VIII. APPENDIX

INDEX OF APPENDICES

24-2495-cv
Wade v. Rodriguez

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of May, two thousand twenty-five.

PRESENT:

GUIDO CALABRESI,
BARRINGTON D. PARKER, JR.,
WILLIAM J. NARDINI,
Circuit Judges.

JOSEPH W. WADE,

Plaintiff-Appellant,

v. 24-2495-cv

ROBERT J. RODRIGUEZ, DBA ROBERT J. RODRIGUEZ, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE, NEW YORK DEPARTMENT OF STATE, DAVID ASHTON, IN HIS OFFICIAL CAPACITY, CATHERINE TRAINA, IN HER OFFICIAL CAPACITY, LAURISSA GARCIA, IN HER OFFICIAL CAPACITY,

Defendants-Appellees,

NEW YORK STATE DEPARTMENT OF STATE OFFICE OF PLANNING, DEVELOPMENT AND COMMUNITY INFRASTRUCTURE,

Defendant.

For Plaintiff-Appellant: JOSEPH WADE, *pro se*, New York, NY.

For Defendants-Appellees: ANTHONY R. RADUAZO, *for* Letitia James, Attorney General of the State of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Paul A. Engelmayer, *District Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment is **AFFIRMED**.

Joseph Wade appeals from the district court's dismissal of his Amended Complaint for lack of subject matter jurisdiction. Wade, the principal at Owl Contracting LLC ("Owl"), brought this action against Secretary Robert J. Rodriguez of the New York State Department of State ("NYS DOS") and NYS DOS employees Catherine Traina, Laurissa Garcia, and David Ashton (collectively, the "Appellees"). Wade alleged that the defendants' inclusion of a "Diversity Practices Questionnaire" ("DPQ") as part of a construction contract proposal application for NYS DOS's Downtown Revitalization Initiative violated his rights to equal protection and due process, federal criminal law, state

law, and amounted to conspiracy under 42 U.S.C. §§ 1985(3) and 1986. The district court granted the Appellees' motion to dismiss Wade's Amended Complaint for lack of subject matter jurisdiction because he lacked Article III standing and because his claims were barred by the Eleventh Amendment. *See Wade v. Rodriguez*, No. 23-cv-4707 (PAE), 2024 WL 4135195 (S.D.N.Y. Sept. 10, 2024). The district court also denied Wade's motion for leave to amend his complaint a second time so that he could add claims for injunctive relief to avoid the Appellees' Eleventh Amendment immunity. *Id.* at *7. On appeal, Wade argues that the district court erred in dismissing his Amended Complaint because he sought declaratory relief that was not barred by Eleventh Amendment immunity, and because the district court abused its discretion when it denied Wade leave to amend his complaint a second time. We disagree and conclude that dismissal of the Amended Complaint was proper because Wade lacked standing. Therefore, we affirm the judgment of the district court. We assume the parties' familiarity with the case.

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it."[1] *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *see* Fed. R. Civ. P. ("Rule") 12(b)(1). When a defendant brings a fact-based Rule 12(b)(1) motion, he is permitted to proffer evidence beyond the complaint. *Carter v. HealthPort Technologies,*

[1] Unless otherwise indicated, when quoting cases, all internal quotation marks, alteration marks, emphases, footnotes, and citations are omitted.

LLC, 822 F.3d 47, 57 (2d Cir. 2016). "We review the dismissal of claims for lack of standing *de novo*." *Ross v. Bank of America, N.A. (USA)*, 524 F.3d 217, 222 (2d Cir. 2008).

Wade lacked standing to bring his claims based on the DPQ. "To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011). To establish Article III standing, a plaintiff must show "[1] that he suffered an injury-in-fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical; [2] that there was a causal connection between the injury and the conduct complained of; and [3] that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Carver v. City of New York*, 621 F.3d 221, 225 (2d Cir. 2010) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Furthermore, "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting damages relief." *Babb v. Wilkie*, 589 U.S. 399, 413 (2020) (quoting *Texas v. Lesage*, 528 U.S. 18, 21–22 (1999)).

Here, the rejection of Wade's bid was not traceable to the conduct he challenged. Each contract bidder on NYS DOS's Downtown Revitalization Initiative who received a Technical Proposal score of less than 55 points was automatically ineligible to be selected for a contract. The parties do not dispute that Wade's Technical Proposal score was 17.67.

Accordingly, Wade failed to plausibly allege that the DPQ could have had a "but-for" causal impact on the final decision to reject his proposal. *See Babb*, 589 U.S. at 413-14.

Separately, the Amended Complaint's additional theory of harm was that the use of the DPQ "caus[ed] [Wade] to subject other citizens to judgment . . . which deprives those citizens of opportunity based on their race and gender." S.D.N.Y., No. 23-cv-4707, doc. 31 at 20. But the Amended Complaint did not allege that Wade was aware of the DPQ prior to making subcontracting decisions or that he discriminated against any group due to the existence of the questionnaire. *See, e.g.*, *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016) ("The traceability requirement of Article III standing means that the plaintiff must demonstrate a causal nexus between the defendant's conduct and the injury.").

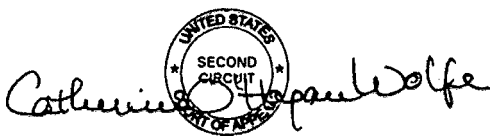
Last, Wade asserted standing on the basis that the defendants' conduct "increased [his] risk of failure in the New York public and private markets." S.D.N.Y., No. 23-cv-4707, doc. 31 at 40. However, such "generalized grievances about the conduct of Government" are not generally sufficient to confer standing. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

Because we conclude that the district court properly dismissed this action for lack of jurisdiction on standing grounds, we need not reach the additional issues he raises on appeal.

* * *

We have considered Wade's remaining arguments and conclude they are unpersuasive. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH WADE,

Plaintiff,

-v-

ROBERT J. RODRIGUEZ, *in his official capacity as Secretary of State, New York Department of State, et al.*,

Defendants.

23 Civ. 4707 (PAE)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

Plaintiff Joseph Wade, proceeding *pro se*, brought this action against New York Secretary of State Robert J. Rodriguez and several other officials of the New York Department of State ("NYDOS"): David Ashton, in his official capacity as a revitalization specialist, Catherine Traina, in her official capacity as assistant director of the Bureau of Fiscal Management, and Laurissa Garcia, in her official capacity as a contract management specialist. His claims arise from the denial of a bid his company made to NYDOS for consulting services. He brings a range of claims. These include federal claims under 42 U.S.C. § 1983, alleging violations of equal protection and due process under the Fifth and Fourteenth Amendments; under 42 U.S.C. §§ 1985 and 1986, alleging conspiracy; and various state-law claims.

