

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.

United States Court of Appeals, Third Circuit.

Kevin TUNG, on behalf of himself and all others  
similarly situated, Appellant

v.

SUPERIOR COURT OF NEW JERSEY; Stuart  
Rabner, Chief Justice of the Supreme Court of New  
Jersey; Glenn A. Grant, Acting Administrative Director  
of the New Jersey Courts; Carmen Messano, Presiding  
Judge for Administration for the Appellate Division;  
John/Jane Doe, Administrators of the New Jersey  
Superior Court

No. 20-3348

Submitted Under Third Circuit L.A.R. 34.1(a) on July 9,  
2021(Filed: July 28, 2021)

On Appeal from the United States District Court for the  
District of New Jersey (D.C. No. 3:19-cv-00871), District  
Judge: Honorable Michael A. Shipp

Attorneys and Law Firms

Kevin K. Tung, Esq., Flushing, NY, Pro Se.  
John Regina, Esq., Office of Attorney General of New  
Jersey, Newark, NJ, for Defendant.  
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New Jersey, Division of Law, Trenton, NJ, John Regina,

Esq., Office of Attorney General of New Jersey, Newark, NJ, for Defendants-Appellees.

Before: AMBRO, JORDAN, and BIBAS, Circuit Judges

OPINION\*

BIBAS, Circuit Judge.

Not every wrong has a federal remedy. A state court criticized lawyer Kevin Tung. Tung claims that this criticism violated due process. But he is suing New Jersey officials in their official capacities, so he must allege that they *continue* to violate his rights. Because he has not done so, we will affirm the District Court's dismissal.

In 2009, Tung represented Janet Fou in her New Jersey divorce case—or so it seemed. Two years later, Janet challenged the divorce in New Jersey state court, claiming that Tung had worked for her ex-husband Joe all along. Even though Tung had represented her, he had been hired by Joe and dealt mostly with him. And though she had signed four agreements with Joe written in Mandarin, she claimed, the English property settlement filed by Tung differed substantially from the Chinese originals.

The judge hearing Janet's challenge sided with her and voided the original judgment. Ruling from the bench, he slammed Tung, suggesting that by "represent[ing] both sides," he had failed in his duty to protect Janet. App. 8. The "illusion of independent counsel," he found, was "grossly misleading." *Id.* And he observed that submitting the property settlement was "a fraud upon the court." *Id.* But the judge never said whether the fraudster was Tung or Joe.

Tung, a New Yorker, now sues New Jersey's Chief Justice and other New Jersey court administrators in their official capacities. Before the judge lambasted him, he claims, he should have had a chance to defend himself. He seeks a declaration that the judge's criticisms were unconstitutional and further seeks an injunction mandating safeguards before future judicial criticisms.

The District Court dismissed, ruling that sovereign immunity shields the defendants. We review *de novo*. *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 82 (3d Cir. 2016).

The Eleventh Amendment bars federal lawsuits “against one of the United States by Citizens of another State.” U.S. Const. amend. XI. Out-of-staters cannot dodge this bar by suing state officials in lieu of the states themselves. *Ex parte New York*, 256 U.S. 490, 500–01, 41 S.Ct. 588, 65 L.Ed. 1057 (1921). Defendants are officials of the State of New Jersey. They are sued by Tung, a New Yorker. So the text of the Amendment commands dismissal.

True, a “narrow exception” lets plaintiffs sue state officials to stop ongoing violations of federal law. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *see Ex parte Young*, 209 U.S. 123, 155–56, 28 S.Ct. 441, 52 L.Ed. 714 (1908). But this case does not fit that exception. The judge criticized him years ago. Any violation is over and done.

Tung claims the violation is ongoing because the criticism still stings. Yet *Ex parte Young*’s exception is limited to ongoing *violations*, not ongoing effects. Imagine that the police unconstitutionally searched a man’s home, sparking gossip among his nosy neighbors. They might shun him for a time, even after he was cleared of all charges. No one would say that the police

continue to search his home just because his embarrassment endures. So too here. Even if Tung feels lasting shame, any deprivation of process ended years ago.

Finally, Tung faults the defendants for not adopting safeguards to prevent similar situations in the future. But he does not allege that he is likely to be criticized again. Because no alleged violation is ongoing, *Ex parte Young* cannot rescue him from the Eleventh Amendment's bar. So we will affirm the District Court's dismissal.

#### Footnotes

\*This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

**NOT FOR PUBLICATION**

United States District Court, D. New Jersey.

Kevin Kerveng TUNG, Plaintiff,

v.

Stuart RABNER, in his official capacity as Chief  
Justice of the Supreme Court of the State of New  
Jersey, et al., Defendants.

Civil Action No. 19-871 (MAS)(TJB)

Signed 11/10/2020

**Attorneys and Law Firms**

Kevin Kerveng Tung, Flushing, NY, for Plaintiff.  
John Francis Regina, Office of the Attorney General,  
Trenton, NJ, for Defendants.

**MEMORANDUM OPINION**

Shipp, District Judge

This matter comes before the Court upon Defendants Stuart Rabner, Chief Justice of the New Jersey Supreme Court, Glenn A. Grant, Administrative Director of the New Jersey Courts, and Carmen Messano, Presiding Judge of the New Jersey Superior Court, Appellate Division's ("Defendants") Motion to Dismiss Plaintiff Kevin Kerveng Tung's ("Tung" or "Plaintiff") Amended Complaint. (ECF No. 30.) Plaintiff opposed. (ECF No. 31.) The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Rule 78.1. For the reasons set forth below, Defendants\* Motion to Dismiss is granted.

## I. BACKGROUND

Tung is an attorney licensed to practice law in the state of New Jersey. (Am. Compl. ¶ 13, ECF No. 20.) In 2009, Tung represented Mrs. Janet Fou in a no-fault divorce proceeding with her husband, Mr. Joe Fou. (*Id.* ¶ 21.) According to Tung, during this representation, he “prepared an English [language p]roperty [s]ettlement [a]greement for the Fous.” (*Id.* ¶ 22.) Tung maintains that at the time of the representation, he understood that “the only binding [p]roperty [s]ettlement [a]greement was going to be the one [he] was going to prepare” for the Fous. (*Id.* ¶ 64.) Tung acknowledges, however, that the Fous asked him to notarize, but not review, a “Chinese Agreement” between Mr. and Mrs. Fou “regarding their divisions of properties.” (*Id.* ¶¶ 22, 71.)

Two years after the conclusion of the divorce proceeding, Mrs. Fou moved to set aside the final judgment of divorce. (*Id.* ¶ 29.) With the assistance of new attorneys, Mrs. Fou argued that there were actually four Mandarin agreements between the couple. (*Id.* ¶ 51.) Mrs. Fou alleged that the property settlement prepared by Tung differed substantially from these documents. (*Id.* ¶ 55.) According to Mrs. Fou, Tung's services were procured by her husband and Tung dealt largely with Mr. Fou rather than with her, his actual client. (Janet Fou Cert. ¶ 16, Ex. 5 to Am. Compl., ECF No. 20-I.) When moving to reopen the divorce proceedings, Mrs. Fou maintained that she “question[ed] the appropriateness of Mr. Tung's representation of me and [Mr. Fou's] role in orchestrating my execution of an English [a]greement, which failed to mention our previous[ly] executed agreements.” (Am. Compl. ¶ 40.)

