plaintiff's retaliation claim in its entirety, Plaintiff has had sufficient notice and an opportunity to be heard with respect to the two theories in question; and (2) in any event, even if Plaintiff cannot be said to have had such notice and an opportunity to be

heard, he filed his Complaint pro se and the Court finds the two theories to be so lacking in arguable merit as to be frivolous, see Fitzgerald v. First E. Seventh St. Tenants Corp., 221 F.3d 362, 363 (2d Cir. 2000) (recognizing that district court has power to sua sponte dismiss pro se complaint based on frivolousness notwithstanding fact that plaintiff has paid statutory filing fee). 3 As discussed above, Plaintiff was actually given three noise violations. However, because his permit was

revoked on the same day that he received the third violation, the Court will disregard the third violation for purposes of this analysis. 4 The Court notes that Plaintiff spends considerable time in his opposition papers disputing the sufficiency of the

evidence and procedures that were followed that led to the issuance of noise violations. (See generally Dkt. No. 67, ¶¶ 56-95 [Pl.'s Decl.].) However, this Court is not the proper forum for that dispute. Furthermore, to the extent that the New York Supreme Court observed that there appeared "to have been a disproportionate amount of time and money spent on [the noise violation] notice," and that the records did not "reveal a real issue with dog-barking," those observations are not binding upon this Court. (Dkt. No. 67, Attach. 2, at 6.) Setting aside the fact that the observations constitute dicta, Defendants have submitted admissible record evidence demonstrating that Mr. Ennis acted upon complaints made to him by residents of the Town, which Plaintiff has failed to properly dispute. 5 For example, with regard to this lack of additional evidence regarding retaliatory animus, Plaintiff has failed to

adduce admissible record evidence establishing that, even assuming Mr. Gleason knew of Plaintiff's intent to engage in protected speech, the so-called "manner of the interaction" by Mr. Gleason (i.e., the hand delivery of the letter) was in fact unusual for Mr. Gleason given the date of the letter and the date of the public meeting. Moreover, Plaintiff has failed to adduce admissible record evidence that the so-called "timing ... of the interaction" is significant, given his rather constant exercise of his First Amendment rights during the time in question. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff is still financially responsible for any other fees or costs she may incur. 2 It appears that the EEOC dismissal notice is dated September 10, 2020. Dkt. No. 1-1. 3 A plaintiff establishes "a prima facie case of discrimination by showing that (1) he is a member of a protected

class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving

rise to an inference of discrimination based on his membership in the protected class." Dawson v. Bumble

& Bumble, 398 F.3d 211, 216 (2d Cir. 2005) overruled on other grounds Zarda v. Altitude Express, Inc.,

883 F.3d 100 (2d Cir. 2018). 4 As the EEOC dismissal notice is dated September 10, 2020, the Court makes the reasonable inference that

plaintiff filed her EEOC complaint some time in 2020. 5 Even if this Court were to assess this case as seeking to proceed under diversity jurisdiction pursuant to 28

U.S.C. § 1332(a), the plaintiff has also failed to set forth a cognizable state law claim. Scherer v. Equitable Life Assur. Soc'y of the United States, 347 F.3d 394, 397 (2d Cir. 2003) (quoting 28 U.S.C. § 1332(a)) (noting that diversity jurisdiction "confers original jurisdiction on the federal district courts with respect to 'all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... citizens of different States.' "). 6 This "emergency motion" notes that it is presented to the United States Supreme Court, but contains a caption

including this Court. It is unclear if this is a document plaintiff intends to submit before this Court, or before the United States Supreme Court. See dkt. no. 5. 7 If you are proceeding pro se and are served with this Report-Recommendation & Order by mail, three (3)

additional days will be added to the fourteen (14) day period, meaning that you have seventeen (17) days from the date the Report-Recommendation & Order was mailed to you to serve and file objections. FED. R. CIV. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Id. § 6(a)(1)(c).

Footnotes

1 At paragraph 3(a) asking to identify the defendant, plaintiff writes: "Not Applicable" 2 Dkt. no. 11-4 is a letter from Maureen Kielt, Director of the EEOC Buffalo Local Office to plaintiff in the matter

of Walker v. CIBC confirming that plaintiff indicated that her "last date of harmed occurred on March 24, 2009, when [she] was terminated," thus making her EEOC administrative claim against CIBC untimely. Dkt. No. 11-4 at 1. 3 In the Prayer for Relief, plaintiff requests the Court to grant the following relief:

1. The plaintiff do not [sic] want to be a party to the religious killing business of Myrna Suzette Walker; her five children; and CIBC First Caribbean Jamaica staff, Allison Carolyn Rattray and her husband Judge Barrington Andrew Rattray, Supreme Court of Jamaica; 2. The plaintiff do not [sic] want cocaine nor any thing to ingest from anyone, by force or otherwise. 3. The plaintiff wants full restitution socially, physically, professionally. Dkt. 11, at 5 (emphasis in original).

Footnotes 1 The language of that section is ambiguous because it suggests an intent to limit availability of in forma

pauperis status to prison inmates. See 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such

prisoner possesses"). The courts have construed that section, however, as making in forma pauperis status

available to any litigant who can meet the governing financial criteria. Hayes v. United States, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); Fridman v. City of N.Y., 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002). 2 Plaintiff is reminded that, although his application to proceed in forma pauperis has been granted, he is still

required to pay fees that he may incur in this action, including copying and/or witness fees. 3 It is unclear at this juncture whether Plaintiff's claims against Defendant Oneida County Sheriff in his

official capacity, should be deemed as claims against the County of Oneida or the Oneida County Sheriff's Department. Compare Carthew v. Cnty. of Suffolk, 709 F. Supp. 2d 188, 195 (E.D.N.Y. 2010) ("It is well settled that an entity such as the Suffolk County Police Department is an 'administrative arm' of the same municipal entity as Suffolk County and thus lacks the capacity to be sued."), and Krug v. Cty. of Rennselaer, 559 F. Supp. 2d 223, 247 (N.D.N.Y. 2008) (McAvoy, J.) ("A city police department is not an independent, suable entity separate from the municipality in which the police department is organized."), with DiJoseph v. Erie Cnty., 18-CV-0919S, 2020 WL 4194136, at *8 (W.D.N.Y. July 21, 2020) (noting that "[u]nder New York State Constitution article XIII, § 13(a) a county cannot be made liable for the acts of its sheriff" and finding that the County—absent a local law agreeing to assume liability for the Sheriff's actions—is not the proper defendant in a claim pursuant to 42 U.S.C. § 1983 against the Sheriff). However, this distinction is immaterial for purposes of this Order and Report-Recommendation. 4 Before Tangreti, various courts in the Second Circuit have postulated how, if at all, the Iqbal decision affected

the five Colon factors which were traditionally used to determine personal involvement. Pearce v. Estate of Longo, 766 F. Supp. 2d 367, 376 (N.D.N.Y. 2011) (Hurd, J.) (recognizing that several district courts in the Second Circuit have debated Iqbal's impact on the five Colon factors), rev'd on other grounds sub nom., Pearce v. Labella, 473 F. App'x 16 (2d Cir. 2012) (summary order); Kleehammer v. Monroe Cnty., 743 F. Supp. 2d 175, 185 (W.D.N.Y. 2010) (holding that "[o]nly the first part of the third Colon categories pass Iqbal's muster...."); D'Olimpio v. Crisafi, 718 F. Supp. 2d 340, 347 (S.D.N.Y. 2010) (disagreeing that Iqbal eliminated Colon' s personal involvement standard). 5 Section 1985(1) provides a damages action against two or more persons who conspire to prevent, by force,

intimidation or threat, any federal officer from performing his or her official duties. Section 1985(2) provides a cause of action against two or more persons who conspire to obstruct justice in the federal courts by force, intimidation, or threat. None of the facts alleged in the Amended Complaint relate in any way to these causes of action. 6 Under General Order #14 and N.D.N.Y. L.R. 9.2, a party who files a RICO claim must also file a Civil RICO

statement within thirty days after the filing date of the Complaint. Despite thirty days having elapsed since the filing of his Amended Complaint (and his Complaint, which also appeared to assert a RICO claim [Dkt. No. 1 at 25-26]), Plaintiff has failed to file a Civil RICO statement. (See generally docket sheet.) As a result, I recommend that Plaintiff's RICO claim be dismissed. See Poole v. Bendixen, 20-CV-0697, 2021 WL 3737780, *12 (N.D.N.Y. Aug. 24, 2021) (Suddaby, C.J.); Murphy v. Onondaga Cnty., 18-CV-1218, 2022 WL 819281, *6 (N.D.N.Y. Mar. 18, 2022) (Sharpe, J.). 7 For example, to demonstrate that Defendants engaged in extortion, Plaintiff must allege that Defendants

"obstruct[ed], delay[ed], or affect[ed] commerce or the movement of any article or commodity in commerce, by ... extortion or attempt[ed] or conspire[d] so to do, or commit[ted] or threaten[ed] physical violence to any person or property in furtherance of a plan or purpose to do [so]." 18 U.S.C. § 1951; see also McLaughlin v. Anderson, 962 F.2d 187, 194 (2d Cir. 1992). Extortion is defined as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2); Entretelas Americanas S.A. v. Soler, 19-CV-3658, 2020 WL 9815186, at *10 (S.D.N.Y. Feb. 3, 2020), aff'd, 840 F. App'x 601 (2d Cir. 2020), as amended (Jan. 7, 2021) (citation

omitted). "[F]atal" to an extortion claim is "[t]he absence of allegations of force, violence or fear." Entretelas

Americanas, 2020 WL 9815186, at *10 (collecting cases). 8 See also Carris v. First Student, Inc., 132 F. Supp. 3d 321, 340-41 n.1 (N.D.N.Y. 2015) (Suddaby, C.J.)

(explaining that the standard set forth in Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir. 1999)— that the Court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would be successful in stating a claim"—is likely not an accurate recitation of the governing law after Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)), rev'd on other grounds, 682 F. App'x 30. 9 The Clerk shall also provide Plaintiff with copies of all unreported decisions cited herein in accordance with

Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009) (per curiam). 10 If you are proceeding pro se and served with this report, recommendation, and order by mail, three additional

days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R.

Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The following facts are taken from the Complaint, exhibits to the Complaint, and public records, which the

Court may consider in evaluating Hall's claims. See Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006). 2 Hall asserts claims under 18 U.S.C. §§ 241 and 242. These sections establish criminal liability for certain

deprivations of civil rights and conspiracy to deprive civil rights. Molina v. City of Lancaster, 159 F. Supp. 2d 813, 818 (E.D. Pa. 2001); Figueroa v. Clark, 810 F. Supp. 613, 615 (E.D. Pa. 1992); see United States v. Philadelphia, 644 F.2d 187 (3d Cir. 1980) (declining to create civil remedy under 18 U.S.C. §§ 241 and 242). However, a plaintiff cannot bring criminal charges against defendants through a private lawsuit, and these sections do not give rise to a civil cause of action. U.S. ex rel. Savage v. Arnold, 403 F. Supp. 172, 174 (E.D. Pa. 1975). Hall also cites 18 U.S.C. § 71, which relates to theft from interstate shipments. The Court assumes that he intended to cite 18 U.S.C. § 371, relating to conspiracy, which also does not provide for a private right of action. See Walthour v. Herron, No. 10-1495, 2010 WL 1877704 at *3 (E.D. Pa. May 6, 2010) (no private right of action exists under 18 U.S.C. §§ 241, 242, 245, 247, 371 or 1951); Jones v. Lockett, No. 08-16, 2009 WL 2232812 at *8 (W.D. Pa. July 23, 2009) ("It is clear that the criminal statutes invoked by Plaintiff, i.e., 18 U.S.C. §§ 241, 371 and 1341 do not provide for a private cause of action.") Hall also cites 18 U.S.C. § 1519 relating to destroying, altering or falsifying documents in a federal investigation, and 18 U.S.C. § 1623 relating to perjury, which also do not provide a private right of action. Antonelli v. Kennedy Hosp., No. 17-13780, 2018 WL 443455, at *2 (D.N.J. Jan. 16, 2018) (no private right of action under 18 U.S.C. 1519). 3 Although Bivens provides a remedy against federal actors, "[a]n action against government officials in their

official capacities constitutes an action against the United States; and Bivens claims against the United States are barred by sovereign immunity, absent an explicit waiver." Lewal v. Ali, 289 F. App'x 515, 516 (3d Cir. 2008) (per curiam); see also F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); Ynfante v. United States, Civ. A. No. 13-767, 2015 WL 631055, at *5 (M.D. Pa. Feb. 12, 2015) ("[A] Bivens claim can only be asserted against individual officials."). Accordingly, the constitutional claims against the Defendants in their official capacities are in essence claims against the United States that must be dismissed on sovereign immunity grounds. See Brooks v. Bledsoe, 682 F. App'x 164, 169 (3d Cir. 2017) (per curiam) ("To the extent that Brooks is suing the BOP employees in their official capacities, his claim fails as actions against prison officials in their official capacities are considered actions against the United States, and Bivens claims against the United States are barred by sovereign immunity, absent an explicit waiver."); Bell v. Rossott, 227 F. Supp. 2d 315, 320 (M.D. Pa. 2002) (dismissing claim

against individual federal defendants sued in their official capacity because the claims are essentially made against the United States). 4 The Court notes that "[m]otions pursuant to 28 U.S.C. § 2255 are the presumptive means by which federal

prisoners can challenge their convictions or sentences that are allegedly in violation of the Constitution," although § 2241 may be used when the remedy provided by § 2255 is "inadequate or ineffective." Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002). In other words, a § 2255 motion is the proper way to challenge a federal conviction, rather than a Bivens action. See Okoro v. Callaghan, 324 F.3d 488, 490 (7th Cir. 2003) ("Okoro adhered steadfastly to his position that there were no drugs, that he was framed; in so arguing he was making a collateral attack on his conviction, and Heck holds that he may not do that in a civil suit, other than a suit under the habeas corpus statute or its federal-defendant equivalent, 28 U.S.C. § 2255."); Beverly v. Reno, 23 F.3d 158, 159 (7th Cir. 1994) (federal prisoner cannot circumvent § 2255 "by bringing an independent civil action"); see generally Abbasi, 137 S. Ct. at 1863 ("[W]hen alternative methods of relief are available, a Bivens remedy usually is not."). The Court will not construe Hall's Complaint as such a motion because the sentencing Judge is in a better position to determine the validity of any challenges to his conviction. Furthermore, this Court does not possess the authority to revoke or alter an order issued by a

federal judge in another federal proceeding. See Smith v. Meyers, 843 F. Supp. 2d 499, 505 (D. Del. 2012)

("The structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction."). 5 There are other reasons why Hall's claims fail. Notably, judges are entitled to absolute immunity from liability

based on acts or omissions taken in their judicial capacity, so long as they do not act in the complete absence of all jurisdiction. See Stump v. Sparkman, 435 U.S. 349, 355-56 (1978). Similarly, prosecutors are entitled to absolute immunity from liability for acts that are "intimately associated with the judicial phase of the criminal process" such as "initiating a prosecution and ... presenting the State's case." Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); see also See Van de Kamp v. Goldstein, 555 U.S. 335, 348-49 (2009). However, the Court need not address these or other defects in Hall's Complaint as alternative reasons for dismissal. Moreover, to the extent the Complaint could be construed as raising claims based on the DEA's investigation consideration of which would not be barred by Heck, it is apparent from the face of the Complaint that those claims are time-barred because Hall knew or should have known of those violations more than two years before he filed the Complaint in the instant action. End of Document

Footnotes 1 After the 1996 amendments to Section 1983, it is clear that a judicial officer may be sued in his official

capacity for injunctive relief (i.e., non-monetary damages), but only where a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C. § 1983; Catanzaro v. Cottone, 228 Fed. App'x 164, 167 (3d Cir.2007). This is a very narrow avenue for relief and Plaintiff has failed to adequately allege that a declaratory decree was violated or that declaratory relief was unavailable to him. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff's exhibits do not provide a basis to change this conclusion. Dkt. No. 15.