Currently pending are defendants' motion to dismiss Wade's Amended Complaint (the "Amended Complaint" or "AC") under Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction, and under Rule 12(b)(6) for failure to state a claim, and Wade's motion to amend the AC. Before the Court is the June 28, 2024 Report and Recommendation of the Hon. Sarah L. Cave, United States Magistrate Judge, recommending that the Court grant the motion to dismiss and deny leave to amend. Dkt. 76 (the "Report"). For the reasons that follow, the Court adopts

the recommendations to grant the motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction and to deny Wade leave to amend the AC.

I. Factual Background[1]

The Court adopts the Report's detailed account of the facts and procedural history in substantial part. The following summary captures the limited facts necessary for an assessment of the issues presented.

A. Parties

Wade is the sole owner of Owl Contracting LLC ("Owl Contracting"). Report at 1. In October 2022, he submitted a bid on behalf of Owl Contracting to NYDOS's Office of Planning, Development and Community Infrastructure ("OPDCI") for the opportunity to provide planning services for certain economic development projects in New York. Wade's bid was ultimately unsuccessful. Traina Decl. ¶¶ 2, 3, 22.

Rodriguez was the Secretary of State of New York at the time Wade submitted his bid. Ashton, Traina, and Garcia also all worked for NYDOS. Report at 1–2.

B. OPDCI's Call for Bids

On September 16, 2022, the OPDCI released a Request for Proposals ("RFP") seeking bids for consultants to provide planning services for the "Downtown Revitalization Initiative" and the "New York Forward" program, to be administered in each of New York State's 10 economic development regions, for a term of up to five years. Traina Decl. ¶¶ 2–3. Both programs had the goal of spurring downtown recovery and revitalization across New York. *Id.* ¶¶ 2–4. A consultant whose proposal was picked would be responsible for helping local

[1] The Court draws the facts in this decision principally from the AC. Dkt. 31. For purposes of the motion to dismiss under Rule 12(b)(1), the Court may refer to evidence outside the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). The Court, for this purpose, has considered the declaration of Catherine Traina. Dkt. 51 ("Traina Decl.").

planning communities complete a strategic investment plan. *Id.* ¶ 4. Preferred qualifications for potential candidates included: "knowledge and expertise in creating community development plans; land regulation; community planning, and functional expertise in information and economic analysis; policy analysis; construction and project cost estimation; public engagement and community outreach; report writing; sub-contracting; and process management." *Id.* ¶ 6.

The RFP requested that all bidders submit a Diversity Practices Questionnaire ("DPQ") with their proposal, as required by New York Executive Law Article 15-A and regulations promulgated by the Empire State Development's Division of Minority and Women's Business Development. *See id.* ¶ 7. The DPQ was designed to solicit information about a bidder's professional associations with certified minority- and women-owned business enterprises. The DPQ asked eight questions:

> 1. Does your company have a Chief Diversity Officer or other individual who is tasked with supplier diversity initiatives?
>
> 2. What percentage of your company's gross revenues (from your prior fiscal year) was paid to New York State certified minority and/or women-owned business enterprises as subcontractors, suppliers, joint-venturers, partners or other similar arrangement for the provision of goods or services to your company's clients or customers?
>
> 3. What percentage of your company's overhead (i.e., those expenditures that are not directly related to the provision of goods or services to your company's clients or customers) or noncontract-related expenses (from your prior fiscal year) was paid to New York State certified minority- and women-owned business enterprises as suppliers/contractors?
>
> 4. Does your company provide technical training to minority- and women-owned business enterprises?
>
> 5. Is your company participating in a government approved minority- and women-owned business enterprise mentor-protégé program?
>
> 6. Does your company include specific quantitative goals for the utilization of minority- and women-owned business enterprises in its non-government procurements?

> 7. Does your company have a formal minority- and women-owned business enterprise supplier diversity program?
>
> 8. Does your company plan to enter into partnering or subcontracting agreements with New York State certified minority- and women-owned business enterprises if selected as the successful Proposer?

Traina Decl., Ex. 2 ("DPQ") at 2–3. In addition to the DPQ, a bidder was also required to submit a technical proposal and a cost proposal. Traina Decl. ¶ 13.

All bids judged to have fulfilled the submission requirements were evaluated by NYDOS. *Id.* ¶ 14. To be eligible for an award under the RFP, bids were required to score a minimum of 55 points (out of 78 total points) on the technical proposal. *Id.* ¶ 16. Bidders that received at least 55 points on the technical proposal then had their full bid—the technical proposal, cost proposal, and DPQ—evaluated and scored out of 100 points. *Id.* ¶ 15. The technical proposal could receive up to 78 points; the cost proposal could receive up to 20 points; and the DPQ could receive up to 2 points. *Id.* The contract was awarded to the bidder who had the highest overall score—by totaling the three categories—for each program in each region. *Id.* ¶ 16. The technical proposal, cost proposal, and DPQ were separately evaluated. *Id.* ¶ 17. The technical proposal was reviewed and scored by three revitalization specialists; the applicant's final score was the average of the specialists' three scores. *Id.* The cost proposal was reviewed and scored by the assistant director of the Bureau of Fiscal Management. *Id.* The DPQ was reviewed and scored by a contract management specialist. *Id.*

C. Wade's Bid on Behalf of Owl Contracting

On October 28, 2022, Wade submitted an RFP on behalf of Owl Contracting for the New York Forward Program in the Finger Lakes and Southern Tier. *Id.* ¶¶ 22–23. In Wade's DPQ, he answered "No" or "None" for each question posed. *Id.* ¶ 28. Owl Contracting's technical proposal was reviewed by three separate evaluators. *Id.* ¶ 25. Out of the available 78 points, it

received a score of 17.67, which reflected an average of three specialists' three scores of 13, 23, and 17. *Id.* Because Wade's technical proposal fell short of the minimum score of 55 points, his bid was not eligible for an award.[2]

On December 13, 2022, Wade received a letter informing him that Owl Contracting had not been awarded a contract in connection with the RFP. *Id.* ¶ 29.

II. Procedural History

On June 5, 2023, Wade, *pro se*, filed the Complaint. Dkt. 1. On August 1, 2023, the Court *sua sponte* dismissed the claims against OPDCI as barred by Eleventh Amendment immunity. Dkt. 8. But, because the Eleventh Amendment did not bar Wade from bringing claims against state officials for prospective injunctive relief, the Court construed the Complaint as also asserting claims against the defendants in their official capacity seeking injunctive relief. *Id.* at 4 (citing *Ex Parte Young*, 209 U.S. 123 (1908)). The Court also referred the case to Magistrate Judge Cave for pre-trial management. Dkt. 7.

On November 30, 2023, defendants filed a motion to dismiss. Dkt. 20. On December 1, 2023, the Court issued an amend or oppose order, Dkt. 26, and issued an amended order of reference, referring the motion to dismiss to Judge Cave for a Report and Recommendation, Dkt. 27.