In his Amended Complaint, Tung presents a different version of events. (*Id.* ¶ 22.) Tung contends that he was only made aware of one of the Mandarin agreements. According to Tung, Mrs. Fou misled him with respect to the agreements and the couple's financial status because she was attempting to commit Medicaid fraud. (*Id.* ¶¶ 22-23.) Tung does not, however, appear to contest the fact that he largely interacted with and received information from Mr. Fou, even though Mrs. Fou was his client. (See Sept. 12, 2012 Hr'g Tr. 65:21-66:4, Ex. 2 to Am. Compl., ECF No. 20-I.) Tung testified at the reopening proceeding pursuant to a subpoena but he did not otherwise take part in these proceedings. (Am. Compl. ¶ 63.)

On September 12, 2012, the New Jersey Superior Court accepted Mrs. Fou's version of events and granted the motion to set aside the final judgment of divorce. (*Id.* ¶ 44.) While ruling from the bench, the judge made several negative comments about Tung's conduct in the divorce action. The judge suggested that Tung had completely failed in his duty to provide independent representation to Mrs. Fou. (See Sept. 12, 2012 Hr'g Tr. 64:13-65:5, 69:19-70:12 (suggesting that Tung "represented both sides" violating "one of the most basic rules of an attorney/client relationship" and that "there [was] a complete failure ... to have independent counsel and there's an illusion of independent counsel which is grossly misleading").) The court also found that the retainer agreement between Tung and Mrs. Fou "doesn't even begin to satisfy" New Jersey state rules on retainer agreements for attorneys representing a party in a matrimonial dispute. (*Id.* at 66:5-13.) The court went on to find that the property settlement's submission in the divorce proceeding amounted to "a fraud upon the court." (*Id.* at 71:2-7.) The court did not,

however, specifically state who committed this fraud. In fact, the court appears to have largely placed blame for this misrepresentation on Mr. Fou. The state court found that Mr. Fou was “the conductor or maestro of ... these proceedings.” (*Id.* at 69:9-18.) Furthermore, at no point in the ruling did the judge specifically note that he was sanctioning Tung. Nor did the court make a factual finding that Tung's conduct was sanctionable. On July 8, 2016, New Jersey's Appellate Division affirmed the trial court's decision to set aside the final judgment of divorce. (Am. Compl. ¶¶ 54, 81.) The Appellate Division also referred Tung to the Office of Attorney Ethics for further investigation into his conduct in the divorce action. (*Id.* ¶ 81.) This matter was still pending when Tung filed the present action. (*Id.*)

Mrs. Fou then sued Tung for malpractice in New Jersey Superior Court. (*Id.* ¶ 78.) Plaintiff participated in these proceedings as the defendant. (*Id.* ¶¶ 78-86 (describing Tung's motion practice, pre-trial conference participation, and appeals in the *Fou v. Tung* malpractice action).) Tung alleges that during the malpractice action, the opinion from the divorce action was used against him over his objection. (*Id.* ¶¶ 78-86.) Tung also accused Mrs. Fou and her new attorneys of making numerous misrepresentations to the court to secure the reopening of the final judgment of divorce. (See generally *id.* ¶¶ 24-62.) Notwithstanding these contentions, on April 25, 2018, a jury in the Superior Court malpractice action found Tung liable for malpractice and awarded Mrs. Fou a \$500,000 judgment. (*Id.* ¶ 85.)

Following the malpractice jury verdict and years after he was subpoenaed to testify in the reopened divorce proceedings, Tung attempted to intervene as a party to the divorce proceedings at both the appellate

and trial levels. (*Id.* ¶¶ 87-88.) The Appellate Division denied Tung's motion to intervene on November 30, 2018. (*Id.* ¶ 87.) The Superior Court denied his motion to intervene on December 18, 2018. (*Id.* ¶ 88.)

In 2019, Tung filed the instant action against the Superior Court of New Jersey under 28 U.S.C. § 2201. Tung argued that the Superior Court violated his substantive and procedural due process rights when it vacated the final judgment of divorce. (Compl. ¶ 1, ECF No. 1.) Moreover, Tung maintained that the Appellate Division violated his substantive and procedural due process rights when it affirmed the trial court's decision to set aside the final judgment of divorce without providing him an opportunity to intervene or present a defense. Tung also maintained that this allegedly unconstitutional action tainted his malpractice case and rendered him unable to receive a fair trial. (*Id.* ¶ 69.) In a November 26, 2019 Opinion, Chief Judge Wolfson dismissed the initial Complaint on sovereign immunity grounds. (Nov. 26, 2019 Op. 6-8, 12, ECF No. 17.) While dismissing the initial Complaint, Judge Wolfson granted Tung leave to file an amended complaint in which he proposed to seek prospective relief from state officers pursuant to the *Ex Parte Young* doctrine. (*Id.* at 10-11.)

Tung has since filed an Amended Complaint. The Amended Complaint brings similar claims as the initial Complaint, although it names judges and court administrators as Defendants instead of the New Jersey Superior Court. The named Defendants are the Chief Justice of the New Jersey Supreme Court, the Acting Administrative Director of the New Jersey Courts, and the Presiding Judge for Administration for the Appellate Division. (Am. Compl. ¶¶ 1-2.) Tung contends that these three officials are responsible for overseeing the administration of the New Jersey court system and,

therefore, are responsible for the policies that injured his substantive and procedural due process rights. (*Id.*) In his Amended Complaint, Tung seeks a declaratory judgment that the decisions and opinions reopening the divorce case violated his due process rights, along with an injunction removing them from the public domain. (*Id.* at 40-42.) Tung also seeks an injunction requiring “the New Jersey State court systems[ ] to implement pertinent substantive and procedural due process procedures” to ensure “plaintiff or attorneys similarly situated ... [are] given an opportunity to defend themselves in the future” when matters of attorney discipline come up in cases where they are not a party to the action. (*Id.*) Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) on the grounds of Eleventh Amendment immunity, the *Rooker-Feldman* doctrine, and *Younger* abstention. (Defs.’ Moving Br. 2, ECF No. 30-4.)