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Footnotes 1 Plaintiff is reminded that, although her IFP Application has been granted, she will still be required to pay fees

that she may incur in this action, including copying and/or witness fees. 2 The Court assumes Plaintiff is referring to St. Joseph's Health Hospital. The address that Plaintiff has listed

for this Defendant is that of St. Joseph's Health Hospital. The Court takes judicial notice of the fact that St. Joseph's Health Hospital is a regional non-profit health care system based in Syracuse, New York, and is part of Trinity Health, the nation's second-largest Catholic Health System. See https://www.sjhsyr.org/about- us/ (last visited Apr. 4, 2022); see also Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC, 127 F. Supp. 3d 156, 167 (noting that, for the purposes of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a court may take judicial notice of information publicly available on a party's website, as long as the website's authenticity is not in dispute and 'it is capable of accurate and ready determination.' ").

3 Plaintiff may be referring to the Comprehensive Psychiatric Emergency Program, also known

as "CPEP". See https://www.sjhsyr.org/location/st-josephs-health-hospital-comprehensive-psychiatric-emergency-program-cpep (last visited Apr. 4, 2022). 4 See Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991) (the complaint is deemed to

include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference). 5 Based on the facts alleged, Plaintiff could not proceed with a claim under Title I of the ADA, which addresses

employment discrimination, because she has not alleged that she was employed by Defendants. 42 U.S.C. § 12117; see Mary Jo C. v. New York State and Local Retirement Sys., 707 F.3d 144, 169 (2d Cir. 2013) ("Title I of the ADA expressly deals with th[e] subject of employment discrimination....") (citation and internal quotation marks omitted). Title II of the ADA covers disability discrimination

in public services, programs, and activities, defined as "state or local governments and their instrumentalities." Sherman v. Black, 510 F. Supp. 2d 193, 197 (E.D.N.Y. 2007) (citing 42 U.S.C. § 12131(1)). However, "[a] private hospital performing services pursuant to a contract with a municipality[,] even if it does so according to the municipality's rules and under its direction, is not a creature of any governmental entity." Green v. City of New York, 465 F.3d 65, 79 (2d Cir. 2006). Moreover, Title IV of the ADA does not appear to be applicable to Plaintiff's claims because Title IV prohibits disability discrimination in telecommunications. See Genco v. Sargent & Collins LLP, No. 18-CV-0107, 2018 WL 3827742, at *3, n.5 (W.D.N.Y. June 4, 2018). Lastly, Title V of the ADA, sometimes referred to as the "retaliation provision," also does not appear applicable because Plaintiff does not allege that she engaged in activity protected by the ADA, that Defendants were aware of that activity, or any causal connection between the allegedly adverse actions that Defendant took against her and the protected activity. See Chiesa v. New York State Dep't of Labor, 638 F. Supp. 2d 316, 323 (N.D.N.Y. 2009) (Hurd, J.). 6 Under the ADA, the term "disability" means "a physical or mental impairment that substantially limits one

or more major life activities of such individual." 42 U.S.C. § 12102. A physical or mental impairment can be "[a]ny mental or psychological disorder, such as an intellectual disability [or an] emotional or mental illness[.]" 29 C.F.R. § 1630.2(h)(2). "[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending speaking, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102. 7 If the District Court adopts this Report-Recommendation, and if Plaintiff chooses to file an amended complaint,

the pleading must comply with Rules 8 and 10 of the Federal Rules. The revised pleading will replace the original complaint, and must be a wholly integrated and complete pleading that does not rely upon or incorporate by reference any pleading or document previously filed with the Court. See Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) ("It is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect."). The revised pleading should not attempt to resurrect any claims dismissed with prejudice in this action Additionally, although Plaintiff may submit objections to this Report-Recommendations, see infra, Plaintiff should wait for the District Court to rule on this Report- Recommendation before submitting an amended pleading. 8 If you are proceeding pro se and are served with this Order and Report-Recommendation by mail, three

additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Order and Report-Recommendation was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. 6(a)(1)(C). End of Document

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Footnotes 1 The court may "take judicial notice of relevant matters of public record." Giraldo v. Kessler, 694 F.3d

161, 164 (2d Cir. 2012). The publicly available information on the DOC website shows that Plaintiff was sentenced on November 30, 2022, to a term of incarceration that has not yet expired. See "Connecticut State Department of Correction: Inmate Information," available at http://www.ctinmateinfo.state.ct.us/ detailsupv.asp?id_inmt_num=327592 [https://perma.cc/ZRB3-G7TZ] (last visited Jan. 31, 2024). 2 Plaintiff filed a first amended complaint in March 2023, and then amended the complaint again thereafter in

May 2023. Although he did not seek leave before filing the second amended complaint, the court accepts the May filing as the operative pleading. 3 All factual allegations are drawn from the amended complaint and exhibits thereto and are considered true

for the purpose of this initial review. 4 Plaintiff's medical condition is not fully explained in the amended complaint itself, but additional detail can be

found in the grievance forms attached thereto. The court relies upon those attachments for clarity. 5 See Mayo Clinic, "Home Parenteral Nutrition," available at https://www.mayoclinic.org/tests-procedures/total-

parenteral-nutrition/about/pac-20385081 [https://perma.cc/7SKD-KMWM] (last visited Jan. 31, 2024). 6 Generally, a PICC line "is a long, thin tube that's inserted through a vein in [an individual's] arm and

passed through to the larger veins near [the] heart." Mayo Clinic, "Peripherally inserted central (PICC) line," available at https://www.mayoclinic.org/tests-procedures/picc-line/about/pac-20468748 [https://perma.cc/ SQM3-M5WE] (last visited Jan. 31, 2024). It provides a "doctor access to the large central veins near the heart ... [and is] used to give medications or liquid nutrition." Id. 7 It appears this device is the outlet for the PICC line. 8 Plaintiff actually asserts only that he was deprived of necessary treatment, but the court gathers that this is

a reference to the TPN. 9 Another nurse also apparently stated that she could only put him on medical watch, or that he could refuse

housing. As this nurse is not a party to this action, this detail is not relevant to this discussion. 10 Plaintiff also alleges that he was sent to the emergency room on April 5, 2023, but it is not clear why.

11 Certain exhibits suggest that Plaintiff already may have a single cell, see, e.g., ECF No. 14 at CM/ECF p.

195, but that is unconfirmed. The court notes that it refers to the pagination supplied by the CM/ECF system because the amended complaint and exhibits are docketed as a single document. 12 He also alleges that nurses did not promptly address his wrist and leg pain, but this appears to be predicate

conduct only for his supervisory claims, which are addressed infra. 13 The only difference between the ADA and the RA is that the RA applies to entities receiving federal financial

assistance while Title II of the ADA applies to all public entities, a distinction not relevant here. See Messier v. Southbury Training Sch., 562 F. Supp. 2d 294, 320 n.13 (D. Conn. 2008); see also Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) (finding it proper to consider such claims together). Where "distinctions between the statutes are not implicated," courts will "treat claims under the two statutes identically.' " Wright, 831 F.3d at 72 (quoting Henrietta D., 331 F.3d at 272). 14 In Garcia v. S.U.N.Y. Health Scis. Ctr. Of Brooklyn, 280 F.3d 98 (2d Cir. 2001), the United States Court of

Appeals for the Second Circuit held that a private individual could bring an official capacity ADA claim for damages against a state official, but only when the conduct also violates the Equal Protection Clause of the Fourteenth Amendment. Thereafter, in United States v. Georgia, 546 U.S. 151 (2006), the Supreme Court of the United States entertained, but specifically left open, the question of whether a Title II claim may proceed against a state official for conduct that violates the ADA, but not the Constitution. See Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis., 804 F.3d 178, 195 (2d Cir. 2015) (discussing, but not answering, whether Garcia survived Georgia). There is now a divergence in how district courts approach this issue. Id. 15 A "qualified individual with a disability" is defined as a disabled individual "who, with or without reasonable

modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The ADA further defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(2)(A). 16 In this motion, Plaintiff asks for the defendants to be served and a deadline to respond to be imposed, which

instructions are included in this order. 17 In this motion, Plaintiff asks the court to order the defendant medical staffers to withdraw as his healthcare

providers because they are denying his medical needs. As discussed supra, the denial of treatment appears to be a legitimate medical judgment, which the court will not disturb. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The Court may "take judicial notice of relevant matters of public record." Giraldo v.

Kessler, 694 F.3d 161,

164 (2d Cir. 2012). The DOC website reflects that Plaintiff is an unsentenced detainee housed at Corrigan. 2 See Dehany v. Chagnon, No. 3:17-cv-00308 (JAM), 2017 WL 2661624, at *3 (D. Conn. June 20, 2017) (for

purposes of Section 1915A review, "[t]he Court must accept as true all factual matters alleged in a complaint"). 3 Review of publicly-available information on the Connecticut Judicial Branch website shows

that Plaintiff's criminal case for these charges is pending. See Case detail for K10K- CR20-0368088-S available at: https://www.jud2.ct.gov/crdockets/CaseDetail.aspx?source=Pending & Key=ae4f9f3b-56ed-4bb3-aad0-8bae5f256d9c. 4 Plaintiff's criminal case for these charges is still pending. See Case detail for docket K10K-

CR20-0368197-S available at: https://www.jud2.ct.gov/crdockets/CaseDetail.aspx?source=Pending & Key=499a82cb-41a2-461c-8edd-ecd3527735c2. 5 In his claims, Plaintiff states that Defendants denied him equal protection of the law and violated his

Fourteenth Amendment rights under "section 1 of the Fourteenth Amendment." Section one of the Fourteenth Amendment, which is the Citizenship Clause, states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Reading Plaintiff's allegations together, the Court construes Plaintiff's allegations as asserting denial of his right to due process and equal protection under the Fourteenth Amendment.

6 Absolute immunity does not apply to a prosecutor's "administrative duties and those investigatory functions

that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings[.]" Warney v. Monroe County, 587 F.3d 113, 121 (2d Cir. 2009) (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993)); See Kalina v. Fletcher, 522 U.S. 118, 125–27 (1997) (holding that prosecutor was not protected by absolute immunity because she was acting as an investigator when she signed a sworn affidavit attesting to the facts supporting an arrest warrant). Here, Plaintiff's claims arise from the Prosecutor Defendants' role as advocates in furthering their prosecutorial functions. 7 Nor can Plaintiff's allegations even generously be construed as alleging that Costello engaged in a conspiracy

with state actors. See Storck v. Suffolk Cnty. Dep't of Soc. Servs., 62 F. Supp. 2d 927, 940 (E.D.N.Y. 1999) (allegations of conspiracy can be neither vague nor conclusory, but must "allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related

to the promotion of the alleged conspiracy."); Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2d Cir. 2002). ("[C]onclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights" are insufficient.) End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The same analysis applies to Plaintiff's claim that Eckert failed to respond to his complaints about retaliation

by other, unnamed employees at Wende. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The Court's factual statement is drawn from Plaintiff's Complaint and Amended Complaint. Plaintiff's factual

allegations are presumed to be true for purposes of resolving a motion to dismiss. See Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229, 237 (2d Cir.2007). 2 Rosado has no claim against Herard in her individual capacity under these statutes. "[N]either Title II of the

ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials." Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir.2001); Keitt v. New York City, 882 F.Supp.2d 412, 426 (S.D.N.Y.2011) ("Individuals in their personal capacities are not proper defendants on claims brought under the ADA or the Rehabilitation Act.") (citing Harris v. Mills, 572 F.3d 66, 72–73 (2d Cir.2009)). Less clear is whether claims for monetary damages are available against Herard in her official capacity. The Second Circuit has held that "a private suit for money damages under Title II of the ADA may only be maintained against a state if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability." Garcia, 280 F.3d at 112. Some courts in this District have extended this holding to individuals sued in their official capacities. See Degrafinreid v. Ricks, 417 F.Supp.2d 403, 411 (S.D.N.Y.2006), on reconsideration on other grounds, 452 F.Supp.2d 328 (S.D.N.Y.2006) ("Since the ADA permits official capacity suits, [plaintiff] can pierce Defendant's claim of state sovereign immunity and recover money damages under Title II, provided he satisfies the standard set forth in [United States v. Georgia, 546 U.S. 151 (2006).]"); see also Johnson v. Goord, No. 01 Civ. 9587 PKC, 2004 WL 2199500, at *19 (S.D.N.Y. Sept. 29, 2004) ("[P]laintiffs' claims against the individual defendants in their official capacities under section 504 of the Rehabilitation Act and Title II of the ADA fail because those laws do not provide for money damages against the state or state officials in their official capacities, absent a showing that any violation was motivated by discriminatory animus or ill will due to the disability."). Other courts have concluded that monetary damages are available against individuals in their official capacities under the ADA, but not under the Rehabilitation Act. See Gowins v. Greiner, No. 01 Civ. 6933(GEL), 2002 WL 1770772, at *5 (S.D.N.Y. July 31, 2002) ("[Plaintiff] may not sue DOCS under ... the Rehabilitation Act at all, and may sue DOCS under the ADA only to the extent that the alleged violation resulted from discriminatory animus based on his disability."). This Court need not

resolve the official capacity issue here. Even reading Plaintiff's pleadings liberally, he has not asserted that he was denied access to therapeutic group sessions because of a disability. 3 "In considering a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), a district court ...

may ... consider matters of which judicial notice may be taken under Fed.R.Evid. 201.... [C]ourts routinely take judicial notice of documents filed in other courts, ... not for the truth of the matters asserted in the other

litigation, but rather to establish the fact of such litigation and related filings." Kramer v. Time Warner Inc.,

937 F.2d 767, 773–74 (2d Cir.1991) . 4 The pages numbers referenced in this opinion are the numbers assigned when the document was

electronically filed. 5 Judge Maas correctly rejected Defendant's argument that Plaintiff alleges discrimination based on language

rather than ethnicity. See Rosado, 2013 WL 6170631, at *6. Although Plaintiff refers to himself and certain other detainees as "Spanish speakers," he repeatedly contrasts this group with "African Americans." (See, e.g., Am. Cmplt. (Dkt. No. 25) ¶ 12) Accordingly, the classification Plaintiff alleges is one based on ethnicity, and not language. This case is thus distinguishable from Soberal–Perez v. Heckler, 717 F.2d 36, 41 (2d Cir.1983)—cited by Defendant—because in that case "[a] classification [was] ... made ... on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin." 6 Defendant argues that this ruling is inconsistent with the dismissal of Plaintiff's privacy claim. This argument

ignores the fact that Plaintiff's privacy and First Amendment retaliation claims involve different rights. The retaliation claim implicates Plaintiff's freedom to engage in constitutionally protected activity—here, First Amendment speech—while Plaintiff's privacy claim is based on his "individual interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599 (1977). While Plaintiff waived his privacy claim by filing court papers disclosing his H.I.V. status, it does not follow that he waived his right to be free of retaliation for engaging in First Amendment speech. The relevant question for purposes of Plaintiff's retaliation claim is whether disclosure of Plaintiff's H.I.V. status to other detainees—individuals who were housed in the same facility as Plaintiff and who did not know of his medical condition—"would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." Dawes, 239 F.3d at 493. It is reasonable to infer that a similarly situated detainee might be deterred from filing a grievance if threatened with disclosure of his H.I.V. status to other detainees. The fact that detainees in the Mental Health Unit could have learned about Plaintiff's H.I.V. status from documents filed in Plaintiff's Florida court action does not change the analysis. 7 Defendant did not raise this argument in her objections to the