On December 21, 2023, Wade filed the AC, the operative complaint today. Dkt. 31. On February 12, 2024, defendants filed a motion to dismiss the AC, Dkt. 49, a supporting memorandum of law, Dkt. 50 ("Def. Mem."), and a declaration, Dkt. 51 ("Traina Decl."). On

[2] Owl Contracting's DPQ received a score of zero (out of two possible points). Traina Decl. ¶ 28. Its cost proposal received a score of 20 (out of 20 possible points). *Id.* ¶ 27. These two scores were ultimately not a factor in NYDOS's rejection of Owl Contracting's bid because, as explained above, the bid's technical proposal did not meet the 55-point minimum requirement. *Id.* ¶ 26.

February 13, 2024, the Court issued an amended order of reference, referring the motion to dismiss to Judge Cave for a Report and Recommendation. Dkt. 55.[3] On March 12, 2024, Wade filed a memorandum of law in opposition. Dkt. 72 ("Pl. Opp."). On March 27, 2024, defendants filed a reply. Dkt. 74 ("Reply").

On March 12, 2024, Wade filed a "Motion to Add Parties," seeking to add claims for monetary damages against Rodriguez, Ashton, and Traina in their individual capacities and to add an official capacity claim against non-party Sandra Nolan. Dkt. 67. On March 19, 2024, Judge Cave denied the motion. Dkt. 73.

On June 28, 2024, Judge Cave issued a Report and Recommendation. Dkt. 76. It recommends that defendants' motion to dismiss be granted on three independent grounds: because (1) Wade lacks Article III standing; (2) Wade's claims are barred by Eleventh Amendment immunity; and (3) the AC's federal-law claims fail to state a claim under Rule 12(b)(6). The Report also recommends that leave to amend be denied, and the AC be dismissed with prejudice. Finally, the Report recommends that the Court not exercise supplemental jurisdiction over the state law claims.

On July 1, 2024, Wade filed his objections to the Report, Dkt. 78, and a declaration in support, Dkt. 79. On July 8, 2024, he filed a corrected version of his objections. Dkt. 80 ("Objs."). On July 30, 2024, defendants filed a memorandum of law in opposition to Wade's objections. Dkt. 84. On July 31 and August 21, 2024, Wade filed two additional memoranda of law. Dkts. 86, 90.[4] On July 31, 2024, Wade also filed a motion for leave to amend his AC, Dkt.

[3] Upon the filing of the motion to dismiss, Judge Cave issued an order denying the earlier motion to dismiss as moot. Dkt. 54.

[4] The Court here considers Wade's corrected objections filed on July 8, 2024, which were filed within 14 days of the Report's issuance on June 28, 2024. *See* Report at 33. The Court does not,

87, and a declaration in support, Dkt. 88.

III. Applicable Legal Standards

A. Report and Recommendation

In reviewing a Report and Recommendation, a district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). When specific objections are timely made, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also United States v. Male Juv.*, 121 F.3d 34, 38 (2d Cir. 1997). "To accept those portions of the report to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record." *Ruiz v. Citibank, N.A.*, No. 10 Civ. 5950 (KPF) (RLE), 2014 WL 4635575, at *2 (S.D.N.Y. Aug. 19, 2014) (quoting *King v. Greiner*, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009)); *see also, e.g.*, *Wilds v. United Parcel Serv.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

If a party objecting to a Report and Recommendation makes only conclusory or general objections, or simply reiterates its original arguments, the Court will review the Report strictly for clear error. *See Dickerson v. Conway*, No. 08 Civ. 8024 (PAE), 2013 WL 3199094, at *1 (S.D.N.Y. June 25, 2013); *Kozlowski v. Hulihan*, Nos. 09 Civ. 7583, 10 Civ. 0812 (RJH) (GWG), 2012 WL 383667, at *3 (S.D.N.Y. Feb. 7, 2012). This is so even in the case of a *pro se* plaintiff. *See Telfair v. Le Pain Quotidien U.S.*, No. 16 Civ. 5424 (PAE), 2017 WL 1405754, at *1 (S.D.N.Y. Apr. 18, 2017) (citing *Molefe v. KLM Royal Dutch Airlines*, 602 F. Supp. 2d 485, 487 (S.D.N.Y. 2009)). Furthermore, "[c]ourts generally do not consider new evidence raised in

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however, consider Wade's memoranda filed on July 31 and August 21, 2024, because these were untimely filed, well after the deadlines Judge Cave set in her Report.

objections to a magistrate judge's report and recommendation." *Tavares v. City of New York*, No. 08 Civ. 3782 (PAE), 2011 WL 5877548, at *2 (S.D.N.Y. Nov. 23, 2011) (collecting cases).

B. Motion to Dismiss Under Rule 12(b)(1)

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova*, 201 F.3d at 113 (2d Cir. 2000) (citation omitted). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citation omitted). "[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Id.* (citation omitted). Additionally, a court may properly refer to matters outside the pleadings when considering the existence of jurisdiction on a motion pursuant to Rule 12(b)(1). *See Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1010–11 (2d Cir. 1986).

IV. Discussion

The Court adopts the Report's recommendation to dismiss the AC under Rule 12(b)(1), for lack of subject matter jurisdiction. As the Report recognized and as the Court explains below, Wade lacks Article III standing to bring his section 1983 claim based on an alleged violation of equal protection. Separately, the Eleventh Amendment bars the AC in its entirety because the AC exclusively brings claims for monetary relief against the defendants—state officials—in their official capacities.

A. Article III Standing

Article III limits the federal judicial power to deciding cases and controversies. *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 45 (2d Cir. 2023). "Under Article III, a case or controversy can exist only if a plaintiff has standing to sue," meaning a personal stake in the

outcome of the litigation. *United States v. Texas*, 599 U.S. 670, 675 (2023). The "irreducible constitutional minimum" of Article III standing consists of three elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). A plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citation omitted). Moreover, "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (citation omitted).

The AC articulates two theories of how alleged violations of equal protection by NYDOS ostensibly injured Wade. First, it alleges that NYDOS subjected Wade to disparate treatment based on his race and gender by forcing him to submit, as part of his bid, a DPQ, which asked questions about Owl Contracting's diversity practices. *See* AC at 13 ("I have been deprived of my fundamental rights and liberties in respect to my race and gender."). The AC alleges that, by being directed to respond to these questions, Wade was discriminated against as a white man on the basis of his race and gender. Second, it alleges, the diversity questionnaire caused Wade to participate in a discriminatory process that forced him to discriminate against his subcontractors on the basis of race and gender. *See* AC at 20 ("Causing me to subject other citizens to judgment in a way in which deprives those citizens of opportunity based on their race and gender."). On neither theory does the AC plead facts satisfying Article III standing.