## II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), “a court must grant a motion to dismiss if it lacks subject-matter jurisdiction to hear a claim.” *In re Schering Plough Corp. Intron/Temodar*, 678 F.3d 235, 243 (3d Cir. 2012). Eleventh Amendment immunity may be invoked through a 12(b)(1) motion because Eleventh Amendment immunity deprives the court of subject matter jurisdiction. *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 694 n.2 (3d Cir. 1996) (citing *Pennhurst State Sch. & Hsp. v. Halderman*, 465 U.S. 89, 98-100 (1984)). Because Eleventh Amendment immunity is an affirmative defense, however, the burden of demonstrating the immunity lies with the defendant who is asserting it. *Carter v. City of Philadelphia*, 181

F.3d 339, 347 (3d Cir. 1999). Where, as here, the State “present[s] a facial challenge to the Court’s subject matter jurisdiction, ‘the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.’” *Rich v. New Jersey*, No. 14-2075, 2015 WL 2226029, at \*5 (D.N.J. May 12, 2015) (quoting *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000)).

### III. DISCUSSION

#### A. The *Ex Parte Young* Exception to Eleventh Amendment Immunity Does Not Apply to Tung’s Claims

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. The Amendment provides “states with immunity from suit ... in federal court not only from suits brought by citizens of other states, but also from suits brought by their own citizens.” *Gattuso v. N.J. Dep’t of Human Servs.*, 881 F. Supp. 2d 639, 645 (D.N.J. 2012) (citing *Hans v. Louisiana*, 134 U.S. 1, 13-14 (1890)). This immunity extends to suits against state officers acting in their official capacity. *Pennsylvania Fed’n of Sportsmen’s Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002). Defendants maintain that Tung’s claims are barred by the Eleventh Amendment. (Defs.’ Moving Br. 5-9.)

In response to the Defendants' Motion to Dismiss, Tung asserts an exception to the State's Eleventh Amendment immunity: the *Ex Parte Young* doctrine. (Pl.'s Opp'n Certification ("Pl.'s Cert.") 7-8, ECF No. 31.) Under *Ex Parte Young*, "individual state officers can be sued ... for prospective injunctive and declaratory relief to end continuing or ongoing violations of federal law." *MCI Telecom Corp. v. Bell Atl. Pa.* 271 F.3d 491, 506 (3d Cir. 2001) (citing *Ex Parte Young* 209 U.S. 123 (1908)). *Ex Parte Young* is based on the theory that a state officer has no authority to violate the federal law and thus, when the official does so, even pursuant to state law, the official "is stripped of his official or representative character and becomes subject to the consequences of his individual conduct." *Id.*

The Supreme Court has found that the *Ex Parte Young* exception should not be given an expansive scope. *Pennhurst*, 465 U.S. at 102-03. For *Ex Parte Young* to apply, a suit must seek both prospective relief and a remedy to an ongoing or continuing violation of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (holding that whether *Ex Parte Young* applied required a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective"); *Christ the King Manor, Inc. v. Sec'y of HHS*, 730 F.3d 291, 318-19 (3d Cir. 2013) (holding that *Ex Parte Young* only allows suits "that seek prospective relief to end an ongoing violation of federal law" and finding that in making these determinations, courts "must look to the substance rather than the form of the relief requested" (internal quotation marks and citations omitted)).

### 1. Tung Does Not Allege a Violation of Federal Law

Tung's claims fail because he cannot demonstrate that the Defendants violated his federal rights. The Amended Complaint directs the Court to several state court findings made during the reopened divorce proceedings. Tung alleges that these findings amounted to a public reprimand rising to the level of a sanction. His central claim is that the court found that he was involved in a fraud on the court. (Am. Compl. ¶ 48 (citing Sept. 12, 2012 Hr'g Tr. 71:4-7 ("I think the English agreement, quite frankly in the way it was presented to the [c]ourt, unfortunately rises to the level of a fraud upon the [c]ourt."))) Additionally, Tung argues that the state court's finding that Mrs. Fou "was being manipulated through this divorce process" amounted to a sanction. (*Id.* ¶ 51 (quoting Sept. 12, 2012 Hr'g Tr. 71:11-15).)

As Tung correctly argues, the Third Circuit has held that judicial criticism against an attorney in an opinion or order "rising to the level of a public reprimand is a sanction" requiring the court to provide the attorney due process before rendering such an opinion. *Bowers v. NCAA*, 475 F.3d 524, 543 (3d Cir. 2007); (Am. Compl. ¶ 61.) In *Bowers*, the Third Circuit held that "[w]henever the district court imposes sanctions on an attorney, it must at a minimum, afford the attorney notice and opportunity to be heard." *Bowers*, 475 F.3d at 544 (internal quotation marks and citation omitted). In *Bowers*, the plaintiff's attorneys were involved in a years long litigation that involved discovery disputes and subsequent sanctions motions against the attorneys. *Id.* at 544. In the course of that litigation, the district court clearly and "explicitly stated that [it] was sanctioning not only [plaintiff] but also [plaintiff's] attorneys" for their failure to properly disclose discoverable

information requested by defendants. *Id.* As Tung notes, the district court in *Bowers* “did not impose any additional monetary or disciplinary sanctions on [plaintiff's] attorneys beyond factual findings and language in the actual order that the conduct of those attorneys merited sanctions.” *Id.* at 542. The attorneys appealed. *Id.* at 535.

The Third Circuit began its analysis by noting that there was “some disagreement among the courts of appeals” about precisely what kind of language in an opinion amounted to a sanction. *Id.* at 543. The Third Circuit noted, however, that “most courts agree that mere judicial criticism is insufficient to constitute a sanction.” *Id.* The court observed that the central issue dividing the courts of appeals was whether a factual finding that an attorney engaged in improper conduct is itself a sanction, or whether a court must enter an explicit order that the conduct was sanctionable. *Id.* The Third Circuit found that it need not decide that issue in *Bowers* because the district court clearly set out that it intended its reprimand to act as a sanction. *Id.* at 544. The Third Circuit found, accordingly, that the district court's explicit holding that it was sanctioning the *Bowers* attorneys violated the attorneys' due process rights, because they were denied notice and an opportunity to be heard. *Id.*

There are a number of factual and procedural distinctions between *Bowers* and the case at bar. First, in *Bowers*, the sanctioned lawyers were actively representing parties in the case in which they were sanctioned. “[W]hen a court imposes a sanction on an attorney” it is “exercising its inherent power to regulate the proceedings before it.” *Nisus Corp. v. Perma-Chink Sys., Inc.*, 497 F.3d 1316, 1319 (Fed Cir. 2007). Unlike in *Bowers*, the court was not criticizing Tung's professional

conduct in an effort to regulate the proceedings before it. As Tung acknowledges, at the time of the judge's criticism, he was no more than a subpoenaed "fact witness." (Am. Compl. ¶ 63.) Tung presents no case law suggesting that an attorney has a right to due process because he was criticized by a judge at a time when he was not practicing before that judge.

Second, the *Bowers* attorneys apparently sought to be heard on the district court's sanctions shortly after they were imposed. *See Bowers v. NCAA*, No. 97-2600, 2005 WL 5155198 (Mar. 21, 2005 D.N.J.) (sanctioning the *Bowers* attorneys), *rev'd*, 475 F.3d 524 (3d Cir. 2007). Here, as the State observes, Tung moved to be heard with respect to these alleged sanctions more than six years after the state courts\* findings. (Am. Compl. ¶¶ 87-88; Defs.' Moving Br. 8.) Again, Tung cites no authority for the proposition that a state court violates due process by refusing to allow a non-party to be heard years after a finding that may have damaged the non-party's professional reputation.