R & R. Accordingly, to the extent that this

argument concerns Plaintiff's retaliation claim, this Court will review the Magistrate Judge's determination for clear error. As to Plaintiff's equal protection claim, Judge Maas determined that that claim should be dismissed and did not reach the issue of damages. Accordingly, as to Plaintiff's equal protection claim, this Court will consider Defendant's PLRA argument de novo. 8 Herard argues that Rosado's claims for injunctive and declaratory relief are moot because Rosado has been

transferred from the Mental Health Unit at the George R. Vierno Detention Center, where the alleged events occurred. (Def. Objections (Dkt. No. 44) at 9) "In this circuit, an inmate's transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility." Salahuddin v. Goord, 467 F.3d 263, 272 (2d Cir.2006). The rationale for this rule is that—with the prisoner's transfer—"the problem sought to be remedied has ceased, and ... there is 'no reasonable expectation that the wrong will be repeated.' " Prins v. Coughlin, 76 F.3d 504, 506 (2d Cir.1996) (quoting Preiser v. Newkirk, 422 U.S. 395, 402 (1975)). However, both the George R. Vierno Detention Center and the Anna M. Kross Center—where Rosado is currently housed— are Rikers Island facilities. It is not clear from the record whether Rosado continues to be under Herard's care, or will be under Herard's care again in the future, given that he is detained in a Rikers Island facility. Accordingly, Plaintiff's claims for injunctive and declaratory relief will not be dismissed as moot at this time. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Despite his IFP status in this action, plaintiff may still be responsible for any costs he may incur, such as

copying fees or witness fees. 2 Any unpublished decisions cited within this Report-Recommendation and Order have been provided to

plaintiff pro se. 3 Plaintiff submits his complaint on a form for a civil rights complaint pursuant to 42 U.S.C. § 1983, but does not

set forth any allegations of violations of his constitutional rights under color of state law pursuant to section 1983. See Compl. Instead, plaintiff attempts to set forth allegations pursuant to the Americans with Disabilities Act and Title VII. However, it appears plaintiff merely used this form out of convenience, and not in an attempt to set forth section 1983 claims. 4 The New York State Division of Human Rights was not named as a party to this action. 5 This Court's citation to the pages in the complaint are to the pagination generated by the Court's electronic

filing system at the top of each page, rather than to the pagination of the original document. 6 Copies of any unpublished decisions cited within this Report-Recommendation and Order have been provided

to plaintiff by the Court. 7 Although plaintiff must meet all prongs in order to have demonstrated a prima facie claim under Title II, the

undersigned will continue to assess whether plaintiff has met the third prong of Title II in order to assess whether plaintiff should be afforded an opportunity to amend. 8 The Second Circuit has declined to hold that Title VII's definition of prohibiting discrimination "because of ...

sex" includes sexual orientation. Zarda v. Altitude Express, ––– F.3d ––––, 2017 WL 1378932, at *2-3 (2d Cir. Apr. 18, 2017) (declining to overturn Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000) to hold that Title VII sex discrimination includes prohibitions on sexual orientation discrimination); Anonymous v. Omnicom Group, Inc., ––– F.3d ––––, 2017 WL 1130183 (2d Cir. Mar. 27, 2017) . 9 It is also noted that, even if Title VII applied, no private action may be brought against individuals in either

their personal or official capacity under Title VII. 10 Plaintiff has not attempted to set forth any state-law sexual orientation discrimination claims. See, e.g., N.Y.

Exec. Law § 296(1)(a). Although it is possible that plaintiff may be able to allege such claims, as plaintiff has set forth no viable sexual orientation discrimination claims, opportunity to amend to provide a chance to assert potential state law claims is not recommended. 11 The undersigned also observes that plaintiff failed to demonstrate the efforts he took to find an attorney on

his own or attach correspondence supporting such attempts, despite signing his motion for appointment of

counsel stating that he had completed such actions and declar[ing] under penalty of perjury that the foregoing

is true and correct." Dkt. No. 3. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

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Footnotes 1 Plaintiff also seeks an order "restrain[ing] the [D]efendants from any further state court action until the federal

court dispute is adjudicated. Plaintiff also requests the court to vacate any state court judgments or orders in the interest of justice," (DE 8 at 21.) 2 The exhibits are largely excerpts from law treatises, copies of cases, and state and federal statutory laws,

well as several reports prepared on Plaintiff's behalf concerning the mortgage at issue in the underlying state case. See DE 1-1. 3 Plaintiff's Section 1983 claims against NYS are frivolous for the additional reason that New York State is not

a "person" within the meaning of Section 1983. Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989) (State is not a "person" for the purpose of § 1983 claims); Zuckerman v. Appellate Div., Second Dep't Supreme Court, 421 F.2d 625, 626 (2d Cir. 1970) (Court not a "person" within the meaning of 42 U.S.C. § 1983). 4 Given that the Eleventh Amendment and judicial immunity divest this Court of subject matter jurisdiction, the

Court need not address the application of the Rooker-Feldman doctrine and declines to do so. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 See N.Y.Crim. Proc. Law § 170.55. This disposition cannot be obtained without the consent of both parties

and the court. Id. 2 Shortly after filing the complaint, plaintiff filed what he entitled a "Table of Contents" which outlines the dates

of the various court filings and dispositions that are at issue in his complaint. This Court will treat this Table of Contents as a document attached to the complaint and incorporated by reference in the complaint. Chance v. Armstrong, 143 F.3d 698, 698 n. 1 (2d Cir.1998) ("the court may consider facts set forth in exhibits attached as part of the complaint as well as those in the formal complaint itself"); see Cortec Industries, Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir.1991) ("the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference"). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Even if not precluded by judicial immunity, it seems clear that one or both of plaintiff's claims against

defendants Connerton and Seidon would be precluded by the Rooker–Feldman doctrine, which precludes a federal court from asserting subject matter jurisdiction over a claim that is inextricably intertwined with a state court judgment. See McKithen v. Brown, 481 F.3d 89, 96 (2d Cir.2007). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Prisoners are not exempt from paying the full filing fee even when they have been granted permission to

proceed in forma pauperis. See 28 U.S.C. § 1915(b)(1). 2 See also Zuckerman v. Appellate Div., Second

Dep't, Supreme Court, 421 F.2d 625, 626 (2d Cir. 1970)

(holding that a state court is not a "person" for the purpose of § 1983 liability). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 In addition to the instant natter, plaintiff has filed seven other actions in the Western and Northern Districts

of New York since 2001: Curto v. Town of Orchard Park, et al., 07-CV-255 (W.D.N.Y.); Curto v. Siwek, 06- CV-761 (W.D.N.Y.); Curto v. Bender, et al., 04-CV-26 (W.D.N.Y.); Curto v. Roth, 02-CV-1157 (N.D.N.Y.); Curto v. Edmundson, 01-CV-1824 (N.D.N.Y.); Curto v. Smith, 01-CV-1781 N.D.N.Y.); Curto v. Smith, 01- CV-1570 (N.D.N.Y.) 2 Plaintiff obtained waivers of service from defendants Phillip Marshall and the New York State Unified Court

System. (Docket No. 8). 3 Plaintiff indicates that the complaint filed by Palisades alleged that her address was "20 Hazel Court, West

Seneca, NY," the mailing address used by plaintiff in filing the instant lawsuit. She states that the action was dismissed by Buffalo City Court Judge Givens pursuant to § 213(a) and related provisions of the Uniform City Court Act, pursuant to which money actions may be filed in Buffalo City Court if plaintiff or defendant resides in Buffalo or, inter alia, a town contiguous to the city. Plaintiff asserts chat Judge Givens dismissed the action after taking judicial notice that the County of Erie's Internet Mapping Service indicated that plaintiff's address is in Orchard Park, not West Seneca, and that Orchard Park is not contiguous with Buffalo. (Amended Complaint ¶ 13).

4 Plaintiff is well-familiar with the nature and extent of judicial immunity, having had claims against New York

State judges dismissed in several previous actions. See, e.g., Curto v.Siwek, 06-CV-761S, 2007 U.S. Dist. LEXIS 60986, at *5-6 (W.D.N.Y. 2007) (Given plaintiff's knowledge, from the Court's dismissal of her previous action against Justice Burns, that New York State judges cannot be sued for judicial acts, her attempt to commence a very similar if not essentially identical lawsuit against Justice Burns' successor, Justice Siwek, can be properly regarded as frivolous within the meaning of 28 U.S.C. § 1915(e)(2)(B). Plaintiff is accordingly cautioned that the filing of any similarly frivolous actions against state judicial officers in the future may lead the Court to consider the imposition of appropriate sanctions."). 5 Indeed, Section 202 of the Uniform City Court Act provides that City Courts "shall have jurisdiction of actions

and proceedings for the recovery of money, actions and proceedings for the recovery of chattels and actions and proceedings for the foreclosure of liens on personal property where the amount sought to be recovered or the value of the property does not exceed fifteen thousand dollars exclusive of

interest and costs." 6 The Court notes that plaintiff's claims that Judge Marshall conspired with other defendants would also

warrant dismissal because of their entirely conclusory nature, See, e.g., Ciambriello v. County of Nassau, 292 F.3d 307, 325 (2d Cir. 2002) ("[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct.") (qoting Dwares v. City of N.Y., 985 F.2d 94, 100 (2d Cir. 1993)). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Berton Saint–Fleur purports to bring this suit on behalf of both himself and his minor son Jermaine Saint–Fleur.

(Cplt.¶ Ill.) However, as this Court noted in a previous report and recommendation in this case, "it is doubtful that Mr. Saint–Fleur, as the non-custodial parent and whose parental rights appear to have been stripped, has standing to assert claims on behalf of the children." (Dkt. No. 11: 1/24/00 Report & Recommendation at 2.) The Court at this time sua sponte recommends that all claims brought by Berton Saint–Fleur against all parties on behalf of Jermaine Saint–Fleur be dismissed. 2 This section summarizes the relevant allegations in plaintiff Saint–Fleur's complaint, without resort to such

phrases as "the complaint alleges." 3 See also, e.g., Port Authority Trans–Hudson Corp. v. Feeney, 495 U.S. 299, 304, 110 S.Ct. 1868, 1872

(1990) ("This Court has drawn upon principles of sovereign immunity to construe the [Eleventh] Amendment to 'establish that "an unconsenting State is immune from suits brought in federal courts by her own citizens as

well as by citizens of another state." " '); Papasan v. Allain, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939 (1986);

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S.Ct. 900, 908 (1984); Edelman v. Jordan, 415 U.S. 651, 662–63, 94 S.Ct. 1347, 1355 (1974) ("While the [Eleventh] Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought by her own citizens as well as by citizens of another State.") (citing cases). 4 See also, e.g., United States v. City of Yonkers, 96 F.3d 600, 619 (2d Cir.1996) (New York State Education

Department and State Board of Regents entitled to Eleventh Amendment immunity); Jackson v. Johnson, 985 F.Supp. 422, 426 (S.D.N.Y.1997) (Kaplan, D.J. & Peck, M.J.) (New York State Department of Correctional Services entitled to Eleventh Amendment immunity, citing cases). 5 See also, e.g., Mathis v. Clerk of the First Dep't, 631 F.Supp. 232, 234 (S.D.N.Y.1986) ("the Appellate Division,

a state court, is not amenable to suit under 42 U.S.C. § 1983 ... on the grounds that it is immune from suit by virtue of the Eleventh Amendment"); Richards v. State of New York, 597 F.Supp. 692, 693 (E.D.N.Y.1984) (New York Court of Appeals immune under Eleventh Amendment), aff'd mem., 767 F.2d 908 (2d Cir.1985), cert. denied, 474 U.S. 1066, 106 S.Ct. 820 (1986). 6 "On the other hand, a suit against a state official in his official capacity based on federal law and seeking

prospective injunctive relief is not barred by the Eleventh Amendment." Jackson v. Johnson, 30 F.Supp.2d at 618; accord, e.g., Dube v. State University of New York, 900 F.2d at 595; Russell v. Dunston, 896 F.2d 664, 667–68 (2d Cir.) , cert. denied, 498 U.S. 813, 111 S.Ct. 50 (1990); Minotti v. Lensink, 798 F.2d at 609 ("The amendment does not prevent federal courts from granting prospective injunctive relief against state officials on the basis of federal claims."); Dwyer v. Regan, 777 F.2d at 835–36; Lora v. Greifinger, 96 Civ. 0628, 1997 WL 102473 at *

3 (S.D.N.Y. Feb 27, 1997); Thomas v. Held, 941 F.Supp. 444, 447 (S.D.N.Y.1996). For the reasons discussed in Point II below, even if Saint–Fleur were to seek leave to amend to sue a State judge solely for injunctive relief, the claim would have to be dismissed. 7

See also, e.g., Burgos v. Department of Children & Families, No. 3:98CV874, 2000 WL 145737 at *

2 (D.Conn. Feb. 7, 2000); Adams v. Bosco, 98 Civ. 8737, 1999 WL 165691 at *

2 (S.D.N.Y. March 25, 1999); Casaburro v. Giuliani, 986 F.Supp. 176, 182 (S.D.N.Y.1997); Fields v. Walthers, No. 94–CV–1659, 1997 WL 204308 at *

2 (N.D.N.Y. April 15, 1997) (Pooler, D. J.); Daisernia v. State of New York, 582 F.Supp. 792, 796 (N.D.N.Y.1984) ("The Supreme Court has consistently held ... that § 1983 does not abrogate the eleventh amendment immunity of states."). 8 Saint–Fleur's brief opposing the State's motion states that "[a]lthough the judges' names are unknown,

plaintiff ... raised issues regarding '[t]he State of New York's appointed judges' being the guilty parties.... After the involved, unknown names are discovered, plaintiff, with leave from this court, will then amend the complaint to enter the names of the judges." (Saint–Fleur Br. at 5.) 9

See also, e.g., Sanchez–Preston v. Judge Luria, No. CV–96–2440, 1996 WL 738140 at *

4 (E.D.N.Y. Dec. 17, 1996); Fariello v. Campbell, 860 F.Supp. 54, 67–68 (E.D.N.Y.1994) ; Levine v. County of Westchester, 828 F.Supp. 238, 243 (S.D.N.Y.1993), aff'd mem., 22 F.2d 1090 (2d Cir.1994). 10

See also, e.g., Sanchez–Preston v. Judge Luria, 1996 WL 738140 at *

4; Fariello v. Campbell, 860 F.Supp. at 68; Levine v. County of Westchester, 828 F.Supp. at 243. 11

Accord, e.g., Pollack v. Nash, 58 F.Supp.2d 294, 303 (S.D.N.Y.1999); Jones v. Newman, 98 Civ. 7460,

1999 WL 493429 at *

6 (S.D.N.Y. June 30, 1999); Reisner v. Stoller, 51 F.Supp.2d 430, 442 (S.D.N.Y.1999); Amaker v. Coombe, 96 Civ. 1622, 1998 WL 637177 at *

3 (S.D.N.Y. Sept. 16, 1998); Carr v. Village of New York Mills, New York, No. CivA96CV0042, 1998 WL 187395 at *

2 (N.D.N.Y. April 15, 1998) (Pooler, D.J.); Sanchez–Preston v. Judge Luria, 1996 WL 738140 at *

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Footnotes 1 In their reply, Defendants make a universal argument that the motion to dismiss was not improper simply

because of the Court's previous decision in its Ruling & IRO. Reply at 1. In response to an IRO, Defendants “may respond by either filing an answer or a motion to dismiss....” Id. In response to the second amended Complaint, Defendants “have properly presented arguments focused on deficiencies in [Plaintiff's] allegations supposedly supporting his various legal claims.” Id. at 2. In their view, the motion to dismiss is proper. The Court agrees. 2 Mr. Morgan also alleges that Defendant Morin specifically prevented him “from contacting the State Police

by letter.” Compl. ¶ 86. Without more specific factual allegations, this claim fails. 3 While there appears to be limited precedent in the Second Circuit on whether psychological harm suffices

as an “injury” for deliberate indifference requirements, other Circuits, however, have recognized that conduct which creates a substantial risk of psychological harm can violate the Eighth Amendment. See Colbruno v. Kessler, 928 F.3d 1155, 1162 (10th Cir. 2019) (“We have held that psychological harm, as well as physical injury, can implicate the Eighth Amendment.” (citations omitted)); Porter v. Clarke, 923 F.3d 348, 353 (4th Cir. 2019) (affirming district court's determination that long-term detention in conditions akin to solitary confinement “created a ‘substantial risk’ of psychological and emotional harm and that [ ] [d]efendants were ‘deliberately indifferent’ to that risk’ ”); Gray v. Hardy, 826 F.3d 1000, 1008 (7th Cir. 2016) (“Evidence that the warden ‘must have known’ about the risk of physical or psychological harm resulting from the unsanitary conditions is sufficient for a jury to find deliberate indifference.”); Jordan v. Gardner, 986 F.2d 1521, 1530 (9th Cir. 1993) (plaintiff-inmates established an Eighth Amendment violation as “[t]he record more than adequately supports the district court's finding of psychological harm, and the harm is sufficient to meet the constitutional minimum”). 4 The Court has included a page number reference to the Second Amended Complaint

because each claim

begins at paragraph 85 and thus creates duplicative numbering. 5 Although Defendants move to dismiss claims against Defendant Conger, they fail to make any arguments

specific to Defendant Conger's actions.