The first theory of harm fails to plead a cognizable injury in fact. In *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville,* 508 U.S. 656 (1993), the Supreme Court analyzed an equal protection challenge to a city program providing preferential treatment to minority-owned businesses in the award of government

contracts. The Supreme Court held that an "injury in fact" in this context means "the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.* at 666 (citation omitted). The Court explained:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Id. (citation omitted).

Here, however, the AC does not plead that Wade competed in the bidding process on an unequal footing. As pled, although Wade submitted a DPQ and NYDOS scored the DPQ, the DPQ score did not having any bearing on NYDOS's decision to deny Wade's bid. That is because his technical proposal, a threshold part of his bid, failed to meet the 55-point minimum that would have enabled the bid to advance to the next stage at which the DPQ score would have been taken into account. Wade's technical proposal received a score of 17.67—far short of the 55-point minimum required—such that his bid was automatically ineligible and screened out of the bidding process. As such, it did not advance to the stage at which NYDOS would have considered the balance of Wade's bid, including the DPQ. Wade's DPQ score thus did not play any role in the rejection of his proposal. In addition, even if Wade's DPQ had been considered, his claim to have been treated differently on the basis of *his* gender or race would still fail, because the DPQ did not ask questions about the race or gender of the contractor (Owl Contracting) or its principal (Wade). It instead inquired about the contractor's business practices, in particular, whether it employed subcontractors that are certified as "minority and/or women-owned business enterprises." Traina Decl., Ex. 2 at 2. As such, Wade cannot claim that

DPQ served as a barrier that made it more difficult for *him*, as a member of a group that the DPQ allegedly disfavored, to compete for a government benefit because of *his identity*. Accordingly, the AC does not plead that Wade suffered any injury—any deprivation to his ability to compete on an equal footing in the bidding process.

The AC's second theory of harm is that NYDOS "caus[ed] [Wade] to subject other citizens to judgment . . . which deprives those citizens of opportunity based on their race and gender." AC at 20. This allegation is hazy at best. Construed most favorably to Wade, the AC appears to allege that NYDOS in some manner encouraged Wade to "discriminate against others based on their race or sex." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 707 (9th Cir. 1997). Some courts have held that "[a] person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex." *Id.*; *see also Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 350 (D.C. Cir. 1998) ("[F]orced discrimination may itself be an injury."); *Safeco Ins. Co. of Am. v. City of White House, Tenn.*, 191 F.3d 675, 689 (6th Cir. 1999) (same). *But see Dunnet Bay Const. Co. v. Borggren*, 799 F.3d 676, 693 (7th Cir. 2015) (rejecting "*Monterey Mechanical*'s broad view of standing" because it "collapsed third-party standing into Article III standing"). But even assuming this to be a viable species of injury in fact, the AC does not plead concretely how Wade was forced, by the existence of the DPQ, to discriminate against certain subcontractors such that they were "deprived . . . of opportunit[ies] based on their race and gender." AC at 20. It does not allege, for example, that Wade was even aware of the DPQ at any time when he made subcontracting decisions, let alone that the existence of a DPQ influenced his subcontracting (or other) decisions. On the contrary, in filling out the DPQ for Owl Contracting, Wade responded "no" or "none" to every question the DPQ posed. These

inquired, for example, whether Owl Contracting had a chief diversity officer, what percentage of Owl Contracting's gross revenue was paid to certified minority- and/or women-owned business enterprises as subcontractors, what percentage of Owl Contracting's overhead or noncontract-related expenses were paid to certified minority- and women-owned business enterprises as suppliers and contractors, and whether Owl Contracting provided technical training to minority- and women-owned business enterprises. Wade's "no" or "none" answers to these questions are inconsistent with his claim to have been injured by having been forced to conform his practices to the ostensibly discriminatory preferences embedded in the DPQ.

Even if the AC were construed to claim that Wade, now aware of the DPQ, may be encouraged to consider race and gender in future subcontracting decisions, the AC still would not plead the necessary ingredients of Article III standing. That is because the relief (money damages) it seeks is backward-looking. It is limited to compensating Wade for the *past* injury he claims from the failure to be awarded the RFP contract. *See* AC 34–52. The AC does not seek relief from injuries that could arise from Wade's participation in future bid processes involving the DPQ. Any such injuries thus cannot "be redressed by a favorable judicial decision" here. *Spokeo*, 578 U.S. at 338; *cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108 (1998) (plaintiff lacks standing where relief sought—mainly injunctive and declaratory relief—"cannot conceivably remedy any past wrong"); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct").[5]

[5] The AC contains three stray references to "declaratory relief." None, however, specifies the declaratory relief sought, save that at one point, the AC, confusingly, identifies the "declaratory redress" as monetary damages of "$200,000." AC at 43. In any event, read grammatically, each appears to relate to the denial of Wade's earlier bid, not to future bids. *See* AC at 21 ("For the deprivation inflected upon me by the harms above, I claim civil injury, harm and damage, and

The Court thus adopts the Report's recommendation that it find Article III standing lacking with respect to the AC's section 1983 claim based on an asserted equal protection violation.

B. Eleventh Amendment Immunity

The Court also adopts the recommendation to find that the Eleventh Amendment bars all claims in the AC, because each sues state officials in their official capacities solely for damages. As the Report explains, when "a state official is sued for damages in his official capacity, such a suit is deemed to be a suit against the state, and the official is entitled to invoke the Eleventh Amendment immunity belonging to the state." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993) (citation omitted). The Eleventh Amendment, however, does not bar suits against state officers in their official capacity for prospective injunctive relief. *See Ex parte Young*, 209 U.S. at 155–56.

When Wade filed the Complaint, the Court initially construed it to assert official-capacity claims against Rodriguez seeking prospective injunctive or declaratory relief, such that these claims would not be barred by the Eleventh Amendment. But Wade's AC, today the operative complaint, seeks only monetary relief from defendants and only in their official capacities.[6] It does not seek any defined injunctive or declaratory relief. As such, its claims are barred by the Eleventh Amendment. *See, e.g.*, *Auguste v. Dep't of Corr.*, 424 F. Supp. 2d 363, 367 (D. Conn.

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pray for declaratory and compensatory relief."); *id.* at 31 ("Similarly, descriptions of instances of proximate causes with grounds for redress and reasoning for compensatory and declaratory relief."); *id.* at 43 ("For subjecting me actively to the 'increase in risk' and cheapening the aspects discussed above, I propose the following declaratory redress, $200,000.")

[6] As explained above, see *supra* note 5, the AC seeks only damages, *see* AC 31–52 (calculation of damages). It does not mention injunctive relief. And it refers only conclusorily to "declaratory relief" without specifying what such relief would be. The AC nowhere states that it is suing defendants in their individual capacities. Instead, it repeatedly refers to defendants "in their official capacities." *See* AC at 1, 8, 9, 21, 26, 30, 46.