Third, Tung has not directed the Court to statements finding that he engaged in sanctionable conduct. True, as Tung notes, the State court found that Mrs. Fou "was being manipulated," (Hr'g Tr. 71:11-15), and that there was "a fraud upon the Court," (Sept. 12, 2012 Hr'g Tr. 71:4-7). But Tung does not direct the Court to language in which State judges held that Tung engaged in this conduct. Indeed, taking these statements in context, a reader could just as easily conclude that the Court was condemning Mr. Fou's conduct throughout the divorce proceedings. The Court takes note of other statements in the 2012 state court hearing transcript setting aside the divorce judgment where the court found "there's a complete failure ... to have independent counsel and there's an illusion of independent counsel,

which is grossly misleading on its face." (Sept. 12, 2012 Hr'g Tr. 70:9-12.) Although this language likely did apply to Tung, the state court did not, however, hold that Tung's conduct in this regard was "sanctionable," let alone make an explicit ruling sanctioning Tung for these failings. *Cf. Bowers*, 475 F.3d at 544-45.

The Third Circuit has found that a court does not impose sanctions when it makes a mere "judicial admonishment" or "judicial criticism" of an attorney. *Venesevich v. Leonard*, 378 F. App'x 129, 131 (3d Cir. 2010). In *Venesevich*, in the course of making a ruling on the merits of a case, a district court wrote a footnote rebuking plaintiff's attorney for plagiarism in a brief. *Id.* The Court of Appeals held that this statement did not amount to a sanction. *Id.* at 131. The court noted that "the district court action in this case differs materially from the one in *Bowers*." *Id.* at 130. The court reasoned that all the district court had done was make an observation, if a highly critical one, about the attorney's conduct in the course of its opinion. *Id.* at 131. Thus, there was no ruling formally sanctioning the attorney, nor a holding that it intended to sanction the attorney, or even a specific finding that the attorney's conduct was sanctionable. *Id.* Thus, in *Venesevich*, there was no sanction under *Bowers* requiring notice and opportunity to be heard.

The New Jersey Superior Court's statements here more closely resemble those of the court in *Venesevich* than in *Bowers*. Here, the Superior Court described and criticized some of Tung's conduct in the context of its decision on the merits of the issue before it. The Court acknowledges that the Superior Court's criticisms were serious, especially with regard to its suggestion that Tung failed to provide Mrs. Fou with independent counsel. (See Sept. 12, 2012 Hr'g Tr. 64:11-

65:4, 69:19-70:12.) Unlike in *Bowers*, however, the Superior Court did not formally sanction Tung in any way, nor did it make an express factual finding that the conduct was sanctionable. Rather, the court only generally discussed Tung's actions in the context of deciding the merits of the issue before it. Thus, the court did not undertake any of the actions that *Bowers* held could be a sanction, and rather only offered the type of judicial criticism that both *Bowers* and *Venesevich* held was insufficient to be a sanction. Indeed, federal courts have routinely rejected attorney-plaintiffs' claims along the lines of those brought by Tung. See, e.g., *Nisus Corp.*, 497 F.3d at 1321 (holding that "a finding of inequitable conduct is insufficient to confer appellate jurisdiction over an appeal by [an] aggrieved attorney"); *Keach v. Cnty. of Schenectady*, 593 F.3d 218, 225 (2d Cir. 2010) (finding that there were no sanctions where "the district court's comments were in the nature ... of routine judicial commentary or criticism" (internal quotation marks omitted)). Accordingly, the Court finds that Tung has not alleged a constitutional violation because he has not alleged that he was sanctioned without notice and opportunity to be heard.

## 2. Tung Does Not Allege That a Violation of Federal Law Is Continuing

Even if Tung established that the New Jersey state courts criticized him to the point of sanctioning him, he would still need to establish that the constitutional violation was ongoing. *Christ the King Manor*, 730 F.3d at 318 ("Plaintiffs can ... bring suit against state officers, but their remedies are limited to those that are designed to end a continuing violation of federal law"). Courts have described the "inquiry into

whether the complaint alleges an ongoing violation of federal law" as "straightforward." *Surina v. S. River Bd. of Educ.*, No. 17-2173, 2018 WL 3617970, at \*6 (D.N.J. July 30, 2018). Here, Tung's Amended Complaint fails to allege that the State's constitutional violation is ongoing.

*Surina* is instructive. There the plaintiff had a series of long-running disputes with local school officials regarding her child's care and education. *Id.* at \* 1-3. The disagreement culminated in the school district sending a social worker to plaintiff's home to check on the child. *Id.* at \*3. Plaintiff alleged that the visit was retaliation for the past disputes and an abuse of process creating an ongoing violation of her constitutional rights. *Id.* at \*6. The court found *Ex Parte Young* inapplicable because the complaint only plausibly alleged that the "isolated" initial visit by the social worker violated the Constitution, not that there was an ongoing violation of federal law. *Id.* The court further noted that there was "no reason to believe that such conduct ... will repeat in the future." *Id.* Other cases in the District of New Jersey have come to similar conclusions in a variety of factual situations. *See, e.g., Rich v. New Jersey*, No. 14-2075, 2015 WL 2226029 (D.N.J. May 12, 2015) (holding that *Ex Parte Young* was not satisfied because there was no ongoing violation of federal employment law where plaintiffs were already terminated); *Dinoia v. Cumbo*, No. 12-03175, 2015 WL 6739114 (D.N.J. Nov. 4, 2015) (finding no ongoing constitutional violation where the plaintiff only alleged a single prior illegal arrest); *see also Treistman v. McGinty*, 804 F. App'x 98, 100 (2d Cir. 2020) (holding that there was no ongoing constitutional violation where plaintiff's assertions that there would be future due process violations in court proceedings were "speculative").

Similarly, here, Tung only alleges isolated prior proceedings in which he was not allowed to be heard. He does not allege that that proceeding is ongoing. In fact, the State has afforded Tung notice and opportunity to be heard regarding the ethical concerns at issue in the Fou divorce proceedings. For example, Tung participated in Mrs. Fou's subsequent malpractice suit and in related attorney disciplinary proceedings, the latter of which was ongoing at the time he filed his Amended Complaint. (Defs.' Moving Br. 2-3.) Aside from the past isolated proceedings in which Tung's arguably untimely motion to intervene was overruled, there is no allegation in the Amended Complaint that there are ongoing proceedings in which Tung is not being heard. Nor does Tung "allege any facts that plausibly showed (1) future proceedings would likely occur *and* (2) that such proceedings would be accompanied by any due process violations." *Treistman v. McGinty*, 804 F. App'x 98, 100 (2020). Thus, Tung does not state any constitutional injury that is ongoing.