6 The Court also notes that the cell search cannot be the basis of a First Amendment retaliation claim. See

Davis v. Collado, 2018 WL 4757966, at *12 (S.D.N.Y. Sept. 30, 2018) (finding retaliatory cell searches do not violate the Constitution or support a federal claim). 7 While "the loss of a prisoner's constitutional right against unreasonable searches 'is occasioned only by the

legitimate needs of institutional security," that claim is properly brought as a harassment claim. Willis, 301 F.3d at 67 (emphasis in the original) (quoting U.S. v. Cohen, 796 F.2d 20, 23 (2d Cir. 1986)). The Court has already dismissed Mr. Morgan's harassment claim. Ruling & IRO at 17–18; Order on Mot. to Reconsider. 8 Conn. Gen. Stat. § 4-165b provides: "[a]ny inmate ... who suffers an injury may file a claim against the state."

Conn. Gen. Stat.§ 4-165b(a). It requires an inmate to first exhaust administrative remedies before going to the claims commissioner and requires an inmate to present their claim within a year of exhausting all administrative remedies. Conn. Gen. Stat. § 4-165b(b). 9 The parties collapsed their arguments regarding Mr. Morgan's intentional infliction of emotional distress claim

within their arguments regarding supervisory liability. The Court chooses to analyze this claim distinctly from the other instances of supervisory liability. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Doc. #16 at 2. 2 Doc. #17. 3 Doc. #16 at 2–3. 4 See Pettaway v. Nat'l Recovery Sols., LLC, 955 F.3d 299, 303 (2d Cir. 2020) ("an amended pleading ordinarily

supersedes the original and renders it of no legal effect") (internal quotation marks and citation omitted); see also Doc. #15 (noting that the amended complaint is "the operative complaint in this action"). 5 Doc. #16 at 14 (¶¶ 28–29). 6 Id. at 9 (¶¶ 1–2). 7 Id. at 16 (¶ 41); see Doc. #117, Mitchell v. Martin, No. KNL-CV21-5022320-S (Conn. Super. Ct. 2022). 8 Doc. #16 at 15 (¶¶ 33, 35). 9 Id. at 16 (¶ 44).

10 Id. at 16 (¶ 45). 11 Id. at 17 (¶ 46). 12 Id. at 17 (¶ 47). 13 Id. at 17 (¶¶ 49–50). 14 Id. at 17 (¶ 51). In September 2023, Calderone told Mitchell "that she brought all of [Mitchell's] request

responses to the mail room and does not know what happened after that." Id. at 18 (¶ 55). 15 Id. at 17

(¶ 52), 18 (54). 16 Id. at 17–18 (¶ 53); see Doc. #113, Mitchell v. Spotten, No. KNL-CV21-5022520-S (Conn. Super. Ct. 2022).

Mitchell concedes that Calderone was not a party to that suit. Doc. #16 at 18 (¶ 55). 17 Doc. #16 at 11 (¶ 15), 12 (¶ 20). 18 Id. at 12 (¶ 24), 14 (¶ 26). 19 Ibid. 20 Id. at 11 (¶ 12). 21 Id. at 11 (¶ 13). 22 Ibid. 23 Id. at 18 (¶ 57). The Court understands that the "a/p area" refers to the Admitting and Processing area of

Corrigan. See Granger v. Santiago, 2021 WL 4133752, at *1 (D. Conn. 2021) (noting that strip searches at Corrigan occur in the Admitting and Processing ("AP") area). 24 Doc. #16 at 19 (¶ 58). 25 Id. at 19 (¶ 59). 26 Id. at 19 (¶ 61). 27 Id. at 19 (¶ 63). 28 Id. at 21 (¶¶66, 70) 29 Id. at 21 (¶¶ 65, 68, 70). 30 Id. at 23 (¶¶ 74–75). The Court understands that "PREA" stands for the Prison Rape Elimination Act, 42

U.S.C. §§ 15601– 15609, which was "the first federal law to address the sexual abuse of prisoners." Crawford v. Cuomo, 796 F.3d 252, 260 (2d Cir. 2015). 31 Doc. #16 at 23 (¶ 76). 32 Id. at 23 (¶ 77). Mitchell does not allege that the state constitution affords him any greater protection than the

federal constitution. "Consistent with the Connecticut appellate court's policy regarding unaddressed claims under the Connecticut Constitution, the Court concludes that [Mitchell's] state constitutional rights are co- extensive with his federal constitutional rights in this circumstance." Cozayatl Sampedro v. Schriro, 377 F. Supp. 3d 133, 144 n.6 (D. Conn. 2019) (citing Perez v. Comm'r of Corr., 326 Conn. 357, 383 (2017)).

33 Doc. #16 at 25 (¶ 81). 34 Id. at 23 (¶ 78). 35 Id. at 25 (¶ 79). 36 Id. at 25 (¶ 80). 37 Id. at 25 (¶ 82). 38 Id. at 11 (¶¶ 14, 17). 39 Unless otherwise indicated, this order omits internal quotation marks, alterations, citations, and footnotes in

text quoted from court decisions. 40 Id. at 16 (¶ 41), 17–18 (¶ 53). 41 Mitchell does not bring an explicit retaliation claim against Calderone. To the extent, however, that Mitchell

intended to lodge a retaliation claim against all defendants, such a claim against Calderone would fail for the same reasons as the retaliation claim against Czikowsky. 42 Doc. #16 at 11 (¶ 12). 43 Id. at 11 (¶ 13). 44 See id. at 23 (¶ 76). 45 Id. at 21 (¶ 68). 46 Id. at 25 (¶ 82). 47 Id. at 21 (¶¶ 65–66, 68, 70). Mitchell alleges that his cellmate tested positive for drugs pursuant to the

investigation. Id. at 21 (¶ 70). 48 Id. at 12 (¶ 20). 49 Id. at 12 (¶ 24), 14 (¶ 26). 50 See id. at 12 (¶ 25). 51 Id. at 12 (¶ 24), 14 (¶ 26). 52 Id. at 17 (¶ 50). 53 See, e.g., id. at 18 (¶ 54). 54 See id. at 16 (¶¶ 39, 42), 17 (¶ 52), 23 (¶ 75).

Footnotes 1 Doc. #1 at 1–2. 2 Id. at 2. 3 Ibid. 4 Id. at 1, 3. 5 Id. at 3. 6 Unless otherwise indicated, this order omits internal quotation marks, alterations, citations, and footnotes in

text quoted from court decisions. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The court must interpret pro se complaints to raise the strongest arguments they suggest. Soto v. Walker,

44 F.3d 169, 173 (2d Cir. 1995) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). 2 Plaintiff is advised that service of process cannot be effected on a "John Doe" defendant. In the event Plaintiff

wishes to pursue his claims against a "Doe" defendant, Plaintiff shall take reasonable steps to ascertain his identity. Plaintiff may seek to determine the identity of the "Doe" defendant through discovery. When Plaintiff determines the identity of "John Doe" defendant, Plaintiff may seek to amend his pleading to add the properly named Defendant pursuant to Federal Rule of Civil Procedure 15(a). Plaintiff is further advised that if an unnamed individual is not timely served, the action may be dismissed against that individual. See Cassidy v. Madoff, 18-CV-0394, 2020 WL 554529, at *4 n.7 (N.D.N.Y. Feb. 4, 2020) (Sannes, J.) (advising the plaintiff that (1) service cannot be effected on a "Doe" defendant, (2) he may determine the identity of "Doe" defendants through discovery, and (3) if the "Doe" defendants are not timely served, the action may be dismissed against them). 3 The language of that section is ambiguous because it suggests an intent to limit availability of IFP status to

prison inmates. See 28 U.S.C. § 1915(a)(1) (authorizing the commencement of an action without prepayment of fees "by a person who submits an affidavit that includes a statement of all assets such prisoner possesses"). The courts have construed that section, however, as making IFP status available to any litigant who can meet the governing financial criteria. Hayes v. United States, 71 Fed. Cl. 366, 367 (Fed. Cl. 2006); Fridman v. City of N.Y., 195 F. Supp. 2d 534, 536 n.1 (S.D.N.Y. 2002). 4 It is unclear to the Court how Plaintiff survives with no income and no monthly expenses. (Compare Dkt. No.

7 at ¶¶ 3-5, with Dkt. No. 7 at ¶¶ 6-7.) However, based on Plaintiff's sworn declaration, he certainly qualifies for in forma pauperis status. 5 Plaintiff is reminded that, although the application to proceed in forma pauperis has been granted, he will still

be required to pay fees that he may incur in this action, including copying and/or witness fees. 6 An arrestee's § 1983 claims premised on alleged false arrest or false imprisonment are governed by the

Fourth Amendment, rather than substantive due process principles under the Fourteenth Amendment. Jackson ex rel. Jackson v. Suffolk Cnty., 87 F. Supp. 3d 386, 399 (E.D.N.Y. 2015). As a result, I considered Plaintiff's false arrest claims pursuant to the Fourth Amendment. 7 See also Carris v. First Student, Inc., 132 F. Supp. 3d 321, 340-41 n.1 (N.D.N.Y. 2015) (Suddaby, C.J.)

(explaining that the standard set forth in Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 796 (2d Cir.

1999)— that the Court should grant leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would be successful in stating a claim"—is likely not an accurate recitation of the governing law after Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)), rev'd on other grounds, 682 F. App'x 30. 8 If you are proceeding pro se and served with this report, recommendation, and order by mail, three additional

days will be added to the fourteen-day period, meaning that you have seventeen days from the date that the report, recommendation, and order was mailed to you to serve and file objections. Fed. R. Civ. P. 6(d). If the

last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended

until the end of the next day that is not a Saturday, Sunday, or legal holiday. Fed. R. Civ. P. 6(a)(1)(C). 9 The Clerk shall also provide Plaintiff with copies of all unreported decisions cited herein in accordance with

Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009) (per curiam). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 The defendants have failed to make a proper motion addressing their statute of limitations defense. Therefore,

the Court has determined not to analyze that defense in this writing. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

P's Motion in Limine

225 P's Memo

225–1 Ds' Responses

251, 261 P's Reply

267 (268) Serafini

Killiany

Guerrera D's SJ

217

218

220 D's 56(a)(1)

217–1

219

222 D's Memo

217–2

219–8

221 P's 56(a)(2)

226

229

232–1 P's Cross–SJ

227

230

233 P's 56(a)(1)

227–1

230–1

233–1 (232) P's Memo/Response

236 (239)

235 (238)

237 (240) D's Response/Reply

256

258 (260)

252 (253) D's 56(a)(2)

257

259

266 (254) P's Reply

270

271

269

Footnotes 1 The filings that pertain to the pending motions are voluminous. See Appendix of Filings by ECF Number. 2 The court is mindful that "in the usual case in which all federal-law claims are eliminated before trial, the

balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie–Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720, (1988), quoted in Valencia ex rel. Franco v. Lee, 316 F.3d 299, 305 (2d Cir.2003). Here, considerations of economy, convenience and fairness militate in favor of supplemental jurisdiction. Discovery is complete, and all issues are ripe for adjudication. The court has decided a motion for default judgment and two motions to dismiss, one of which was relitigated in an interlocutory appeal and motion to vacate. Plaintiff also filed a prior motion for summary judgment, which the court denied as moot. There are no novel questions of state law. See, e.g., Raucci v. Town of Rotterdam, 902 F.2d 1050, 1055 (2d Cir.1990) (exercising supplemental jurisdiction where discovery was complete; the court had decided three dispositive motions; the case was trial-ready; and the state-law claims involved only settled principles). 3 Plaintiff alleges that after he left Kmart, he attempted to return the wallet at a condominium address listed on

Hebert's driver's license. No one answered the door, so plaintiff left a note with his sister's phone number. On his way home, his sister informed him that the resident of the condominium had called to say that he had not lost a wallet. Plaintiff's relative then telephoned the Winchester Police Department and reported that plaintiff had found Hebert's wallet. The duty officer told them to take the wallet to the Torrington Police Department. (Second Am. Compl., doc. # 137 at 4–5.) 4 Campos

testified that she gave plaintiff a continuance date of January 5, 2007. (Campos Dep. at 150–53).

Plaintiff disputes that testimony. 5 Sometimes when a defendant missed a court appearance, judges at the Bantam courthouse ordered a

warning to be mailed (called a bail notice) in lieu of immediate rearrest. (Campos Dep. at 54–56.) Plaintiff alleges that Attorney Wittstein advocated for rearrest and substantial bond in this case at Killiany's behest. 6 Killiany was often in court because it was her duty to make recommendations to the court during arraignment

proceedings on domestic violence charges. (Killiany Dep. at 5–7; Pl.'s 56(a)(1), doc. # 230–1 at ¶ 1.) 7 The full inventory of evidence was two Kmart receipts and one surveillance video. The receipts were

destroyed pursuant to a state court order because they were not claimed after six months. (Docs.# 225–6, # 225–9, # 251–3.) 8 The Connecticut Supreme Court has articulated the elements of these claims as follows. To prevail on a claim

of false arrest, a plaintiff must prove that "his physical liberty has been restrained by the defendant and that the restraint was against his will, that is, that he did not consent to the restraint or acquiesce in it willingly." Berry v. Loiseau, 223 Conn. 786, 820, 614 A.2d 414 (1992). With respect to malicious prosecution, a plaintiff must prove that: "(1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice." McHale v. W.B.S. Corp., 187 Conn. 444, 447, 446 A.2d 815 (1982). 9 Officer Guerrera urges the court to apply the doctrine of collateral estoppel to bar plaintiff from challenging

probable cause, an issue that the state court addressed in the criminal case. Plaintiff responds that collateral estoppel should not apply because he did not receive a full and fair hearing in the Superior Court. (Pl's Mem.,

doc. # 237 at 35–36.) Because the court finds that Officer Guerrera had probable cause, it need not reach

collateral estoppel. 10 "A person commits larceny when, with intent to deprive another of property or to appropriate the same to

himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to: ... (4) Acquiring property lost, mislaid or delivered by mistake. A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient is

guilty of larceny if, with purpose to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to it." Conn. Gen.Stat. § 53a–119 . "A person is guilty of larceny in the sixth degree when he commits larceny as defined in section 53a–119 and the value of the property or service is five hundred dollars or less." Conn. Gen.Stat. § 53a–125b . 11 After Officer Guerrera brought the surveillance video to the police station, another police officer misidentified

the man on the video as a transient named "Weston." That officer then went out looking for Weston. (Guida Dep. at 49–60.) Plaintiff appears to argue that he was arrested on the basis of his resemblance to Weston and/or because he is "a dark-skinned Hispanic." (Pl.'s Mem., doc. # 237 at 11–12, 28–29.) The argument is unpersuasive in light of the facts known to Officer Guerrera at the time of plaintiff's arrest. 12 Besides his Fourth Amendment allegations, plaintiff contends that Officer Guerrera violated his "Fifth and

Sixth [A]mendment guarantees against self-incrimination and right to counsel." (Pl.'s Mem., doc. # 237 at 18.) Because he supplies no evidence or argument to substantiate the contentions, the court does not address them. Plaintiff also argues that procedural deficiencies in the April 17, 2007 court proceeding deprived him of his right to confront witnesses under the Sixth Amendment. (Id. at 37, 446 A.2d 815.) This is a futile argument. The state court, not Officer Guerrera, decided how the criminal case would proceed. 13 Plaintiff testified that "another policeman came, a younger guy. He cuffed me, and took me to the

back." (Garcia Dep. at 80.) Officer Guerrera testified that he could not recall who processed the arrest. (Guerrera Dep. at 38–39.) In deposition testimony, a different police officer inferred from the paperwork that he (not Guerrera) had booked plaintiff but could not recall handcuffing him. (Guida Dep. at 62–64.) 14 Plaintiff alleges without further explanation that Killiany was acting under color of state law. Although Killiany

was a state employee, "mere employment by the state does not mean that the employee's every act can properly be characterized as state action." Patterson v. County of Oneida, N.Y., 375 F.3d 206, 230 (2d Cir.2004) (citing West v. Atkins, 487 U.S. 42, 49–50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) ("generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law")). Alternatively, a private individual may be deemed a state actor for § 1983 purposes "if he or she willfully collaborated with an official state actor in the deprivation of the federal right." Dwares v. City of New York, 985 F.2d 94, 98 (2d Cir.1993); see also Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 316 (2d Cir.2007) (private actor "must jointly participate in the wrongful conduct, pursuant to a common design or plan"); Shattuck v. Town of Stratford, 233 F.Supp.2d 301, 313 (D.Conn.2002) (private actor may be liable for § 1983 false arrest or malicious prosecution if she instigated the arrest or commenced the proceedings). Because the claim fails on other grounds, the court need not linger on this issue. 15 See elements of false arrest and malicious prosecution supra at n. 8. 16 In Counts Four and Eight, plaintiff appears to allege that Killiany is responsible for the fact that he was not

informed on December 4, 2006 of an indigent's Sixth Amendment right to appointed counsel. (Second Am. Compl., doc. # 137 at ¶¶ 19B, 36, 54.) Because he supplies no evidence or argument to substantiate the contentions, the court does not address it.