2006) (holding that plaintiff's claims for monetary damages against defendants in official capacities are barred by the Eleventh Amendment); *Gutierrez v. Joy*, 502 F. Supp. 2d 352, 362 (S.D.N.Y. 2007) (same).

Wade objects to this conclusion by asserting that New York has waived its Eleventh Amendment immunity, and that Congress has abrogated sovereign immunity. These arguments fail. New York State has not waived its sovereign immunity or otherwise consented to this present suit, and Wade does not specify a context in which New York State ostensibly did so. Nor has Congress abrogated the states' Eleventh Amendment immunity, including in enacting section 1983. *See Quern v. Jordan*, 440 U.S. 332, 344–45 (1978) (holding that 42 U.S.C. § 1983 does not abrogate states' Eleventh Amendment immunity).

Wade, in his objections, next moves to amend the AC to include a prayer for injunctive relief. Objs. at 4–5; Dkt. 87 (motion to amend). A party, however, ordinarily cannot move to amend a complaint in his objections to a Report and Recommendation. *See, e.g.*, *Clarke v. United States*, 367 F. Supp. 3d 72, 75 (S.D.N.Y. 2019) (in ruling on objections, holding that, because "new claims may not be raised properly at this late juncture," such claims "presented in the form of, or along with, 'objections,' should be dismissed"). The circumstances here make permitting an amendment particularly unwarranted. Wade has already amended his complaint "once as a matter of course" as permitted under Federal Rule of Civil Procedure 15(a)(1). Thus, the motion to amend is governed by Rule 15(a)(2), which provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave" and that "[t]he court should freely give leave when justice so requires." *Id.* A court may deny leave to amend for "good reason"—"futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. Dun &Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007).

The Court adopts the Report's recommendation that leave to amend be denied. As the Report recognizes, when Wade amended his initial Complaint, he had the guidance of the Court that the Eleventh Amendment bars suit for monetary damages against the defendants in their official capacities. *See* Dkt. 8. In amending, Wade chose to not heed this guidance. For this reason, the Report recommends that Wade's present motion to amend—for the sole purpose of adding claims for injunctive relief to avoid defendants' Eleventh Amendment immunity—be denied. *See McDonald v. Head Crim. Ct. Supervisor Officer*, 850 F.2d 121, 124 (2d Cir. 1988) (although *pro se* litigants deserve more lenient treatment than those who are represented, "all litigants, including *pro se* [litigants], have an obligation to comply with court orders").

In his objections, Wade does not engage with the Report's reasoning. He merely reprises his request to amend the AC on this point.[7] The Report's recommendation to deny leave to amend is thus subject to clear error review on this point. *See, e.g.*, *Jackson v. Graham*, No. 16 Civ. 9595 (WHP) (DCF), 2019 WL 3817196, at *2 (S.D.N.Y. Aug. 14, 2019) (reviewing Report for clear error where objections do not address Report's reasoning); *New Amsterdam Cap. Partners, LLC v. Krasovsky*, No. 12 Civ. 7621 (VSB) (HP), 2017 WL 87050, at *3 (S.D.N.Y. Jan. 10, 2017) (reviewing Report for clear error where objections do not address the findings or conclusions of the Report). The Court finds that the Report's recommendation is not only not facially erroneous—it is clearly correct—and adopts that recommendation.

In sum, the Court holds that, because the AC solely seeks monetary relief from defendants in their official capacities, the Eleventh Amendment bars the present suit, and the

[7] Wade initially moved to amend his Amended Complaint in his objections. Later, on July 31, 2024, after the Report had been issued and the parties' objections and responses were filed, he moved again to amend his Amended Complaint. *See* Dkt. 87.

Court accordingly lacks subject matter jurisdiction. The Court declines to grant Wade leave to amend to attempt to correct that deficiency.

CONCLUSION

For the reasons stated herein, the Court grants defendants' motion to dismiss under Rule 12(b)(1) and denies Wade's motion to amend the Amended Complaint. Because the Court dismisses the case under Rule 12(b)(1), the Court does not reach defendants' motion to dismiss based on Rule 12(b)(6). Because the dismissal is based on a lack of subject matter jurisdiction, it is without prejudice to Wade's right to bring a separate lawsuit as to which subject matter jurisdiction exists. *See, e.g., J. J. Cranston Constr. Corp. v. City of New York*, 602 F. Supp. 3d 373, 379 n.9 (E.D.N.Y. 2022) ("Dismissal for lack of subject matter jurisdiction must be without prejudice."); *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999) ("[W]here a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice."); *Siegel v. Apergis*, 610 F. App'x 15, 16 (2d Cir. 2015) ("Our precedent instructs that when a court dismisses for lack of subject-matter jurisdiction, that dismissal must be without prejudice.").

The Clerk of the Court is respectfully directed to terminate the motions pending at Dockets 49 and 87 and to close this case.

SO ORDERED.

Paul A. Engelmayer

PAUL A. ENGELMAYER
United States District Judge

Dated: September 10, 2024
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

JOSEPH WADE,

Plaintiff,

-against-

23 **CIVIL** 4707 (PAE)

JUDGMENT

ROBERT J. RODRIGUEZ, in his official capacity as Secretary of State, New York Department of State, et al.,

Defendants.

----------X

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated September 10, 2024, the Court grants defendants' motion to dismiss under Rule 12(b)(l) and denies Wade's motion to amend the Amended Complaint. Because the Court dismisses the case under Rule 12(b)(l), the Court does not reach defendants' motion to dismiss based on Rule 12(b)(6). Because the dismissal is based on a lack of subject matter jurisdiction, it is without prejudice to Wade's right to bring a separate lawsuit as to which subject matter jurisdiction exists. See, e.g., J J Cranston Constr. Corp. v. City of New York, 602 F. Supp. 3d 373, 379 n.9 (E.D.N.Y. 2022) ("Dismissal for lack of subject matter jurisdiction must be without prejudice."); Hernandez v. Conriv Realty Assocs., 182 F.3d 121, 123 (2d Cir. 1999) ("[W]here a court lacks subject matter jurisdiction, it also lacks the power to dismiss with prejudice."); Siegel v. Apergis, 610 F. App'x 15, 16 (2d Cir. 2015) ("Our precedent instructs that when a court dismisses for lack of subject-matter jurisdiction, that dismissal must be without prejudice; accordingly, the case is closed.

Dated: New York, New York

September 10, 2024

DANIEL ORTIZ

Acting Clerk of Court

BY: Deputy Clerk

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of June, two thousand twenty-five,

Present: Guido Calabresi,
Barrington D. Parker, Jr.,
William J. Nardini,

Circuit Judges,

Joseph W. Wade,

Plaintiff - Appellant,

v.