Finally, courts have also held that the continuing effects of an isolated, prior constitutional violation do not constitute an ongoing constitutional violation. *See, e.g., Jemsek v. Rhyne*, 662 F. App'x 206, 211 (4th Cir. 2016) (finding that while it may be unfortunate from plaintiff's perspective that a medical board's disciplinary findings have "continuing consequences[,] ... invoking those effects does not transform past state action into an ongoing violation'"). As in *Jemsek*, the fact that Tung alleges that he is still being harmed by the existence of the divorce court judgment in the public record does not demonstrate an ongoing violation under *Ex Parte Young*. Tung asks the Court to remove the "unconstitutional decisions or opinions from the public domain," thus at least implying an argument that his

constitutional rights are being continuously violated by the ongoing existence of the opinion. (Am. Compl. ¶ 109.) But this allegedly ongoing injury is similar to the medical board actions at issue in *Jemsek*. Fundamentally, Tung's constitutional claim is that he was denied due process in a past proceeding that is now complete and final. The mere fact that the judgment emanating from the proceeding still has some diffuse effects does not change that fact.

#### IV. CONCLUSION

For the foregoing reasons, the Court finds that Tung's procedural due process claims are barred by the Eleventh Amendment and do not properly fall within the *Ex Parte Young* exception to Defendants' immunity to suit. Thus, the Court will dismiss Tung's Amended Complaint with prejudice.

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Filed 11/10/20

UNITED STATES DISTRICT COURT DISTRICT  
OF NEW JERSEY

Civil Action No. 19-871 (MAS) (TJB)

ORDER

KEVIN KERVENG TUNG, Plaintiff,

v.

STUART RABNER, in his official capacity as Chief  
Justice of the Supreme Court of the State of New  
Jersey, et al.,  
Defendants.

This matter comes before the Court upon Defendants Stuart Rabner, Chief Justice of the New Jersey Supreme Court, Glenn A. Grant, Administrative Director of the New Jersey Courts, and Carmen Messano, Presiding Judge of the New Jersey Superior Court, Appellate Division's ("Defendants") Motion to Dismiss Plaintiff Kevin Kerveng Tung's ("Plaintiff") Amended Complaint. (ECF No. 30.) Plaintiff opposed. (ECF No. 31.) For the reasons set forth in the accompanying Memorandum Opinion, and for good cause shown,

IT IS on this 10th day of November 2020  
ORDERED that:

1. Defendants' Motion to Dismiss (ECF No. 30) is GRANTED.

22a

MICHAEL A. SHIPP  
UNITED STATES DISTRICT JUDGE

23a

Filed 01/19/20  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
(609) 989-2040

CHAMBERS OF TONIANNE J. BONGIOVANNI  
UNITED STATES MAGISTRATE JUDGE

U.S. COURTHOUSE  
402 E. STATE STREET, RM 6052  
TRENTON, NJ 08608

January 17, 2020

LETTER ORDER

Re: Tung v. Superior Court of New Jersey

Civil Action No. 19-871 (FLW)

Dear Parties:

On November 26, 2019, the District Court granted Defendant's Motion to Dismiss and denied Plaintiff's cross-motions for injunctive relief and declaratory judgment. (Docket Entry No. 17). The Court permitted Plaintiff to file a Motion to Amend the Complaint within thirty days of the Order. *Id.* at 11. Plaintiff filed his timely Motion to Amend the Complaint which is now pending before this Court. (Docket Entry No. 18). Plaintiff's motion seeks to change the caption in this matter to read:

Stuart Rabner (intended to be the Chief Justice of the Supreme Court of New Jersey), Glenn A.

Grant, (intended to be the Acting Administrative Director if the New Jersey Courts), Carmen Messano (intended to be the Presiding Judge for Administration for the Appellate Division of the Superior Court of New Jersey), and John Doe and Jane Doe, the individuals who are appointed to be in charge of the managing and supervising of the administration of the Superior Court of New Jersey and who have similar official duties or capacities and whose names are unknown to the Plaintiff.

*Id.* Defendant does not oppose Plaintiff's motion.

Pursuant to FED. R. CIV. P. 15(a)(2), leave to amend the pleadings is generally granted freely. See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Alvin v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000). Nevertheless, the Court may deny a motion to amend where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Id.* However, where there is an absence of undue delay, bad faith, prejudice or futility, a motion for leave to amend a pleading should be liberally granted. *Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004).

The Court does not find that Plaintiff's motion is the product of undue delay, was made in bad faith, or will prejudice the Defendant. Pursuant to the liberal amendment standards set out in FED. R. CIV. P. 15, Plaintiff's motion is GRANTED. Plaintiff is directed to separately file his amended complaint pursuant to this order by January 27, 2020.

IT IS SO ORDERED.

The Clerk of the Court is directed to terminate Docket  
Entry No. 18.

s/ Tonianne J. Bongiovanni  
TONIANNE J. BONGIOVANNI  
United States Magistrate Judge

Filed 11/26/19

\*NOT FOR PUBLICATION\*  
UNITED STATES DISTRICT COURT

Filed 11/26/19  
DISTRICT OF NEW JERSEY

Civil Action No.: 19-00871 (FLW)(TJB)

OPINION

KEVIN K. TUNG, ESQ.,  
Plaintiff,

vs.

SUPERIOR COURT OF NEW JERSEY,

Defendant.

WOLFSON, Chief Judge:

Plaintiff Kevin K. Tung (“Plaintiff” or “Tung”), a licensed New Jersey attorney<sup>1</sup> proceeding *pro se*, alleges that Defendant, the Superior Court of New Jersey (“Defendant” or the “State”) violated his Fourteenth Amendment Due Process rights during a series of legal disputes stemming from Plaintiff’s representation of a client in a divorce action. Defendant moves to dismiss Plaintiff’s claims under Federal Rule of Civil Procedure 12(b)(1) based on Eleventh Amendment Sovereign Immunity, the *Rooker-Feldman* doctrine, and the *Younger* abstention doctrine. Plaintiff opposes the

motion. For the reasons set forth below, Defendant's Motion to Dismiss is GRANTED. Plaintiff may file a motion for leave to file an Amended Complaint, with the proposed Amended Complaint attached, within thirty days of the Order accompanying this Opinion and assert claims against substitute defendant(s), as set forth herein.<sup>2</sup>

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

For the purposes of this motion, the relevant facts are derived from Plaintiff's Complaint and the documents attached thereto and assumed as true.