17 In his brief, plaintiff also claims that he was defamed by the mention of his rearrest in the newspaper's police

blotter (doc. # 234–8) and by Killiany's statements in the victim letter in his court file (doc. # 230–5). These claims were not alleged in the complaint (doc. # 137) and cannot be raised for the first time on summary judgment. Regardless, Killiany is not liable for the newspaper's statement because she did not make it. Nor for that matter could any party be liable for publishing the fact of plaintiff's rearrest. Holmes v. Town of East Lyme, 866 F.Supp.2d 108, 133 (D.Conn.2012) ("truth is a complete defense to a claim of defamation"). As for Killiany's contributions to the victim letter, those statements are privileged from a claim of defamation because they were made for the purpose of marshaling the state's evidence for a judicial proceeding. See Rioux v. Barry, 283 Conn. 338, 343, 927 A.2d 304 (2007) (public policy justifies immunity from defamation suit for "those who provide information in connection with judicial and quasi-judicial proceedings"); Kelley v. Bonney, 221 Conn. 549, 572–74, 606 A.2d 693 (1992) (communications made to discrete group for purpose of marshaling evidence for quasi-judicial proceeding were privileged from defamation suit). 18 The Second Circuit affirmed this court's dismissal of plaintiff's claims against the state's attorneys on the

basis of absolute prosecutorial immunity but noted that it was "disturbed by the allegations of prosecutorial conduct" and described the practices as "if not unconstitutional, likely illegal and certainly improper." Garcia v. Hebert, No. 09–1615–CV, 352 Fed. Appx. 602 (unpublished), 2009 WL 3765549 (2d Cir. Nov.12, 2009) . 19 See elements of false arrest and malicious prosecution supra at n. 8. To prevail on a claim of abuse of

process, a plaintiff must prove that the defendant used a legal process against another primarily to accomplish a purpose for which it was not designed. Mozzochi v. Beck, 204 Conn. 490, 494, 529 A.2d 171 (1987). 20 Whether quasi-judicial immunity attaches under the functional approach may be determined by the so-called

Cleavinger factors: (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal. Cleavinger v. Saxner, 474 U.S. 193, 202, 106 S.Ct. 496, 88 L.Ed.2d 507 (1985), cited in Gross v. Rell ("Gross II"), 695 F.3d 211 (2d Cir.2012). 21 By contrast, court officers are not entitled to quasi-judicial immunity when they perform "purely ministerial and

administrative" tasks that are non-judicial in nature or when they act outside the scope of her official

duties. Quitoriano v. Raff & Becker, LLP, 675 F.Supp.2d 444, 450 (S.D.N.Y.2009). See, e.g., Forrester v. White, 484 U.S. 219, 229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) (judge not entitled to absolute immunity for decision to demote and fire probation officer); Atherton v. D.C. Office of Mayor, 567 F.3d 672, 683–86 (D.C.Cir.2009) (court officer's dismissal of allegedly disruptive grand juror was administrative, not adjudicative, and not subject to absolute quasi-judicial immunity). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 See Doc. #18. 2 Id. at 3 (¶¶ 6–7).

3 Id. at 8 (¶¶ 20, 22).

4 Ibid. (¶ 25). 5 Id. at 8–11 (¶¶ 25–30, 34). 6 Id. at 10 (¶ 33). Leftridge does not specify the name of the Assistant Attorney General. 7 Id. at 39 (¶ 153). 8 Id. at 11 (¶ 35). 9 Id. at 12–13 (¶¶ 41–42). 10 Id. at 12 (¶¶ 38–39). 11 Ibid. (¶ 40). Leftridge does not specify the name of the Hartford Interstate Support Enforcement Supervisor. 12 Id. at 13 (¶ 43). 13 Id. at 12–15 (¶¶ 38–50). 14 Id. at 16 (¶¶ 55–57). 15 Id. at 18 (¶ 64). 16 Ibid. (¶ 64). 17 Id. at 21–22 (¶¶ 81–85). 18 Id. at 22 (¶¶ 87–88). 19 Id. at 25–27 (¶¶ 98, 102–03), 36 (¶ 141). 20 Id. at 56 (¶ 219). 21 Id. at 28–29 (¶¶ 109, 111). 22 Id. at 38 (¶ 150). 23 Id. at 29–30 (¶¶ 113, 118), 32 (¶ 124). 24 Id. at 32–36 (¶¶ 125–31, 137–39), 50–55 (¶¶ 191–204, 210, 212–17). 25 Id. at 34 (¶ 133), 40 (¶¶ 156–58), 53–54 (¶¶ 205, 207, 211), 56 (¶ 218). 26 Id. at 34 (¶ 132). 27 Id. at 34–35 (¶ 134), 37 (¶ 144). 28 Id. at 41–42 (¶¶ 162–64). 29 Id. at 44–45 (¶¶ 170–72). 30 Id. at 45 (¶¶ 173–74).

31 Id. at 47–48 (¶ 181).

32 Id. at 48 (¶ 182). 33 Id. at 1; see id. at 3–7 (¶¶ 9–19) (defendants' full names and positions); id. at 61–94 (¶¶ 237–361) (causes

of action). 34 Id. at 1. 35 Id. at 61 (¶¶ 237–39), 75–80 (¶¶ 285–304). 36 Id. at 61 (¶¶ 240–42). 37 Id. at 61–62 (¶¶ 243–45). 38 Id. at 62–63 (¶¶ 246–48). 39 Id. at 63–64 (¶¶ 249–51). 40 Id. at 64–67 (¶¶ 252–54). 41 Id. at 67–68 (¶¶ 255–57). 42 Id. at 68 (¶¶ 258–60). 43 Id. at 68–69 (¶¶ 261–63). 44 Id. at 69–70 (¶¶ 264–66), 72–73 (¶¶ 273–75). Count Ten also alleges that the defendants violated the

ADA, the Civil Rights Act of 1964, and the Connecticut Fair Employment Practices Act—allegations that are duplicative of the allegations in Counts Four and Five. 45 Id. at 70–71 (¶¶ 267–69). 46 Id. at 71–72 (¶¶ 270–72). 47 Id. at 73 (¶¶ 276–78). 48 Id. at 73–74 (¶¶ 279–81). 49 Id. at 74–75 (¶¶ 282–84). 50 Id. at 79–80 (¶¶ 297–304). Count Eighteen also alleges that the defendants deprived him of his Fourteenth

Amendment due process rights as enforceable under 42 U.S.C. § 1983—an allegation that is duplicative of the allegations in Counts One, Three, and Seventeen. 51 Id. at 80–82 (¶¶ 305–12). 52 Id. at 82–83 (¶¶ 313–19). 53 Id. at 83–89 (¶¶ 320–40). Count Twenty-One also mentions policies of three additional agencies—the

Maryland Department of Human Services, Montgomery Count Office; the Office of the Connecticut Attorney General; and the Connecticut Interstate Government UIFSA Department—but the complaint does not name these agencies as defendants. See ibid. 54 Id. at 89–91 (¶¶ 341–46).

55 Id. at 91 (¶¶ 347–49).

56 Id. at 91–92 (¶¶ 350–54). 57 Id. at 92–93 (¶¶ 355–57). 58 Id. at 93–94 (¶¶ 358–61). 59 Id. at 94–96. 60 Doc. #81; Doc. #123. 61 Unless otherwise indicated, this order omits internal quotation marks, alterations, citations, and footnotes in

text quoted from court decisions. 62 Doc. #18 at 95–96. 63 Id. at 95 (¶ 8). 64 Doc. #81-1 at 8–9; Doc. #123-1 at 15–16. 65 Doc. #81-1 at 8–9. 66 To the extent Leftridge alleges that the defendants violated Title III of the ADA, Leftridge fails to state a claim

because "Title III is not applicable to public entities." Morales v. New York, 22 F. Supp. 3d 256, 266–67 (S.D.N.Y. 2014) (citing cases). 67 Doc. #18 at 63–64 (¶ 250). Leftridge does not explain what acts the defendants took that violate the RA, but

the Court takes them to be the same as those acts that Leftridge alleges violated the ADA. Cf. Paystrup v. Benson, 2015 WL 506682, at *11 (D. Utah 2015) (assuming plaintiff's RA claim to be "based on the same actions as the ADA claims" where it was unclear which of defendants' actions were alleged to violate the RA). 68 Doc. #81 at 10–22, Doc. #123 at 9–15, 17–22. 69 Doc. #123 at 11–14. 70 Doc. #123-3 at 1–2 (¶¶ 1–2, 5). 71 See Doc. #18-1 at 1, 7; Doc. #137 at 9 (Leftridge's opposition to defendants' motion to dismiss stating that

"[t]he plaintiff[ ] ... live[s] in the State of Maryland"). 72 Doc. #18 at 58 (¶¶ 225–26). 73 Doc. #137 at 9.

Footnotes 1 The Order also denied Plaintiff's Motion for Order to Show Cause seeking an order: (1) directing Defendants

to show cause "why a preliminary injunction should not issue" enjoining "them from denying the Plaintiff access to the Records in his Case, County Court Ind. No. 308C-2020 and falsifying documents in the past and in the future," and (2) requesting Defendants temporarily be ordered to "restrain[ ] from commiting [sic] crimes including concealment of Records and falsifying documents." (Order at 1-2 (citing OSC Motion, ECF. No. 4, and Pl.'s Support Aff., ECF No. 4-1).) The Court ruled on Plaintiff's OSC Motion to the extent it sought a temporary restraining order ("TRO") and held in abeyance any determination regarding Plaintiff's request for a preliminary injunction pending its initial screening of Plaintiff's Complaint pursuant to 28 U.S.C. § 1915A. (See Order at 2 n.1.) 2 Notably, the Sentencing Transcript filed by Plaintiff as Exhibit 18 to his Complaint (see ECF No. 7-4 at 2)

reflects that the Court Reporter's sur-name is "Connors" rather than "Conner". For consistency with Plaintiff's Complaint, the Court will use "Conner" in this Memorandum and Order. 3 The Court presumes familiarity with Plaintiff's underlying state court criminal action, but notes that according

to the information maintained by the New York State Office of Court Administration on its public website, in Suffolk County Court, Criminal Term, Case No. 00308C-2020, on July 18, 2022, Plaintiff was convicted by a jury on a multi-count indictment including Operating as a Major Trafficker, a class A-1 felony, and Conspiracy in the Second Degree, a class B felony. See https://iapps.courts.state.ny.us/webcrim (last visited on Sept. 16, 2022). In sum, Plaintiff challenges his arrest and conviction, asserting that he was illegally apprehended, and then convicted, based upon cellphone "ping data" collected without a warrant; he also maintains that evidence used against him at trial was illegally obtained via a warrantless search of his apartment. (See Sept. 23, 2022 Sent'g Hr'g Tr., ECF No. 7-4, at ECF pp. 81-87; see also Compl. at ECF pp. 16-17, 19.) 4 Although "[t]he doctrine of judicial immunity does not shield judges from claims for prospective declaratory

relief," Krupp v. Todd, No. 14-CV-0525, 2014 WL 4165634, at *4 (N.D.N.Y. Aug. 19, 2014), "[a]bsolute judicial immunity bars declaratory judgment claims that are retrospective in nature in that they seek a declaration that a judge's past behavior has violated the Constitution." Leathersich v. Cohen, No. 18-CV-6363, 2018 WL 3537073, at *4 (W.D.N.Y. July 23, 2018) (internal quotation omitted) (citing cases); see also Moore v. City

of N.Y., No. 12-CV-4206, 2012 WL 3704679, at *2 (E.D.N.Y. Aug. 27, 2012) ("Judicial immunity also bars ...

claims for retrospective declaratory relief."). A review of the Complaint makes clear that it is targeted at Judge Collins's conduct in Plaintiff's concluded state court action. (See Compl., ECF No. 1, in toto.) Indeed, Plaintiff seeks not to vindicate some prospective right, but a declaration that Judge Collins's prior judicial actions were erroneous. Given that Plaintiff seeks retrospective relief, such claims are barred. Montesano v. New York, Nos. 05-CV-9574, 05-CV-10624, 2006 WL 944285, at *4 (S.D.N.Y. Apr. 12, 2006) (neither "injunctive nor declaratory relief is available to be used as a vehicle for disgruntled litigants to reverse adverse judgments") (citing Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005)). 5 Although Plaintiff alleges Tropea is the Clerk of the Court, County Court of Suffolk County (see ECF No. 1 at 2),

the information maintained by the New York State Office of Court Administration on its public website reflects that Tropea is the Chief Clerk of that court. See https://ww2.nycourts.gov/courts/10jd/suffolk/county.shtml (last visited on June 16, 2023). 6 Similarly, given that Judge Collins is also a New York state employee, he too is shielded from liability in

his official capacity by the Eleventh Amendment. See Silvels v. New York, 81 F. App'x 361, 362 (2d Cir. 2003) (affirming dismissal of Section 1983 claims sua sponte pursuant to 28 U.S.C. §