Robert J. Rodriguez, DBA Robert J. Rodriguez, in his official capacity as Secretary of State, New York Department of State, David Ashton, in his official capacity, Catherine Traina, in her official capacity, Laurissa Garcia, in her official capacity,

Defendants - Appellees,

New York State Department of State Office of Planning, Development and Community Infrastructure,

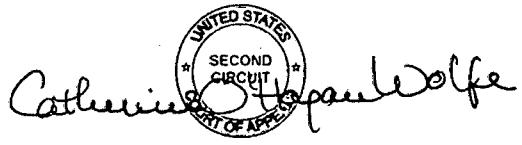
Defendant.

ORDER
Docket No. 24-2495

Appellant Joseph W. Wade having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court



APPENDIX E

Jurisdiction & Procedure

28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions;

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S. Code § 2106 – Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S. Code § 1651 – Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S. Code § 1652 - State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The Constitution of The United States of America

Article III - Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; — ... between a State, or the Citizens thereof, ...

United States Constitutional Amendments

Fifth Amendment

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eleventh Amendment

The 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.

Fourteenth Amendment Section 1

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statues

28 U.S. Code § 2201 - Creation of remedy

In a case of actual controversy within its jurisdiction., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S. Code § 2202 - Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S. Code § 1983 - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State.., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.., injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

42 U.S. Code § 1985 - Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges. If two or more persons in any State... conspire...', for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State... from giving or securing to all persons within such State or Territory the equal protection of the laws: ... if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S. Code § 1986 - Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action;...

42 U.S. Code § 2000d - Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S. Code § 2000d-7 - Civil rights remedies equalization

(a)General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ...title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

New York State Constitutional Amendments

Article I - Bill Of Rights

Section 11- Equal protection of laws; discrimination in ... rights prohibited

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

New York State Statues

NYS Executive (EXC) CHAPTER 18, ARTICLE 15

NYS EXC § 291. Equality of opportunity a civil right.

1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, gender

identity or expression, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right.

NYS EXC § 292. Definitions.

When used in this article:

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

8. The term "national origin" shall, for the purposes of this article, include "ancestry."

19. The term "discrimination" shall include segregation and separation.

37. The term "race" shall, for the purposes of this article include traits historically associated with race, including but not limited to, hair texture and protective hairstyles.

NYS EXC § 296. Unlawful discriminatory practices.

1. It shall be an unlawful discriminatory practice:

(a) For an employer... because of an individual's age, race, creed, color, national origin, citizenship... military status, sex, disability, ... to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, citizenship ... military status, sex, disability, ... or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; ...

1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs:

(a) To select persons for an apprentice training program registered with the state of New York on any basis other than

their qualifications, as determined by objective criteria which permit review;

(b) To deny to or withhold from any person because of race, creed, color, national origin, citizenship ... military status, sex, age, disability, ... the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, executive training program, or other occupational training or retraining program;

(c) To discriminate against any person in his or her pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color, national origin, citizenship, ... military status, sex, age, disability ...

(d) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for such programs or to make any inquiry in connection with such program which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin, citizenship, ... military status, sex, age, disability, ... or any intention to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

NYS EXC § 296-d. Unlawful discriminatory practices relating to non-employees.

It shall be an unlawful discriminatory practice for an employer to permit unlawful discrimination against non-employees in its workplace. An employer may be held liable to a non-employee who is a contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace, with respect to an unlawful discriminatory practice, when the employer, its agents or supervisors knew or should have known that such non-employee was subjected to an unlawful discriminatory practice in the employer's workplace, and the employer failed to take immediate and appropriate corrective action. In reviewing such cases involving non-employees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the

conduct of the person who engaged in the unlawful discriminatory practice shall be considered.

NYS Executive (EXC) CHAPTER 18, ARTICLE 15-A

NYS EXC § 310. Definitions.

As used in this article, the following terms shall have the following meanings;

21. "The disparity study" shall refer to the disparity study commissioned by the department of economic development, pursuant to section three hundred twelve-a of this article, and published on June thirtieth, two thousand seventeen.

NYS EXC § 312-a. Study of minority and women-owned business enterprises.

The director of the division of minority and women-owned business development is authorized and directed to recommission a statewide disparity study regarding the participation of minority and women-owned business enterprises in state contracts since the amendment of this article to be delivered to the governor and legislature no later than August fifteenth, two thousand twenty-four.

NYS EXC § 313. Opportunities for minority and women-owned business enterprises.

Goals and requirements for agencies and contractors.
Each agency shall structure procurement procedures for contracts made directly or indirectly to minority and women-owned business enterprises, in accordance with the findings of the disparity study,

1-b. Each agency shall develop and adopt agency-specific goals based on the findings of the disparity study.

1-c. The goals set pursuant to subdivision one of this section shall be consistent with the findings of the disparity study.

NYS EXC § 313-a. Diversity practices of state contractors.

The director shall promulgate rules and regulations setting forth measures and procedures to require all contracting agencies, where practicable, feasible and appropriate, to assess the diversity practices of contractors submitting bids or proposals in connection with the award of a state contract... the method of procurement required to be used by a state agency to award the contract and minority and women-owned business utilization plans required to be submitted pursuant to sections three

hundred twelve and three hundred thirteen of this article; Each bid or proposal shall be analyzed on an individual per bid or per proposal basis with the contractor's diversity practices considered as only a part of a wider consideration of several factors when deciding to award or decline to award a bid or proposal. The director shall develop the rules and regulations required hereunder only after consultation with the state procurement council established by section one hundred sixty-one of the state finance law.

1-b. Each agency shall develop and adopt agency-specific goals based on the findings of the disparity study.

1-c. The goals set pursuant to subdivision one of this section shall be consistent with the findings of the disparity study.

New York Codes Rules & Regulations
Title 5 Department of Economic Development
Chapter XIV Division of Minority and Women's Business Development

NYCRR 5 § 140.1 – Definitions

(n) Disparity Study. The latest published study of New York State minority and women owned business enterprise programs commissioned by the State pursuant to section 312-a of the Executive Law.

(o) Diversity practices. The contractor's past, present, and prospective practices and policies with respect to:

(1) utilizing certified minority or women-owned business enterprises in contracts awarded by State agencies, other public entities or private sector companies, as subcontractors and suppliers; and

(2) entering into partnerships, joint ventures or other similar arrangements with certified minority or women-owned business enterprises as defined in this Part or other applicable federal, state, or local statutes or regulations, or certified by the certifying entities recognized by the division governing an entity's utilization of minority or women-owned business enterprises;

(3) any other information requested by the State agency or activities, supported by affidavit, that demonstrate the contractor's commitment to a policy of diversity practices related to minority or women-owned business enterprises.

NYCRR 5 § 141.2 - Annual State agency-specific goals

(a) Each State agency shall develop and adopt agency-specific goals in accordance with Section 313 (1-b) and Section 313 (1-c) of the Executive Law, and which are consistent with the finding of the disparity study.