This matter arises from Plaintiff's representation of one spouse in a no-fault divorce (the "Divorce Action") in the New Jersey Family Court in the spring of 2009. ECF No. 1, Complaint ("Compl.") at ¶10. During his representation of the client, Plaintiff reviewed a property settlement agreement, drafted by the couple in their native Mandarin, and he prepared an English translation of the document. *Id.* at ¶11. Plaintiff then initiated the divorce proceedings on behalf of his client, and at the culmination of the proceeding, the property settlement agreement was incorporated into the parties' Final Judgment of Divorce. *Id.* at ¶11. Plaintiff alleges that unbeknownst to him, there were four Mandarin versions of the property settlement agreement, and he was only provided with one. *Id.*

In 2011, two years after the conclusion of the Divorce Action, Plaintiff's former client moved to set aside the Final Judgement of Divorce, arguing that the property settlement agreement prepared by Plaintiff differed substantially from the Mandarin agreement. *Id.* at ¶¶13-14. Represented by new counsel, Plaintiff's

former client allegedly testified before the trial court that her husband had been the one to hire Plaintiff, and as such, Plaintiff represented both the husband and the wife in the Divorce Action; the former client also accused Plaintiff of deliberately omitting terms from the Property Settlement Agreement to benefit her husband. *Id.* at ¶¶13-14, 26-28. Plaintiff testified, pursuant to a subpoena, as a fact witness in that proceeding, but was not permitted to sit in on the entire hearing, call witnesses, conduct cross-examination, or otherwise participate in the litigation. *Id.* at ¶¶47-48. The client successfully vacated the Property Settlement Agreement, and the family court's decision was upheld on appeal. *See* Compl., Ex. 2, September 12, 2012 Transcript and Decision Vacating the Final Divorce Decree (the "Family Court decision"); ECF No. 13, Plaintiff's Declaration in Opposition to Motion to Dismiss Complaint and In Support of Cross-Motion ("Tung Decl."), Ex. I, July 2, 2016 Decision of the New Jersey Appellate Division (the "Appellate Division Opinion"). In defending against the adverse rulings, Plaintiff argues that in both proceedings, his former client failed to divulge that Plaintiff was only provided one of the four relevant Mandarin agreements. *Id.* at ¶¶13-14. In Plaintiff's view, the client's accusations were merely a guise to escape the terms of the property settlement agreement, spite her ex-husband, and obtain funds from Plaintiff by laying the groundwork for a subsequent malpractice claim. *Id.* at ¶¶ 26-28.

Nonetheless, Plaintiff's former client instituted a successful legal malpractice action against him in the New Jersey Superior Court. *Id.* at ¶¶ 67-75, 70. Furthermore, the New Jersey Appellate Division, reviewing the Divorce Action, referred Mr. Tung to the Office of Attorney Ethics for further investigation of his

wrongdoing during the divorce proceeding. *Id.* at ¶66. At the time Plaintiff filed the instant Complaint, the attorney-ethics proceeding was still ongoing. *Id.* Subsequently, Plaintiff moved to intervene in the then-completed appeal from the Divorce Action, to set aside the Appellate Divisions' July 2016 decision. *Id.* at ¶72. On November 30, 2018, the Appellate Division denied Plaintiff's motion. *Id.* at ¶72. Thereafter, on December 18, 2018, Plaintiff also moved to intervene in the then-completed family court proceeding to set aside the state court's September 12, 2012 decision vacating the Final Divorce Decree. *Id.* at ¶73.

After unsuccessfully attempting to challenge the completed state court proceedings, on January 21, 2019, Plaintiff filed the instant declaratory judgment action against the Superior Court of New Jersey pursuant to 28 U.S.C. §2201. Plaintiff alleges that his substantive and procedural due process rights were violated by the trial court decision vacating the Final Divorce Decree and the subsequent decision of the New Jersey Appellate Division, because he was a non-party and was never given an opportunity to present a defense. *Id.* at ¶46. Furthermore, Plaintiff alleges that the New Jersey Superior Court violated his due process rights by precluding him from intervening in either proceeding. *Id.* As a result, Plaintiff was allegedly unable to obtain a full, fair, and impartial trial in the subsequent malpractice proceeding. *Id.* at ¶79.<sup>3</sup>

Defendant now moves to dismiss this action alleging lack of subject matter jurisdiction based on Eleventh Amendment Sovereign Immunity, and the *Rooker-Feldman* doctrine. See ECF No. 12-4, Def. Br. at 3. Defendant further argues that, even if subject-matter jurisdiction exists, this Court should refrain from acting pursuant to the *Younger* abstention doctrine. *Id.*

In opposition to Defendant's motion, Plaintiff cross-moved for declaratory judgment, preliminary injunction, and permission to amend the complaint. *See* Tung Decl. ¶2.

## II. STANDARD OF REVIEW

### A. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) permits the Court to dismiss a proceeding for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). This includes cases where Eleventh Amendment immunity bars the plaintiff's claims, as the Court of Appeals for the Third Circuit has noted that "the Eleventh Amendment is a jurisdictional bar which deprives federal courts of subject matter jurisdiction." *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 693 n.2 (3d Cir. 1996) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98–100, 1 (1984)). Once a Rule 12(b)(1) challenge is raised, the plaintiff bears the burden of demonstrating the existence of subject matter jurisdiction. *See McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 286 (3d Cir. 2006). A Rule 12(b)(1) motion to dismiss is treated as either a "facial or factual challenge to the court's subject matter jurisdiction." *Gould Electronics, Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). Under a facial attack, such as here, the movant challenges the legal sufficiency of the claim, and the court considers only "the allegations of the complaint and documents referenced therein and attached thereto in the light most favorable to the plaintiff." *Id.*

## III. ANALYSIS

### A. Eleventh Amendment Sovereign Immunity

The Eleventh Amendment provides that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. Const. amend. XI. The Amendment affords states and state entities immunity from suits brought by citizens in federal court, regardless of whether legal or equitable relief is sought. *See Pennhurst State School & Hosp.*, 465 U.S. at 89,100-101; *see also Thorpe v. New Jersey*, 246 F. App’x 86, 87 (3d Cir. 2007) (“The Eleventh Amendment of the U.S. Constitution protects a state or state agency from a suit brought in federal court by one of its own citizens regardless of the relief sought. . . .”).

The New Jersey Superior Court is indisputably a component of the State of New Jersey and is entitled to the protections of the Eleventh Amendment. *See Robinson v. New Jersey Mercer County Vicinage-Family Div.*, 514 F. App’x 146, 149 (3d Cir. 2013)(explaining that county courts are “clearly a part of the state of New Jersey,” thus, “both the court itself and its employees in their official capacities were unconsenting state entities entitled to immunity under the Eleventh Amendment”) (citing *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 240 (3d Cir. 2005)); *see also Dongon v. Banar*, 363 F. App’x. 153, 156 (3d Cir. 2010)(“state courts, its employees, and the judges are entitled to immunity under the Eleventh Amendment because they are part of the judicial branch of the state of New Jersey, and therefore considered ‘arms’ of the state.”). Accordingly, the New Jersey Superior Court is not subject to suit, unless an exception to sovereign immunity applies.

Exceptions to sovereign immunity apply primarily in three circumstances "(1) congressional abrogation, (2) waiver by the state, and (3) suits against individual state officers for prospective injunctive and declaratory relief to end an ongoing violation of federal law." *Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002).