1915(e)(2)(B)(ii) on the grounds of judicial and Eleventh Amendment immunity). Moreover, given Conner's apparent employment by the New York State Office of Court Administration as an Official Senior Court Reporter, she too would be shieled from liability in her official capacity by the Eleventh Amendment. However, the Court need not reach that question for the reasons that follow. 7 Insofar as Plaintiff complains that the alleged transcript errors prejudice an appeal of his conviction, such facts

may form the basis of a proper Section 1983 claim at the appropriate time. A criminal defendant possesses a due process right to a "substantially accurate" transcript in a criminal proceeding. Argentieri v. Majerowicz, 158 F. App'x 306, 307 (2d Cir. 2005) (summary order). However, "[m]ore than an inaccurate transcript is necessary to state a claim, [ ] [and] a [p]laintiff must also show that the alleged inaccuracies adversely affected the outcome of her proceedings." Wilson v. Richards, No. 14-CV-2459, 2014 WL 6682579, at *2 (S.D.N.Y. Nov. 25, 2014) (citing Tedford v. Hepting, 990 F.2d 745, 748 (3d Cir. 1993) (internal quotation marks omitted); also citing Argentieri, 158 F. App'x at 308 (affirming summary judgment for defendant because plaintiff was not "deprived in any way of his access to courts or right to an effective appeal")). Any such claim is premature at this juncture given that the appeal filed by Plaintiff is not yet perfected. See People v. Braithwaite, No. 2022-09001, May 5, 2023 Decision and Order (N.Y. App. Div., 2d Dep't 2023) (granting Braithwaite leave to prosecute the appeal as a poor person, assigning appellate counsel, and granting extension to perfect appeal). In turn, any related claim of prejudice is currently speculative, making it implausible. See Burrell, 558 F. Supp. at 92 ("[I]f a state official intentionally alters a transcript in a way that prejudices a defendant's appeal, the due process clause of the fourteenth amendment might be violated.... To prove such a violation plaintiff would have to show ... the existence of intentional tampering; then, he would have to prove the alleged errors and omissions in the trial transcript prejudice his statutory right to appeal." (citations omitted)); Godfrey v. Irvin, 871 F. Supp. 577, 584 (W.D.N.Y. 1994) ("In order to demonstrate denial of a fair appeal, [plaintiff] must show prejudice resulting from the missing or incomplete transcript."). Thus, any substantive due process claim is not plausible given the absence of any allegation that Plaintiff suffered "some tangible harm." Curro v. Watson, 884 F. Supp. 708, 720 (E.D.N.Y. 1995), aff'd, 100 F.3d 942 (2d Cir. 1996); see also Collins, 438 F. Supp. 2d 399, 415–16 (2d Cir. 2006) (plaintiff alleging violation of right to access to the courts must allege an "actual injury"). Upon careful review of the Complaint, Plaintiff has not alleged any tangible harm. (See Compl., in toto.) Plaintiff does not allege that he was not successful in his Article 78 proceedings. Even if he was unsuccessful in those proceedings, he does not allege that any such failure stemmed from the transcriptions. Compare Collins, 438 F. Supp. 2d at 417 (prisoner adequately alleged tangible harm where he alleged that his Article 78 proceeding was dismissed when prison officials failed to provide him with necessary

copies of documents). 8 Plaintiff's allegation that the transcript was deliberately tampered with does not save his procedural due

process claim because the state provides adequate post-deprivation remedies. See Curro, 884 F. Supp.

at 717–19 (prisoner who alleged that court reporters deliberately altered the transcript of his criminal trial did not state procedural due process claim because New York provides a procedure for challenging inaccuracies in trial transcripts). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff sometimes lists this defendant's last name as "Bowmen." 2 Plaintiff writes using irregular capitalization. For readability, the Court uses standard capitalization when

quoting from the complaint. The Court otherwise quotes from the complaint verbatim and all grammar, spelling and punctuation are as in the original. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Further, the complaint fails to plead facts showing why the Court would have personal jurisdiction over any

of the defendants. See Fed. R. Civ. P. 8(a)(1) (requiring allegations showing that the court has jurisdiction); Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp., 619 F.3d 207, 213 (2d Cir. 2010) (where defendants have not appeared in a case, the court may dismiss a case sua sponte for lack of personal jurisdiction). 2 While the statute of limitations is an affirmative defense, the Court may consider it upon the filing of the

complaint if "it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law." Staehr v. Hartford Fin. Servs. Grp., 547 F.3d 406, 425 (2d Cir. 2008). Further, while the statute of limitations may be avoided where equitable tolling or other tolling doctrines apply, in this case the inapplicability of such doctrines is apparent because Ms. Chmura pleads no facts demonstrating that she was reasonably diligent in pursuing her claims and that extraordinary circumstances prevented her from filing her complaint within the limitations period. See Walker v. Jastremski, 430 F.3d 560, 564 (2d Cir. 2005). The facts alleged indicate not only that she knew of the cause of action but that she was actively litigating related claims in another forum at a time that is well beyond the statute of

limitations. Ms. Chmura asserts a "fraud upon the court" but pleads no facts alleging "fraudulent concealment

of the existence of a cause of action," as required for equitable tolling on the basis of "fraud." See Pearl v. City of Long Beach, 296 F.3d 76, 84 (2d Cir. 2002). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Under the Rooker–Feldman doctrine, cases "brought by [a] state-court loser[ ] 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" are barred in federal courts, which lack subject-matter jurisdiction over such actions. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Plaintiff filed an Addendum to his Complaint which is a copy of the handwritten pages appended to the

Complaint. The only change is a correction to the date the incident occurred. 2 Miranda v. Arizona, 384 U.S. 436 (1966). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

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Complaint. The only change is a correction to the date the incident occurred. 2 Miranda v. Arizona, 384 U.S. 436 (1966). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Defendants also point out that there is no evidence in the record that anyone has ever been appointed

Mayfield Dog Control Officer for more than a one-year term. Id. ¶ 64. 2 For their part, Defendants point out that Plaintiff never requested a letter of appointment. Id. ¶ 56. 3 See Defs.' Mem. at 2 ("[D]uring this action Plaintiff failed to conduct a single deposition or demand a single

document ... from any named defendant – despite his knowledge and the Court's reminders to him that he had the right to do so."). 4 Defendants have identified twenty-eight cases apparently filed by Plaintiff in both state and federal court

since 2005. Defs.' Reply at 4 n.1. 5 Plaintiff also purports to bring his due process claims under the Fifth Amendment. However, "because his

due process claims are against state, not federal, actors, ... the Fourteenth Amendment, rather than the Fifth Amendment, applies to these claims." Wolff v. State Univ. of New York Coll. at Cortland, No. 13-CV-1397, 2016 WL 9022503, at *16 (N.D.N.Y. Feb. 5, 2016) (citing Bussey v. Phillips, 419 F. Supp. 2d 569, 586 (S.D.N.Y. 2006)), aff'd sub nom. Wolff v. State Univ. of New York, 678 F. App'x 4 (2d Cir. 2017).

6 As Defendants make clear in their statement of material facts, Plaintiff admitted in his deposition

that he had

never served in the military, never taken a civil service exam, and never seen a civil service application or job description for the Dog Control Officer position. Defs.' SMF ¶¶ 5, 6, 10, 11. 7 Without much explanation, Plaintiff instead cites to Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985),

a case that discussed the procedural due process rights of a public employee who enjoyed "classified civil servant" protections under Ohio law. Id. at 535. However, because New York Civil Service Law § 75 does not apply to Plaintiff's position, and therefore the Dog Control Officer position does not enjoy civil service protections, Cleveland Board is inapposite. 8 "Q: You never signed any contract with the Town of Mayfield that related to the dog control officer position,

correct? A: No, I did not." 9 Plaintiff also lacks any claim to "unpaid" or "back" wages, as it is undisputed that he was paid in full for the

work did as Dog Control Officer from August 11, 2018 to December 31, 2017, Defs.' SMF ¶ 44, and the Court finds that none of his cognizable federal rights were violated when the Board declined to reappoint him. 10 For the same reasons as those stated above in Footnote 5, Plaintiff's substantive due process claim

purportedly brought under the Fifth Amendment fails. 11 To the extent Plaintiff's retaliation claim is based on his refusal to sign the independent contractor agreement,

assuming for the sake of argument that such a refusal constitutes protected conduct, the claim fails for the same reason. The time period between August—when Plaintiff refused to sign the Agreement—and December—when the Board declined to reappoint him—is too long, without other evidence of retaliatory animus, to establish an inference of causation. Id. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Defendants refer to the New York City Department of Education as the "BOE," designating the Board of

Education of the City School District of the City of New York. See, e.g., Defs.' Reply Br. 1 n. 1, Doc. 19. 2 Some of the allegations appear in documents attached to the complaint and incorporated by reference, as

well as in Plaintiff's opposition to the motion to dismiss. "[I]n cases where a pro se plaintiff is faced with a motion to dismiss, it is appropriate for the court to consider materials outside of the complaint to the extent they are consistent with the allegations in the complaint." Donhauser v. Goord, 314 F.Supp.2d 119, 121 (N.D.N.Y.2004) (quotation marks omitted) (collecting district court

cases), vacated in part on other grounds, 317 F.Supp.2d 160 (N.D.N.Y.2004); see also Gill v. Mooney, 824 F.2d 192, 195 (2d Cir.1987) (considering allegations in pro se plaintiff's opposition to motion to dismiss). 3 The BOE is considered a "public employer" as defined by the New York State Civil Service Law. N.Y. Civ.

Serv. Law § 75–b (1)(a)(iii) (McKinney). 4 Presumably, to teach special education students during the daytime.

5 Although the Complaint specifies the 2010–2011 academic year for this allegation, the Court assumes that

Plaintiff meant to state 2011–2012 in light of her contention that the "critical period" for her retaliation claim started in September 2011. See Compl. ¶¶ 31–32. 6 As discussed infra, Plaintiff attaches several letters to the Complaint, including a disciplinary letter dated

October 28, 2011 written by Assistant Principal DeJesus. To the extent that they are consistent with Plaintiff's allegations, the Court deems such letters incorporated into the Complaint by reference. Donhauser, 314 F.Supp.2d at 121. 7 The meaning of this acronym is not apparent to the Court, as Plaintiff's allegations do not define the term. 8 Other than the limited reference to it in the Special Ed Complaint, the record is silent regarding the content

of this disciplinary letter. 9 While Exhibit 2 to the Complaint indicates that she attended a meeting on January 23, 2012, prior to going

into labor, Plaintiff appears to allege that she went into labor before the meeting (Compl.¶ 41). 10 The letter bears Plaintiff's signature, an apparent acknowledgement of receipt. 11 Section 4.3.2 of the BOE's bylaws, entitled "Appeals re Discontinuance of Probationary Service," provides

that: Any person in the employ of the City School District who appears before the Chancellor, or a committee designated by the Chancellor, concerning the discontinuance of service during the probationary term, or at the expiration thereof, shall have a review of the matter before a committee which shall be designated in accordance with contractual agreements covering employees or by regulations of the Chancellor, as appropriate. After the review, the committee shall forward its advisory recommendation to the community superintendent or to the Chancellor in accordance with contractual agreements. Kahn v. N.Y.C. Dep't of Educ., 18 N.Y.3d 457, 463 (N.Y.2012). Pursuant to section 4.3.3, "the employee is entitled to appear in person at the hearing, accompanied by an advisor; to be confronted by and call witnesses; and to examine exhibits and introduce relevant evidence. The CBA calls for the section 4.3.2 review to be conducted by a tripartite committee of professional educators, with one selected by the teacher, one by BOE and the third by the other two from an agreed-upon list." Id. 12 The Court interprets the "HR Connect blacklist" to be internal to the City of New York Department of Education

based on facts alleged by the Plaintiff. 13 While Plaintiff also cites the Fifth and Seventh Amendments, see Compl. ¶ 1, neither amendment provides

a basis for an additional cause of action. The Court construes Plaintiff's citation to the Seventh Amendment as support for her request for a civil jury trial, U.S. Const. Amend. VII, and the Fifth Amendment has no applicability here, as Defendants are state, not federal, actors. 14 To the extent that the Complaint can be construed to allege First Amendment retaliation for Plaintiff's decision

to file the Special Ed Complaint, the Court likewise dismisses such claim. Plaintiff's Special Ed Complaint expressed concern about the Defendants' response to the September 24, 2011 Emails and complained of "special education fraud" at P.S. 249. Compl. Ex. 6. Yet, because filing a grievance with a union is "not a form or channel of discourse available to non-employee citizens," it is not speech made as a public citizen, and thus falls outside of the umbrella of First Amendment protection. Weintraub v. Bd. Of Educ., 593 F.3d 196, 204 (2d Cir.2010). "[T]he First Amendment invests public employees with certain rights, [but] it does not empower them to 'constitutionalize the employee grievance.' " Garcetti, 547 U.S. at 420 (quoting Connick,

461 U.S. at 154). Thus, Plaintiff's grievance lacks First Amendment protection and cannot form the basis of

a retaliation claim. 15 Claims under the Fourteenth Amendment are not restricted to multi-person classes; an individual, as a "class

of one," can seek Equal Protection under the Fourteenth Amendment. See, e.g., Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008). However, the Supreme Court has held that equal protection "class of one" claims do not apply in the public employer context. Id. at 605–607. Accordingly, Plaintiff cannot seek relief as a "class of one" here. See id. at 602. 16 To the extent that the Complaint can be construed as an attempt to allege violations of the witness tampering

statute, 18 U.S.C. § 1512, the Court also dismisses such claims. Compl. ¶ 11. None of Plaintiff's allegations involve a witness threatened with physical force or death at an "official proceeding"—but most significantly, the witness tampering statute does not provide for a private right of action. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 With respect to Defendants Matos and Hanley, service was accepted on behalf of both Defendants and was

deemed complete for Hanley as of July 26, 2023 (Doc. 29) and Matos as of August 16, 2023. (Doc. 42). Defense counsel did not appear or move on behalf of Matos or Hanley. (Doc. 43; Doc. 53). Accordingly, Matos and Hanley are currently in default and not a part of this motion practice. 2 On February 1, 2023, the Court dismissed Plaintiff's Ninth Claim for Relief for municipal liability against

Dutchess County. (Doc. 6). 3 While Defendants acknowledge in briefing that the Complaint alleges the use of excessive force (Def. Br. at

7), Defendants do not address excessive force or failure to intervene as independent claims for relief. The Complaint states that Plaintiff "has raised multiple violations under the Eighth Amendment of the Constitution that include, Deliberate Indifference to Serious Medical need, Excessive Force By Prison Officials, and Failure to Protect From Prison Officials." (Compl. at p. 54). Indeed, the gravamen of the Complaint is the alleged physical assault on Plaintiff during the C.E.R.T. Raid. Therefore, the Court construes the Third Claim for Relief as alleging claims for excessive force and failure to intervene, as well as deliberate indifference to serious medical needs, under the Eighth Amendment. 4 On a Rule 12(b)(6) motion, "the Court is entitled to consider facts alleged in the complaint and documents

attached to it or incorporated in it by reference, [as well as] documents 'integral' to the complaint and relied upon in it, and facts of which judicial notice may properly be taken ...." Heckman v. Town of Hempstead, 568 F. App'x 41, 43 (2d Cir. 2014); Manley v. Utzinger, No. 10-CV-02210, 2011 WL 2947008, at *1 n.1 (S.D.N.Y. July 21, 2011) (explaining that a court may consider "statements or documents incorporated into the complaint by reference, and documents possessed by or known to the plaintiff and upon which the plaintiff relied in bringing the suit"). The Court may therefore consider the medical records attached to the Complaint. 5 Though Plaintiff identifies Nurses Mukkatt and Gifty as having failed to provide prompt medical care (Compl. ¶

58), Plaintiff does not allege in sufficient detail that Mukkatt or Gifty saw him after the C.E.R.T. Raid, became aware of a serious medical risk, and deliberately disregarded that risk. The Third Claim for Relief against them is dismissed. 6 Given the conclusions reached herein, the Court need not address Defendants' argument that Plaintiff's

deliberate indifference allegations against Sullivan are duplicative of those asserted in Plaintiff's prior litigation. (Def. Br. at 13). 7 These claims proceed against the Defendants in their individual capacities only, since the Eleventh

Amendment bars § 1983 claims against individual Defendants in their official capacities as DOCCS employees. Phillips v. New York, No. 13-CV-00927, 2013 WL 5703629, at *3 (N.D.N.Y. Oct. 17, 2013) (citing

Vincent v. Yelich, 718 F.3d 157, 177 (2d Cir. 2013)); see also Keitt v. New York City, 882 F. Supp. 2d 412,

424 (S.D.N.Y. 2011). End of Document

Footnotes 1 Defendants state, and Plaintiff does not dispute, that Cesar E. Chavez School – erroneously named as "Cesar

E. Chaves Elementary School" in the initial Complaint, (ECF No. 1 ("IC")), and Amended Complaint, (ECF No. 11 ("AC")) – is within YPS and therefore not a separate legal entity. (ECF No. 26 ("Ds' Mem.") at 1 n.1.) 2 At the pre-motion conference, Plaintiff's counsel had no explanation for why he had served Defendants with

an unsigned, unsealed "summons" that had not been issued by the Court, but in the interest of resolving the claims on the merits, I extended Plaintiff's time to serve to 21 days after the filing of the AC. 3 Unless otherwise indicated, case quotations omit all internal citations, quotation marks, footnotes, and

alterations. 4 Plaintiff's counsel acknowledges that Twombly and Iqbal are more recent than Conley v. Gibson, 355 U.S.