(b) Agency-specific goals shall be reflected in the State agency's master goal plan and any subsequent updates to the master goal plan, as well as for any four-year growth plan, for the inclusion of certified:

(1) minority-owned business enterprises;

(2) women-owned business enterprises; and

(3) minority and women-owned business enterprises with justifications for such goals.

NYCRR. 5 § 142.1 - Purpose, scope and applicability

(a) The purpose of this Part is to provide standards, criteria and procedures for establishing contract goals; to regulate, prepare, submit, and review utilization plans, to prescribe the elements of a contractor's good faith efforts to be reviewed when a waiver of goals is requested, and to provide procedures for evaluating compliance and resolving disputes related to participation by certified minority and women-owned business enterprises on State contracts.

NYCRR 5 § 142.2 - Establishing contract goals and identifying subcontract opportunities for certified businesses

(a) Where practical, feasible and appropriate, and in a manner consistent with the findings of the disparity study, State agencies shall establish the following goals on all State contracts:

(1) overall minority and women-owned business enterprises;

(2) minority-owned business enterprises; and

(3) women-owned business enterprises.

(d) In determining appropriate goals for a particular State contract, State agencies shall give consideration to the following factors:

(1) the contract and subcontract scope(s) of work;

(2) the potential subcontract opportunities available in the prime contract;

(3) the relevant availability data and industry specific disparities contained within the disparity study with respect to the scope of the contract and potential subcontracting opportunities;

(4) the number and types of certified minority-and women-owned business enterprises found in the directory of certified minority and

women-owned businesses available to perform the State contract work;

(5) the geographic location of the contract performance;

(6) the extent to which geography is material to the performance of the contract;

(7) the ability of certified minority and women-owned enterprises located outside of the geographic location of contract performance, notwithstanding the regional location of the certified enterprise, to perform on the State contract;

(8) the total dollar value of the work required by the State contract in relation to the dollar value of the subcontracting opportunities;

(9) the relationship of the monetary size and term of the State contract to the monetary size and term of the project for which the State contract is awarded; and

(10) the agency's annual agency-specific goal established pursuant to section 141.2 of these regulations.

NYCRR 5 § 142.3 - Diversity practices, bidding and award considerations

(c) If a contracting agency makes a determination that the evaluation of diversity practices is not practicable, feasible, or appropriate for a subject State contract, such determination shall be supported by findings in writing.

(f) The director shall provide each State agency with numerical guidelines for assessing a contractor's past, present and prospective practices and policies with respect to:

(1) utilizing certified minority-and women-owned business enterprises in contracts awarded by State agencies, other public entities or private sector companies, as subcontractors and suppliers;

(2) entering into partnerships, joint ventures or other similar arrangements with certified minority-and women-owned business enterprises as defined in this Part or other applicable federal, state, or local statutes or regulations, or certified by the certifying entities recognized by the division governing an entity's utilization of minority-and women-owned business enterprises; and

(3) any other information requested by the State agency or activities that demonstrate the contractor's commitment to a policy

of diversity practices related to minority-and women-owned business enterprises.

NYCRR 5 § 142.4 - Utilization plans

(e) Certified minority or women-owned business enterprises may list themselves on utilization plans toward the achievement of prescribed certified minority and women-owned business enterprise contract goals.

NYCRR 5 § 142.14 - Quantitative scoring factors for State contracts

(a) On contracts where State agencies do not assess diversity practices pursuant to section 142.3 of this Part, State agencies may establish and include a quantitative factor in the scoring of bids or proposals submitted to agencies for bidders that are certified minority-or women-owned business enterprises.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH W. WADE,

Plaintiff,

-v-

ROBERT J. RODRIGUEZ, et al.,

Defendants.

CIVIL ACTION NO. 23 Civ. 4707 (PAE) (SLC)

REPORT AND RECOMMENDATION

SARAH L. CAVE, United States Magistrate Judge.

TO THE HONORABLE PAUL A. ENGELMAYER, United States District Judge:

I. INTRODUCTION

In September 2022, the New York Department of State's Office of Planning, Development and Community Infrastructure ("OPDCI") issued a Request for Proposals ("RFP") seeking bids for consultants to provide planning services for the "Downtown Revitalization Initiative" and "New York Forward" programs, each of which seeks to spur economic development in communities across the state. (ECF No. 51-1). Non-party Owl Contracting LLC ("Owl"), of which Plaintiff Joseph Wade ("Mr. Wade") is the sole proprietor, submitted an unsuccessful bid, following which Mr. Wade filed this action under 42 U.S.C. §§ 1983 et seq., asserting that New York state officials discriminated against him based on his race and gender and seeking damages of at least $28 million. (ECF No. 1 (the "Complaint")); ECF No. 31 (the "FAC")). Mr. Wade also invoked several sources of state law in his pleadings. (Id.)

Defendants Secretary of State Robert Rodriguez ("Rodriguez"), Revitalization Specialist David Ashton ("Ashton"), Assistant Director of the Bureau of Fiscal Management Catherine Traina

("Traina"), and Contract Management Specialist Laurissa Garcia ("Garcia") (collectively "Defendants") now move to dismiss the FAC pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on grounds of Eleventh Amendment immunity, lack of standing, and failure to state a claim. (ECF Nos. 49–51 (the "Motion")). For the reasons set forth below, the Court respectfully recommends that the Motion be GRANTED, that the exercise of supplemental jurisdiction over any state law claims is not warranted, and that leave to amend be denied.

II. BACKGROUND

A. Factual Background

In considering the Motion, the Court considered the FAC, the documents it incorporates by reference, and documents that are "integral" to the pleading. See DiFolco v. MSNBC Cable LLC, 622 F.3d 104, 111 (2d Cir. 2010); Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006).[1] The FAC explicitly refers to several documents on which Defendants also rely in support of their arguments, namely the RFP (see, e.g., ECF No. 31 at 8, 10–15, 30, 37, 49–51), the Diversity Practices Questionnaire contained in the RFP (see, e.g., id. at 11–13, 15, 17, 30, 37, 50), and Owl's bid (see, e.g., id. at 37–38). In addition, Mr. Wade has filed a declaration itemizing other documents that he has not actually submitted but seeks to include "in support of" the FAC. (See ECF No. 33 at 2 (the "FAC Documents")). The Court deems it appropriate to consider each of these documents in deciding the Motion. See Kamen v. Am. Tel. & Tel. Co., 791 F.2d 1006, 1010–11 (2d Cir. 1986).

Recognizing Mr. Wade's pro se status and interpreting his filings "to raise the strongest arguments they suggest," Pabon v. Wright, 459 F.3d 241, 248 (2d Cir. 2006), the Court has also

[1] All internal citations and quotation marks are omitted from case citations unless otherwise indicated.

considered information and allegations in the Opposition to the Motion as well as the exhibits appended to the Opposition to the extent those exhibits "are consistent with the facts [Mr. Wade] alleges in the [FAC]." Evans v. City of New York, No. 21 Civ. 8660 (JPC), 2022 WL 1172740, at *1 n.1 (S.D.N.Y. Apr. 20, 2022); see also Henning v. N.Y.C. Dep't of Corr., No. 14 Civ. 9798 (JPO), 2016 WL 297725, at *3 (S.D.N.Y. Jan. 22, 2016) ("Although this allegation appears in his opposition papers, the Court—consistent with its duty to liberally construe pro se pleadings—will credit Plaintiff's assertion in evaluating the sufficiency of his complaint.").