Here, Plaintiff argues that the State has waived its immunity because 1) the family court and New Jersey Appellate Division's denials of his motions to intervene constitute a waiver of sovereign immunity. Tung Decl ¶ 8. In that regard, Plaintiff avers that on October 2, 2018, he requested permission from Carmen Messano, one of the Appellate Division's presiding judges, to file a motion to intervene. *Id.* at ¶10. In his letter, Plaintiff requested that "[i]n the event, the Court declines to accept my filing of the Motion to Intervene, please issue an Order so that the undersigned can continue to exhaust the State Court's remedy." *Id.* at ¶10; *see also* Compl. Ex. H, Plaintiff's Letter to the Honorable Carmen Messano. On November 29, 2018, the Appellate Division issued an Order denying the motion to intervene. Tung Decl. ¶11; *see also* Compl., Ex. 15, Appellate Division Order dated November 29, 2018. In Plaintiff's view, the denial constitutes a limited or partial waiver of sovereign immunity. Tung Decl. ¶¶11-12. Furthermore, Plaintiff alleges that absent federal court jurisdiction, Plaintiff will have no remedy at law or equity because he has been repeatedly denied access to the Superior Court of New Jersey and Plaintiff has exhausted his state judicial remedies. *Id.* at ¶12.

Plaintiff's specious contention that the State has unwittingly consented to suit and waived sovereign immunity by acquiescing to his demand that he be permitted to "continue exhausting the State Court's

remedy" is unavailing. Plaintiff insists that the language "to exhaust the State Court's remedy" cannot be interpreted "to mean anything other than to go to federal court." *See* Pl. Reply Br. at 3-4. Plaintiff is incorrect. As an initial matter, in this instance, a state court judge cannot unilaterally waive sovereign immunity and consent to suit on behalf of the judiciary. *See Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999)(explaining that waiver will be found where "the State voluntarily invokes [Federal] jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to our jurisdiction. (citation and internal quotation marks omitted)). Furthermore, even if the State did execute a limited waiver of sovereign immunity, such a waiver would not necessarily subject the State to suit in *this* Court. When a state consents to a waiver of sovereign immunity, that consent "is construed narrowly and exists only where the State makes a 'clear declaration' that it intends to submit itself" to a court's jurisdiction. *Bennett v. City of Atl. City*, 288 F. Supp. 2d 675, 680 (D.N.J. 2003)(quoting *Coll. Sav. Bank.*, 527 U.S. 666, 675-76 (1999)). The State's alleged consent does not satisfy that exacting standard. Plaintiff's request could very easily have been interpreted as one seeking leave to appeal to the Supreme Court of New Jersey or to file a suit seeking a declaratory judgment in State court. Assuming, *arguendo*, that the State consented to suit by denying Plaintiff's motion to intervene, there is no indication that it was consenting to suit in *federal* court, rather than one of its own courts. *Ritchie v. Cahall*, 386 F. Supp. 1207, 1208 (D.N.J. 1974)(“it is well settled that even when a state consents to suit in its own courts, it does not follow that a similar suit may be maintained in the federal courts.”). Accordingly, Plaintiff's claims

against the New Jersey Superior Court are barred by the Eleventh Amendment and are dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).<sup>4</sup>

Because I find that dismissal for lack of subject matter jurisdiction is appropriate, I need not address Defendant's remaining contentions regarding the *Rooker-Feldman* and *Younger* abstention doctrines. Furthermore, because Plaintiff's claims are dismissed, Plaintiff's cross-motions for injunctive relief and declaratory judgment are denied.

Even if Plaintiff were to assess the adequacy of Plaintiff's proposed amendment, Plaintiff's amendment would be futile. Under the *Ex Parte Young* doctrine, Eleventh Amendment immunity is waived when officers of a state are sued for prospective injunctive relief to end an ongoing violation of federal law. *Pa Fed'n of Sportsmen's Clubs, Inc.*, 297 F.3d at 323; *see also Ex Parte Young*, 209 U.S. 123, 159-60 (1908). In order for the *Ex Parte Young* exception to be applicable, "[t]he relief sought must be prospective, declaratory, or injunctive relief governing an officer's future conduct and cannot be retrospective, such as money damages." *MCI Telecomm. Corp. v. Bell Atl. Pennsylvania*, 271 F.3d 491, 506 (3d Cir. 2001). To determine whether application of the doctrine is appropriate, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Pennsylvania Fed'n of Sportsmen's Clubs, Inc.*, 297 F.3d at 323 (quoting *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 5353 U.S. 635, 645 (2002)).

However, it is not clear that the *Ex Parte Young* doctrine is applicable to Plaintiff's proposed amended claims. As an initial matter, Plaintiff's requested relief is

not wholly prospective, because he seeks to have this Court decree that the state court judgments are unconstitutional. *See Rich v. New Jersey*, No. 14-2075 FLW, 2015 WL 2226029, at \*9 (D.N.J. May 12, 2015)(finding that the *Ex Parte Young* doctrine was inapplicable because Plaintiffs were “in sum, asking for a declaration from this Court that the conduct allegedly done by Defendants was discriminatory.”); *Heine v. Comm'r of The Dep't of Cnty. Affairs of the State of New Jersey*, No. 2:11-5347, 2016 WL 7042069, at \*7 (D.N.J. Dec. 1, 2016)(“Even a claim that nominally seeks injunctive or declaratory relief will not circumvent the Eleventh Amendment prohibition if, in its actual substance, it seeks retrospective relief”). Thus, Plaintiff’s proposed amended claim seeking to vacate the state court orders would not fall within the scope of *Ex Parte Young*. Furthermore, *Young* does not apply if, “although the action is nominally against individual officers, the state is the real, substantial party in interest and the suit in fact is against the state.” *MCI Telecomm. Corp.*, 271 F.3d at 506. “A plaintiff may not evade or circumvent a defendant’s assertion of sovereign immunity by purposefully omitting the state as a formal party to a complaint,” as Plaintiff seeks to do here. *Chisolm v. McManimon*, 275 F.3d 315, 322-23 (3d Cir. 2001). A state is a party-in-interest when “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting or to compel it to act.” *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989). Critically, Plaintiff has not alleged that the “Presiding Administration Judge of the New Jersey Superior Court” had any direct involvement in the alleged wrongful conduct. Ostensibly, Plaintiff’s

basis for substitution is solely his or her role in judicial administration. Thus, even if Plaintiff substituted the presiding judge, in his or her official capacity, as a defendant in this action, Eleventh Amendment sovereign immunity would nonetheless bar Plaintiff's claims. *See Heine*, No. 2:11-5347, 2016 WL 7042069 at \*8 (dismissing Plaintiffs' claims against the Commission of the New Jersey Department of Community Affairs because Plaintiffs' requested relief, changes to the State's housing policies, did not "seek the cessation of unlawful conduct, but revision of the State's policy choices regarding housing" and ran "afoul of the rule that a federal court lacks jurisdiction in a suit brought by an individual to compel a state to act.").