41, 45-46 (1957), yet seems to rely on Conley's statement that dismissal is not warranted unless it is apparent that Plaintiff can prove no set of facts that would entitle it to relief. (ECF No. 27 ("P's Opp.") at 9.) Conley's "no set of facts" standard, however, was "retire[d]" by the Supreme Court in Twombly, 550 U.S. at 562-63, and the applicable standard is now one of plausibility, see Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570. No attorney should be citing to or relying on the "no set of facts" standard over a decade after it has been overruled. 5 The fifth claim in the AC is captioned "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq." (AC

at 15.) This caption is puzzling, because § 2000d is Title VI of the Civil Rights Act, whereas Title VII is § 2000e. It is even more puzzling because I specifically told Plaintiff's counsel at the pre-motion conference to make clear under which Title Plaintiff was bringing her claim. "Title VI prohibits a recipient of federal funds from discriminating on the basis of race, color, or national origin." Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 664 (2d Cir. 2012). Because Plaintiff in her fifth claim alleges that Defendants receive federal funds, (AC ¶ 76), and because at the pre-motion conference Defendants represented that no administrative

complaint had been filed, as would be required for a Title VII claim, I conclude that Plaintiff means to assert

a Title VI claim. 6 To the extent Plaintiff wishes to bring discrimination claims based on gender, those claims also fail. Gender

is not a protected class under § 1981. Anderson v. Conboy, 156 F.3d 167, 170 (2d Cir. 1998) (" Section 1981 does not prohibit discrimination on the basis of gender or religion, national origin, or age.") More fundamentally, the AC is devoid of any facts even faintly suggesting that Defendants

discriminated on the basis of her gender. The same is true as to Plaintiff's religion (which she does not describe) and veteran status. 7 In addition, as Defendants point out, (ECF No. 28 ("Ds' Reply") at 4-5), Plaintiff does not address this argument

in her opposition, and thus has abandoned her Title VI claim. 8 "There is a 'personal interest' or 'personal stake' exception to the intracorporate conspiracy doctrine, however,

which permits a § 1985 claim where there are individuals who are 'motivated by an independent personal stake in achieving the corporation's objective.' " Salgado v. City of N.Y., No. 00-CV-3667, 2001 WL 290051, at *8 (S.D.N.Y. Mar. 26, 2001) (quoting Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66, 71-72 (2d Cir. 1976)). Plaintiff does not allege that any such exception applies, and courts in this district have held that personal bias, by itself, is insufficient to defeat the intracorporate conspiracy doctrine. See Salgado, 2001 WL 290051, at *9 (officer defendants' derogatory remarks about plaintiff's sexual orientation were insufficient to properly allege "personal interest" exception to intracorporate conspiracy doctrine); Johnson v. Nyack Hosp., 954 F. Supp. 717, 723 (S.D.N.Y. 1997) ("[P]ersonal bias is not the sort of individual interest that takes a defendant out of the intraenterprise conspiracy doctrine," or else the exception would swallow the rule.). 9 The AC states that the directive to remain in her classroom (if indeed that is what Plaintiff was told, as opposed

to being required to stay in her room except for her free periods) followed "[s]oon after" the report, (AC ¶¶ 67-69), and that the verbal abuse "intensified" after the report, (id. ¶¶ 67, 72). But it also says that Delany "increased" her abuse "[s]tarting in 2009 and running through 2019," (id. ¶ 71), and that Delany blackballed Plaintiff "[s]tarting in 2014 and running through 2019," (id. ¶ 73). It is hard to see how mistreatment after August 31, 2018 – which by Plaintiff's account was the continuation of years of increasing abuse – could be attributable to the protected activity. See Cayemittes v. City of N.Y. Dep't of Hous. Pres. & Dev., 974 F. Supp. 2d 240, 262 (S.D.N.Y. 2013) ("It is well-settled that an adverse employment action cannot serve as the basis for a retaliation claim if the action was set in motion before a plaintiff engaged in protected activity."), aff'd, 641 F. App'x 60 (2d Cir. 2016) (summary order). 10 To the extent Plaintiff meant to advance a claim of retaliation under New York Social Services Law § 413(c)

and New York Labor Law § 740 – and she makes no such suggestion in her opposition – it would be even further outside the statute of limitations, see Lomonoco v. Anne, No. 15-CV-1163, 2016 WL 4402029, at *6 (N.D.N.Y. Aug. 18, 2016) (no private right of action under N.Y. Social Services Law so Plaintiff must bring action under N.Y. Labor Law § 740) (collecting cases); Geldzahler v. N.Y. Med. Coll., 746 F. Supp. 2d 618, 630 (S.D.N.Y. 2010) ("The statute of limitations for bringing an action under Section 740 is one year after the alleged retaliatory action was taken"), and would fail for the same reasons as her other state-law claims, as discussed below. Plaintiff plainly did not intend to advance a claim of First Amendment retaliation, as her IC contained such claims, (IC at 8, 11-12), and they were removed in the AC. 11 To the extent this allegation could be interpreted as advancing a claim that the hostile work environment was

retaliation for this protest, it would fail for two reasons. First, as set forth in note 11 above, Plaintiff withdrew her First Amendment claims. Second, when teachers complain internally about their work conditions, they are speaking as employees, not citizens, and their speech does not constitute protected activity that can support a retaliation claim. See, e.g., Brooke v. County of Rockland, No. 21-598-CV, 2022 WL 6585350, at

*3-4 (2d Cir. Oct. 11, 2022); Weintraub v. Bd. of Educ., 593 F.3d 196, 203 (2d Cir. 2010); Geer v. Gates Chili

Cent. Sch. Dist., 577 F. Supp. 3d 147, 177 (W.D.N.Y. 2021). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Internal quotation marks omitted. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Varughese voluntarily dismissed another count for intentional infliction of emotional distress after Magistrate

Judge Francis ordered her to submit to a psychiatric evaluation as a condition of maintaining it. See Docket # 45. 2 Only the transcripts were submitted with the motion. By order dated March 13, 2015 (Docket # 215), the Court

ordered Varughese to produce the tapes so that I could listen to them myself, rather than merely reading the transcripts or relying on the parties' characterizations of what was said and how. See Scott v. Harris, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (appropriate for a court to take judicial notice of facts regarding intangible circumstances of an encounter preserved in audio-visual recordings if court reviews said recordings). 3 Varughese herself provided this document to the Court in a public filing. See Docket # 205–24. 4 In May 2011, after she made this complaint, Varughese was on rotation at the VA Hospital in the Bronx.

(Varughese Dep. at 127–128.) McCash was also there. (Id.) There is no evidence that he had any supervisory authority over Varughese, and it is undisputed that he and Varughese were kept apart. (Id.) While Varughese reports that McCash “glared” at her or “stomped” around her workplace, she did not report this to anyone. (Id.)

5 There is no evidence in the record that Schiller had any role in guiding the course of the Department's

investigation of the December 8 incident. The record is also devoid of evidence that Schiller had any role in placing Varughese on Academic Advisement. 6 It begins, “Well, we need some honesty and transparency then because, you know, you can't just have one

person, you know, saying whatever they want and doing whatever they want, such as on the moonlighting nights-I'm the primary moonlighter, really, then why does the schedule say somebody else is the primary moonlighter? You know, these are issues like, you need to address, like if you are going to have integrity you're going to have integrity across the board, if not, you're not." (Id.) It goes on for another paragraph in the transcript. 7 Jordan testified that a doctor's note was required whenever an absence prevented a resident from fulfilling

a departmental requirement or whenever the resident is out for three or more days (Jordan Dep. at 162); Morency testified that a note was not required unless the absence was longer than three days. (See Transcript of Internal Appeal at 158, Docket # 205–31 at 47.) Specifically, Morency was asked whether she ever asked Varughese "for proof ofillness since her absences precluded her from fulfilling a task?" She answers "No, because the policy is you have to miss three consecutive days and she only missed two, so I didn't ask her." (Id.) 8 Varughese's claim that the Staff Affairs Committee was a kangaroo court (see Varughese 56.1, passim), must

be assessed in light of her contemporaneous refusal to put any objection to the conduct of the proceedings when those objections could have been addressed. 9 I cannot fault the Hospital for failing to make records available if it did not do so, since this claim has arisen

at the last possible moment, long after the close of discovery. 10 Lento appears to have been responsible for Jordan's selection as Chief Resident. Varughese submits only

her own conclusory assertions of bias as against him. There is no evidence that McCash had anything to do with the decision, and Schiller was no longer acting as Chair. 11 These facts could also demonstrate that Varughese failed to meet her burden, at McDonnell–Douglas Stage

One, of proving, as part of her prima facie case, that she was qualified for the position. It really does not matter, however, whether one analyzes this as a Stage One or a Stage Three issue: there were significant differences between Jordan and Varughese that easily overcame her lesser experience. 12 One might ask whether the hospital's immediate corrective action is enough to save it from liability under

the NYCHRL. After all, it immediately removed Varughese from McCash's supervision and separated them moving forward. The answer is no, at least in the context of sexual harassment. See Zakrzewska v. New Sch., 14 N.Y.3d 469, 477, 902 N.Y.S.2d 838, 928 N.E.2d 1035, 1037–38 (2010) . In Zakrzewska, the state high court returned to the language of the city statute to find that "the affirmative defense to employer liability articulated in Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) [does not] apply to sexual harassment and retaliation claims under section 8–107 of the New York City Administrative Code ." Id. (answering certified question from the Second Circuit in the negative). Of course, there is no Faragher– Ellerth defense under federal law to

claims of discrimination, as opposed to harassment/retaliation CHECK; the pertinence of the Hospital's action is that the employer did not discriminat 13 McDonnell Douglas, 411 U.S. at 804; see also Ellis v. Long Island Rail Road Co., No. 05–CV–3847, 2008

WL 838766, at *4 (E.D.N.Y. Mar. 31, 2008) (citing Collins v. New York City Transit Auth., 305 F.3d 113, 119 n. 1 (2d Cir.2002)).

14 The evaluation was shown to persons who were deposed, including Dr. Fyfe of Robert Wood Johnson

Hospital, but that is a privileged act, taking place in the context of a lawsuit, where the witness (who was identified by Varughese) was being questioned about whether RWJ would have been willing to employ Varughese if the evaluation had been sent (it had not even been written yet when Varughese was discussing possible employment at RWJ). It is not actionable. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 To the extent plaintiff's Bivens claim concerns employment discrimination (including hostile work

environment) at TSA, Title VII and the ADEA are his exclusive remedies and no Bivens cause of action may lie. See Brown v. Gen. Servs. Admin., 425 U.S. 820, 835, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976) (holding Title VII to be the "exclusive judicial remedy for claims of discrimination in federal employment"); Briones v. Runyon, 101 F.3d 287, 289 (2d Cir.1996) ("Title VII is the exclusive remedy for discrimination by the federal government on the basis of race, religion, sex, or national origin."); Bumpus v. Runyon, No. 94 Civ. 2570(DC), 1997 WL 154053, at *4 (S.D.N.Y. April 2, 1997) ("ADEA provides the exclusive remedy for federal employees who allege age discrimination."). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 "[A]llegations made in a pro se plaintiff's memorandum of law, where they are consistent with those in the

complaint, may also be considered on a motion to dismiss." Braxton v. Nichols, No. 08-CV-8568, 2010 WL 1010001, at *1 (S.D.N.Y. Mar. 18, 2010). The Court will send Plaintiff copies of all unreported cases cited in this Opinion and Order. Plaintiff submitted several unauthorized sur-replies, (Docs. 45-47), which I nevertheless have considered and which do not change the outcome. 2 In my December 3, 2019 Order, I erroneously referred to Docs. 28-31, but Doc. 31 is a letter from defense

counsel; I meant to refer to Docs. 28-30. 3 Plaintiff's papers include entirely frivolous material, such as irrelevant legal citations and incoherent

arguments regarding ancient treaties and the like. I informed Plaintiff several times, through memo

endorsement and at conferences, that "[t]his case is about an allegedly unlawful stop and allegedly unlawful tickets" and that he "would do well to set aside the gobbledygook and focus on those claims." (See Doc. 12.) He did not heed my suggestion. Nevertheless, because Plaintiff pro se he is entitled to "special solicitude," Shibeshi v. City of N.Y., 475 F. App'x 807, 808 (2d Cir. 2012) (summary order) (internal quotation marks omitted), and I construe his papers liberally to raise the strongest arguments that they suggest, see Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam). 4 Citations to the Second Amended Complaint and Plaintiff's Opposition use the page numbers generated by

the Court's Electronic Filing System. 5 I can take judicial notice of the Chester Town Court Certificate of Disposition dated August 20, 2019, attached

to Defendants' counsel's declaration in support of the motion to dismiss. (Doc. 40-2.) See Jones v. Rivera, No. 13-CV-1042, 2015 WL 8362766, at *3 (S.D.N.Y. Dec. 7, 2015) (taking judicial notice of certificate of disposition submitted by defendant on motion to dismiss). 6 It does not appear that Miranda was served, but for the reasons discussed herein, Plaintiff's claims against

him are dismissed sua sponte for failure to state a claim, pursuant to 28 U.S.C. § 1915(e)(2)(B). 7 Plaintiff alleges that Chambers detained him "for over 45 minutes." (P's Opp. at 4.) To the extent Plaintiff

is seeking to allege an unreasonable seizure based on the length of his detention, he fails to do so. Even though "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures," Rodriguez v. United States, 575 U.S. 348, 350 (2015), Plaintiff alleges no facts suggesting that the stop was overly long. To the contrary, Plaintiff admits that he prolonged the stop by refusing to produce a driver's license, providing only unofficial identification that required the officers to track down whether Plaintiff was in fact licensed, and insisting that the laws of New York State and the United States do not apply to him as a Moorish national. (P's Opp. at 4.) 8 To the extent Plaintiff means to argue that traffic enforcement violates his right to travel, that claim is dismissed

as frivolous. See Annan v. State of N.Y. Dep't of Motor Vehicles, No. 15-CV-1058, 2016 WL 8189269, at *5 (E.D.N.Y. Mar. 2, 2016), aff'd, 662 F. App'x 85 (2d Cir. 2016) (summary order).

9 If Plaintiff intended to assert a false arrest claim, it would likewise fail, both because Plaintiff was not subjected

to deprivation of liberty tantamount to an arrest, see LoSardo v. Ribaudo, No. 14-CV-6710, 2015 WL 502077, at *5 (E.D.N.Y. Feb. 5, 2015) (collecting cases), and because his conviction shows that by definition there was probable cause, see, e.g., Horvath v. City of N.Y., No. 12-CV-6005, 2015 WL 1757759, at *3 (E.D.N.Y. Apr. 17, 2015). 10 Because the previous suit arose in federal court, federal

common law governs. See Taylor v. Sturgell, 553

U.S. 880, 891 (2008); Wyly v. Weiss, 697 F.3d 131, 140 (2d Cir. 2012). 11 Chief Judge McMahon's order of dismissal is dated November 22, 2019. Plaintiff's Second Amended

Complaint is dated November 26, 2019. It therefore seems like Plaintiff was trying to get a second bite at the apple as to his pistol permit revocation claim. He is advised that further attempts to bring this same claim may be dismissed as frivolous because he has now been told twice that it is not meritorious, and any further attempts will waste the Court's and opposing counsel's time. 12 Evidently, Plaintiff lied to the licensing judge in 2015 and said he was not guilty of the felony of which he had

previously been convicted. (SAC at 12.) But he has not denied in his many submissions to this Court that he was convicted of Criminal Possession of a Loaded Firearm in the Third Degree in 1991. (See id. at 14.) 13 Further, the crime of perjury involves knowingly false statements under oath, and there is no indication that

any of the challenged statements were made under oath. 14 The Court dismisses this claim sua sponte as to Miranda under 28 U.S.C. § 1915(e)(2)(B) (authorizing

dismissal of claims filed in forma pauperis if they are frivolous or fail to state a claim upon which relief can be granted). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Because the complaint is not consistently, the Court refers to the ECF page numbers. 2 For example, Annan does not have standing to assert claims under the host of criminal statutes he cites

(some of which have been repealed, such as 18 U.S.C. § 835, or are non-existent, such as 18 U.S.C. § 8872). Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.”). As another example, Annan refers to FOIA, but FOIA applies only to federal agencies and would thus provide no relief against any of the defendants in this action. See, e.g., Grand Cent. P'ship, Inc. v. Cuomo, 166 F.3d 473, 484 (2d Cir. 1999) (FOIA applies only to federal agencies). 3 The State Defendants style their sovereign immunity defense as a motion to dismiss for lack of subject

matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). It is an open question of law in the Second Circuit whether an assertion of Eleventh Amendment sovereign immunity should be treated as a defect in subject matter jurisdiction or as an affirmative defense. Carver v. Nassau Cnty. Interim Fin. Auth., 730 F.3d 150, 156 (2d Cir. 2013) (“[W]hether the claim of sovereign immunity constitutes a true issue of subject matter jurisdiction or is more appropriately viewed as an

affirmative defense is an open question in the Supreme Court and the Second Circuit." (citing Wisc. Dep't of Corr. v. Schacht, 524 U.S. 381, 391 (1998) (stating that the Court has "not decided" whether "Eleventh Amendment immunity is a matter of subject- matter jurisdiction"))). Although this distinction may be significant in certain circumstances, because it impacts what materials the Court may consider and what inferences it may draw from the record, it does not affect the outcome in this case. In considering the State Defendants' sovereign immunity defense, the Court has considered "only the pleadings and the relevant state and federal law and has drawn all inferences in [the p]laintiff's favor" and therefore need not resolve whether a sovereign immunity defense is more appropriately raised under a Rule 12(b)(1) or Rule 12(b)(6) motion. Tiraco v. N.Y. State Bd. of Elections, 963 F. Supp. 2d 184, 191 n.6 (E.D.N. Y, 2013); see also McMillan v. N.Y. Bd. of Elections, No. 10-CV-2502 (JG) (VVP), 2010 WL 4065434, at *3 (E.D.N.Y. Oct. 15, 2010) aff'd. 449 Fed.Appx. 79 (2d Cir. 2011) ("This distinction does not affect the outcome here; in evaluating the State Board's assertion of sovereign immunity, I look only to the pleadings and to state and federal law."). 4 To the extent Annan refers to a "writ of mandamus" in his submissions, the Court lacks jurisdiction to grant

mandamus relief against state officials. Davis v. Lansing, 851 F.2d 72, 74 (2d Cir. 1988) ("[F]ederal courts have no general power to compel action by state officials."); see also Main v. Altieri, No. 09-CV-108, 2009 WL 1109878, at *1 (D. Vt. Apr. 22, 2009) (dismissing request for writ of mandamus to compel action by state officials sua sponte for lack of jurisdiction).

5 Nothing in the complaint suggests Annan is attempting to claim his license was suspended without due

process. However, any such claim would be meritless. As discussed above, the Supreme Court has repeatedly affirmed state statutes allowing for summary suspension of a driver's license with a postdeprivation opportunity to challenge the suspension. See Mackey, 443 U.S. 1, 19 (1979); Dixon. 431 U.S. 105, 115 (1977). Under New York law, tickets for traffic infractions are adjudicated at hearings, see N.Y. Veh. & Traff. § 227, the determinations at such hearings may be appealed to an administrative appeal board, see id. § 261, and judicial review is available for any appeal determination through an Article 78 proceeding. Annan does not challenge the constitutional adequacy of those procedures or allege that he was deprived of those opportunities to challenge the suspension of his license. To the contrary, the complaint confirms that Annan availed himself of the opportunity to appeal at least one of his traffic convictions. (See Compl. at 84-85 (letter from DMV Appeals Board).) Moreover, the complaint reveals that at least one of the suspensions stemmed from his failure to appear to answer a traffic ticket receive for running a red light. (Id. at 83). He was thus afforded a predeprivation opportunity to challenge the underlying traffic conviction that he chose not to pursue. See Davis v. Nassau Cnty., No. 06-CV-4762 (ADS) (WDW), 2011 WL 5401663, at *5–6 (E.D.N.Y. Nov. 5, 2011) ("The Plaintiff was given the opportunity of a trial on the merits [of his traffic infraction] and did not attend, even though he knew the consequences of not doing so. Therefore, the Court finds that the Plaintiff received all the process he was due under the law."). 6 Although not raised by the State Defendants, any claims against ALJs Hamsho and Levine are also barred

by absolute judicial immunity. See Burroughs, 2013 WL 3820673, at *4 (dismissing claims against ALJs for DMV as barred by judicial immunity); see also Bliven v. Hunt, 418 F. Supp. 2d 135, 137-38 (E.D.N.Y. 2005) (dismissing claims barred by judicial immunity sua sponte in fee-paid pro se action). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Defendant Fairport Police Department's argument that Federal Rule of Civil Procedure 15(c) precludes leave

to amend is inapposite because Plaintiff invokes Rule 15(a) as a basis for the request for leave to amend. See ECF No. 13 at 4-5. 2 Because the parties do not dispute that Defendants County of Monroe Department of Health and Fairport

Police Department are not proper parties to this action, see Section B, supra, the Court does not address any claim asserted against these Defendants. 3 Plaintiff also references several other bases for her claims throughout both her original complaint and

proposed amended complaint, including her “right to liberty.” ECF No. 1; ECF No. 19-1, 20-1. This is not a cognizable claim, and the Court accordingly does not address it. See Nguyen v. Ridgewood Sav. Bank, 66 F. Supp. 3d 299, 307 (E.D.N.Y. 2014) (rejecting Section 1983 claim premised on the “vague invocation of the right to life, liberty and the pursuit of happiness” (internal quotation marks omitted)); Transitional Servs. of N.Y. for Long Island, Inc. v. N.Y.S. Office of Mental Health, 91 F. Supp. 3d 438, 442 (E.D.N.Y. 2015) (“ Section 1983 is enforceable only for violations of federal rights.” (internal quotation marks omitted)). 4 The Court does not construe this claim to allege that the health order of quarantine enacted in connection with

COVID-19 was, itself, unconstitutional. Rather, Plaintiff alleges that Defendants’ enforcement of the health order of quarantine, as applied to M.B. via police assistance, was the alleged unconstitutional act. For a discussion of the former, see Section V. infra. 5 Under 42 U.S.C. § 1986, a defendant can be held liable for neglecting or refusing to stop a conspiracy when

he was aware of the conspiracy and in a position to prevent it. See 42 U.S.C. § 1986. However, “a claim under section 1986 ... lies only if there is a viable conspiracy claim under section 1985.” Gagliardi v. Vill. of Pawling, 18 F.3d 188, 194 (2d Cir. 1994). 6 Though Plaintiff asserts this claim against all Defendants, the Court can discern no factual basis for alleging

this claim against proposed Defendant Village of Fairport. Plaintiff does not allege that that Defendant contributed to the creation or issuance of the challenged public health measure. Accordingly, the Court analyzes the sufficiency of this claim only with respect to Defendants County of Monroe and Mendoza. 7 Defendants do not appear to dispute that the issuance of public health measures during COVID-19, like the

quarantine order, amounted to a "custom or policy" sufficient to establish Monell liability, nor that the practice may have caused the alleged constitutional violation of M.B.'s "right to travel." Monell v. Dep't Soc. Servs., 436 U.S. 658, 693, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Court accordingly confines its analysis whether a "constitutional deprivation" occurred. Plair v. City of New York, 789 F. Supp. 2d 459, 468 (S.D.N.Y. 2011). 8 Though the parties do not raise it, the Court is mindful that this claim may be subject to dismissal for

"mootness." A claim is moot, and therefore no longer a case or controversy for the purposes of Article III, "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." Already, LLC v. Nike, Inc., 568 U.S. 85, 91, 133 S.Ct. 721, 184 L.Ed.2d 553 (2013). Still, a defendant's "voluntary cessation of challenged conduct does not [necessarily] render a [claim] moot." Knox v. Serv. Emp. Int'l Union, Local 1000, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012). Because

Defendants' cessation of the challenged conduct under Knox is not alleged or raised, the Court cannot

engage meaningfully with the mootness doctrine and applies the Jacobson framework. In addition, the Court assumes, without deciding, for the purposes of this Decision and Order that Plaintiff has Article III standing to pursue this claim on M.B.'s behalf. 9 To the extent Plaintiff argues that M.B "was not able to exercise her right to travel [...] for additional time"

because the quarantine order "should have been based on the exposure date which [Plaintiff alleges] occurred earlier in the week on Thursday or Friday, prior to [Saturday,] March 27, 2021," ECF No. 19-1 at 15-16, the Court finds that, even accepting as true this contention that the exposure date was one or two days before March, 27, 2021, this "additional time" of approximately one or two days would not materially change the Court's analysis of the order under Jacobson. In addition, Plaintiff presents no plausible allegations that the exposure date the quarantine order was based on was estimated or imposed in an "arbitrary [or] unreasonable manner." Luke's Catering Serv., LLC v. Cuomo, 485 F. Supp. 3d 369, 379 (W.D.N.Y. 2020) (citing In re Abbott, 954 F.3d at 783). End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Zietek no longer resides at Pinnacle, but is instead a resident at the Schervier Rehabilitation and Nursing

Center. Dkt. No. 34 at 7. 2 This is consistent with Zietek's own description of her lawsuit. See Notice of Appeal at 1, Dkt. No. 85

(describing her case as one for "financial assault"). 3 This request was part of a 37-page letter to the Court. No motion to amend was ever made, and Varghese

was accordingly never added as a defendant. 4 In its papers, Pinnacle also identifies a potential mail interference claim under 18 U.S.C. § 1701. As Zietek's

allegations of mail interference concern one of the individual defendants who had been previously dismissed by the Court (Compl. at 9), this Report will not address this claim in detail. But in any event, 18 U.S.C. § 1701 does not provide a private right of action. See, e.g., Sciolino v. Marine Midland Bank–Western, 463 F. Supp. 128, 130–31 (W.D.N.Y. 1979) (holding "[a] civil claim arising out of an alleged violation of penal statutes relating to the mails—i.e., 18 U.S.C. §§ 1701, 1702, 1703, 1708 and 1709 is not" cognizable (citations omitted)).

5 Zietek argued that the motion was untimely, as she had received it on February 16. Pl. Obj. at 1. However,

the motion was timely filed via the Court's Electronic Case Filing system on February 13. Dkt. No. 87. 6 In its Notice of Motion, Pinnacle also cited to Rule 12(b)(2) and argued that the Court lacked personal

jurisdiction, but it did not pursue this argument in its renewed motion papers. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 To the extent that Lee's statement of facts in his complaint raises issues relevant to the period at issue in

his first suit, Lee I, 2017 WL 486944, those claims are also barred by res judicata. Allen v. McCurry, 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."); see also Cho v.

Blackberry Limited, 991 F.3d 155, 168–69 (2d Cir. 2021) (holding that plaintiffs' claims arose out of the same

transaction or occurrence as a prior suit and so were precluded by res judicata). 2 In Lee's first lawsuit, he also alleged that toner was not provided, but admitted that "the lack of toner was

due to funding, and was an issue office-wide." Lee I, 2017 WL 486944, at *11 n.10. As such, Judge Failla declined to "make the logical leap to conclude that these episodes amounted to the SSA's failure to make a reasonable accommodation." Id. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes * Honorable Denise Cote, United Stated District Judge for the Southern District of New York, sitting by

designation. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

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Footnotes 1 I note, however, that the report-recommendation would survive even de novo review. End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes 1 Genco has filed a separate suit in this Court against Starpoint alleging employment discrimination, retaliation

and failure to accommodate in violation of the Americans with Disabilities Act. (See Genco v. Starpoint Central School District, Case No. 1:17-CV-01168). Starpoint moved to dismiss plaintiff's pro se complaint. Today, the Court issued a Report recommending that Starpoint's motion to dismiss plaintiff's complaint be denied. (Case No. 1:17-CV-01168, Dkt. No. 26). Plaintiff further filed suit, also on a pro se basis, against the law firm of Webster Szanyi LLP. (See Genco v. Webster Szanyi, LLP, Case No. 1:18-CV-00093). Webster Szanyi, who is representing Starpoint in the course of plaintiff's employment discrimination lawsuit, moved to dismiss the complaint. Today, this Court issued a Report recommending that the complaint against Webster Szanyi be dismissed with prejudice. (Id. at Dkt. No. 18). It is also noted that plaintiff filed a previous employment discrimination lawsuit against Starpoint, in this Court, in March of 2013. In February of 2015, the Honorable William M. Skretny granted summary judgment in favor of Starpoint. See Genco v. Starpoint Central School District, 1:13-CV-301, 2015 WL 540217 (WDNY Feb. 10, 2015). 2 The complaint states that Michael P. Santa Maria, Ph.D. performed plaintiff's medical examination. (Dkt. No.

1). Defendant's response papers indicate that Dr. Santa Maria is a board-certified neuropsychologist and that he performed a neuropsychological evaluation and independent medical examination of plaintiff. (Dkt. No. 5). 3 The allegations and arguments in plaintiff's responses, like those in his complaint, lack clarity or coherence.

His disjointed narrative sets forth a litany of grievances against Starpoint, Sargent & Collins, and Dr. Santa Maria. He attaches various documents including letters from Sargent & Collins and Starpoint relative to his leave and fitness for duty examination, Dr. Santa Maria's report from his neuropsychological evaluation and independent medical examination, a “transcript” of the medical examination that plaintiff transcribed himself, HIPAA releases provided to Dr. Santa Maria, plaintiff's individualized education plan from when he was enrolled in the Starpoint School District, internet research regarding Dr. Santa Maria's practice and areas of specialty, a decision in a prior federal lawsuit filed by plaintiff against Starpoint, and information regarding the elements of the crime of filing a false instrument. As best the Court can ascertain, plaintiff's chief complaint against defendant is that by providing legal representation to Starpoint when plaintiff was placed on administrative leave, Sargent & Collins discriminated against him.

4 Also at that time, this Court heard oral argument as to the motion to dismiss and a request for a filing injunction

on behalf of Starpoint in Genco v. Starpoint Central School District, and oral argument as to the motion to dismiss in Genco v. Webster Szanyi LLP. 5 Likewise, the facts of this lawsuit have nothing to do with the other four titles of the ADA, which prohibit

disability discrimination in: (1) access to public services, programs and activities provided by public entities (Title II); (2) access to public accommodations, such as hotels and theaters, provided by private entities (Title III); and (3) telecommunications (Title IV). See 42 U.S.C. §§ 12101-12213. 6 Similarly, plaintiff has failed to establish any viable claim for relief against Sargent & Collins based upon

his allegations that the doctor who performed the fitness for duty examination was not a physician and that the examination was not performed in accordance with the New York State Civil Service Law or New York State Education Law. Plaintiff acknowledges in his complaint that Starpoint, his employer, placed him on administrative leave and sent him for a medical examination. No cause of action exists against Sargent & Collins for their role in facilitating the medical examination or communicating Starpoint's position to plaintiff or others. See Hills v. Praxair, Inc., 11-CV-678, 2012 U.S. Dist. LEXIS 74125 (WDNY May 29, 2012) (dismissing plaintiff's complaint against the attorneys who represented his employer in defense of plaintiff's EEOC charge because, inter alia, statements made in quasi-judicial proceedings, such as arguments submitted in response in an EEOC charge or while representing a client at a hearing, are protected by absolute privilege). End of Document