However, Plaintiff also seeks to enjoin the "Presiding Administration Judge of the Superior Court of New Jersey" to implement pertinent due process procedures to protect non-party attorneys like Plaintiff from criticism in an opinion or order, without due process. In that regard, it may be that Plaintiff's potential amendment, regardless of the merits, seeks the type of forward-looking relief permitted under *Young*. *See Am. Exp. Travel Related Servs. Co. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 568 (D.N.J. 2010), *aff'd sub nom. Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359 (3d Cir. 2012) ("it has long been established by the Supreme Court that the Eleventh Amendment does not preclude lawsuits against state officials in their official capacities to enjoin violations of federal law even where the remedy would enjoin enforcement and implementation of an official state policy"). However, in *Constitution Party of Pennsylvania v. Cortes*, 824 F.3d 386, 396 (3d Cir. 2016), the Third Circuit clarified that in order for the *Ex parte Young* exception to apply, the officer "must have some

connection with the enforcement of the [unconstitutional] act" and explained that "even 'entirely ministerial' duties can be sufficient under *Young*, because 'the inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights.'" (internal citations omitted). Here, Plaintiff has not identified who is the "the Presiding Administration Judge for the New Jersey Superior Court," let alone alleged what role that individual plays in the judicial administration and, even more tellingly, whether that individual has the ability to implement the policy changes Plaintiff seeks. Accordingly, Plaintiff's motion for leave to amend his Complaint in order to substitute the Presiding Administration Judge for the New Jersey Superior Court is denied. While the Court has difficulty envisioning a viable party or a viable claim 5, I will nonetheless, permit Plaintiff thirty days to file a motion for leave to file an amended complaint.

#### IV. CONCLUSION

For the reasons set forth above, Defendants' Motion to Dismiss is GRANTED. Plaintiff's claims against the Superior Court of New Jersey are dismissed with prejudice. Because Plaintiff's claims are dismissed, his cross-motions for injunctive relief and declaratory judgment are DENIED. Plaintiff may file a motion for leave to file an Amended Complaint within thirty days of the Order accompanying this Opinion.

Date: November 26, 2019.

/s/ Freda L. Wolfson  
Hon. Freda L. Wolfson  
U.S. Chief District Judge

## Footnotes

1 At the time his complaint was filed, Plaintiff was in the midst of attorney ethics proceedings, and the current status of his license is unclear.

2 Plaintiff is forewarned that he proceeds with his Rule 11 obligations in mind and that his proposed Amendment Complaint will be reviewed for futility.

3 While the Court does not assess the merits of Plaintiff's Constitutional claims in this Opinion, the Court is compelled to note that those claims, as pled, are questionable at best.

4 Furthermore, Congress has not abrogated the State's sovereign immunity pursuant to 42 U.S.C. §1983. See *Quern v. Jordan*, 440 U.S. 332, 342 (1979) (holding that Section 1983 does not override a state's Eleventh Amendment immunity). Although Plaintiff does not expressly reference Section 1983, that is ostensibly the statutory vehicle for Plaintiff's due process claims.

5 In the posture of this motion, I cannot definitively express an opinion as to the ultimate merits of Plaintiff's claims, and whether Plaintiff can plausibly state a claim that the State's current procedures violate the Fourteenth Amendment.

Date Filed: 07/28/2021

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 20-3348

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KEVIN TUNG, on behalf of himself and all others  
similarly situated,

Appellant

v.

SUPERIOR COURT OF NEW JERSEY; STUART  
RABNER, Chief Justice of the Supreme Court of New  
Jersey; GLENN A. GRANT, Acting Administrative  
Director of the New Jersey Courts; CARMEN  
MESSANO, Presiding Judge for Administration for the  
Appellate Division; JOHN/JANE DOE, Administrators  
of the New Jersey Superior Court

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On Appeal from the United States District Court  
for the District of New Jersey  
(D.C. No. 3:19-cv-00871)

District Judge: Honorable Michael A. Shipp

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Submitted Under Third Circuit L.A.R. 34.1(a)  
on July 9, 2021

Before: AMBRO, JORDAN, and BIBAS, *Circuit  
Judges*

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JUDGMENT

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This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted under L.A.R. 34.1(a) on July 9, 2021.

On consideration whereof, it is now ORDERED and ADJUDGED that the District Court's judgment entered on November 12, 2020, is hereby AFFIRMED. Costs will be taxed against Appellant. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit  
Clerk

Dated: July 28, 2021

Date Filed: 08/27/2021

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 20-3348

KEVIN TUNG, on behalf of himself and all others  
similarly situated,  
Appellant

v.

SUPERIOR COURT OF NEW JERSEY; STUART  
RABNER, Chief Justice of the Supreme Court of New  
Jersey; GLENN A. GRANT, Acting Administrative  
Director of the New Jersey Courts; CARMEN  
MESSANO, Presiding Judge for Administration for the  
Appellate Division; DOE JOHN/JANE, Administrators  
of the New Jersey Superior Court

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(D.C. No. 3:19-cv-00871)

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SUR PETITION FOR REHEARING

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Present: SMITH, Chief Judge, and McKEE, AMBRO,  
CHAGARES, JORDAN, HARDIMAN,  
GREENAWAY, JR., SHWARTZ, KRAUSE,  
RESTREPO, BIBAS, PORTER, MATEY, and  
PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the  
above-captioned case having been submitted to the  
judges who participated in the decision of this Court and  
to all the other available circuit judges of the circuit in  
regular active service, and no judge who concurred in the

decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is DENIED.

By the Court,  
s/Stephanos Bibas  
Circuit Judge  
Dated: August 27, 2021  
JK/cc: All Counsel of Record

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

Civil Action No.: 19-00871 (FLW)(TJB)

ORDER

KEVIN K. TUNG, ESQ.,  
Plaintiff,

vs.

SUPERIOR COURT OF NEW JERSEY,

Defendant.

THIS MATTER having been opened to the Court by John Francis Regina, Esq., counsel for Defendant the Superior Court of New Jersey ("Defendant"), on a Motion to Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(1); it appearing that Plaintiff Kevin K. Tung ("Plaintiff"), *pro se*, opposes the motion and has filed a cross-motion seeking a declaratory judgment, injunctive relief, and leave to amend his Complaint; the Court having considered the submissions of the parties without oral argument, pursuant to Fed. R. Civ. P. 78; for the reasons set forth in the Opinion filed on this date, and for good cause shown,

IT IS on this 26th day of November, 2019,  
ORDERED that Defendant's Motion to Dismiss [ECF No. 12] is GRANTED and Plaintiff's claims

against Defendant are dismissed with prejudice; it is further

**ORDERED** Plaintiff's cross-motion for injunctive relief, declaratory judgment, and leave to amend his Complaint in order to substitute a defendant [ECF No. 13] is DENIED; it is further **ORDERED** that Plaintiff is directed to file a motion for leave to amend his complaint within thirty (30) days of this Order or this case will be closed.

/s/ Freda L. Wolfson  
Freda L. Wolfson  
U.S. Chief District Judge