1. The DPQ

Under New York law, state agencies are directed to "structure procurement procedures for contracts made directly or indirectly to minority and women-owned business enterprises . . . to attempt to achieve [ ] recommended results with regard to total annual statewide procurement" of contracts by minority- and women-owned businesses in certain industries including, as relevant here, the construction- and non-construction related services industries. N.Y. Exec. Law § 313(1)(a)–(f). To that end, the Division of Minority and Women's Business Development (the "Division")—an arm of the Empire State Development Corporation—"promulgate[s] rules and regulations setting forth measures and procedures to require all contracting agencies, where practicable, feasible and appropriate, to assess the diversity practices of contractors submitting bids or proposals in connection with the award of a state contract." N.Y. Exec. Law § 313-a.

Pursuant to section 313-a, the Division created and disseminated to state agencies a questionnaire—the DPQ—designed to solicit information regarding a bidder's professional

associations with certified minority- and women-owned business enterprises ("MWBE"). The DPQ asks eight questions:

1. Does your company have a Chief Diversity Officer or other individual who is tasked with supplier diversity initiatives? Yes or No

2. What percentage of your company's gross revenues (from your prior fiscal year) was paid to New York State certified minority and/or women-owned business enterprises as subcontractors, suppliers, joint-venturers, partners or other similar arrangement for the provision of goods or services to your company's clients or customers?

3. What percentage of your company's overhead (i.e., those expenditures that are not directly related to the provision of goods or services to your company's clients or customers) or noncontract- related expenses (from your prior fiscal year) was paid to New York State certified minority- and women-owned business enterprises as suppliers/contractors?

4. Does your company provide technical training to minority- and women-owned business enterprises? Yes or No

5. Is your company participating in a government approved minority- and women-owned business enterprise mentor-protégé program? Yes or No

6. Does your company include specific quantitative goals for the utilization of minority- and women-owned business enterprises in its non-government procurements? Yes or No

7. Does your company have a formal minority- and women-owned business enterprise supplier diversity program? Yes or No

8. Does your company plan to enter into partnering or subcontracting agreements with New York State certified minority- and women-owned business enterprises if selected as the successful Proposer? Yes or No

(ECF No. 51-2 at 2–3).

2. <u>The RFP</u>

On September 16, 2022, the OPDCI issued the RFP. (ECF No. 51-1 at 2). The RFP solicited bids for contractors to provide planning services for two state-funded programs—the

"Downtown Revitalization Initiative" and "New York Forward" (the "Contract"). (Id. at 6).[2] The RFP described the responsibilities successful bidders would assume and the two-part proposal—consisting of a Technical Proposal and a Cost Proposal, the latter of which encompasses the DPQ—each bidder was to submit. (Id. at 11–23). OPDCI considered the components as follows. As to the Technical Proposal, OPDCI considered, inter alia, the bidder's demonstration of relevant experience, capacity to perform services, and technical approach and methodology. (Id. at 23–25). As to the Cost Proposal, OPDCI awarded the bidder with the lowest overall proposed project cost the highest possible number of points and awarded other proposers a proportional score based on their proposed costs. (Id. at 25). Finally, OPDCI scored the DPQ responses using a matrix. (Id.) Each proposal was graded on a 100-point scale: the Technical Proposal accounted for up to 78 points, the Cost Proposal for up to 20 points, and the DPQ for up to two points. (Id. at 24–25). Any bid that failed to receive at least 55 points for its Technical Proposal was automatically deemed ineligible. (Id. at 24). The bidder with the highest aggregate score for each New York region would receive the Contract to provide services there. (Id. at 25).

3. Owl's Bid

On October 28, 2022, in response to the RFP, Owl submitted a bid, which was prepared by Mr. Wade, a white male. (ECF No. 51-3, 51-4 ("Owl's Bid")). On the DPQ, Mr. Wade answered "No" or "None" as to each question posed. (ECF No. 51-4 at 106–07). Three evaluators considered Owl's Technical Proposal and assigned it individual scores of 13, 23, and 17 points, resulting in an average of 17.67 points out of a possible maximum of 78. (ECF No. 51-6 at 2). Owl

[2] The Downtown Revitalization Initiative and New York Forward programs seek to "accelerate and expand New York's burgeoning downtown revitalization . . . by creating a critical mass of vibrant downtown destinations" in each of ten designated regions of New York State. (ECF No. 51-1 at 7).

received 20 points for its Cost Proposal because it carried the lowest projected cost of any proposal submitted. (Id.) Owl received zero out of a possible two points for the DPQ. (Id.)

On December 12, 2022, Ashton authored a letter informing Mr. Wade that Owl's Bid was unsuccessful. (ECF No. 72-1).

B. Procedural Background

On June 5, 2023, Mr. Wade filed the Complaint, challenging OPDCI's use of the DPQ in the RFP process, alleging that because he, Owl's sole proprietor, is a white male, the use of the DPQ made it "impossible for [Owl] . . . to receive a perfect score of 100 points." (ECF No. 1 at 10); (see also id. ("For reasons of my race, color and gender, the highest score I can receive without pledging profits to another is 98 out of 100.")). Mr. Wade sought $28 million in monetary damages for this alleged violation of his rights. (Id. at 6).

Evaluating the Complaint sua sponte, on August 1, 2023, the Court dismissed Mr. Wade's claim against OPDCI as barred by the Eleventh Amendment but, noting that litigants may "bring suit for prospective injunctive relief against an individual state official," construed the Complaint as also asserting official-capacity claims seeking injunctive relief pursuant to Ex parte Young, 209 U.S. 123 (1908), against Rodriguez under the Equal Protection Clause of the Fourteenth Amendment. (ECF No. 8 at 1, 4 (the "Aug. 2023 Order")).

On November 30, 2023, Rodriguez moved to dismiss the Complaint. (ECF No. 20). On December 1, 2023, the Court issued an order informing Mr. Wade of his right to amend within twenty-one days. (ECF No. 26). On December 21, 2023, Mr. Wade filed the FAC (ECF No. 31), which appears to allege: (1) official-capacity claims against Rodriguez, Traina, and Garcia under 42 U.S.C. § 1983 based on alleged Equal Protection and Due Process violations (the "Section 1983

Claims"); (2) conspiracy claims under §§ 1985(3) and 1986 (the "Conspiracy Claims"); (3) a criminal claim under a federal criminal statute (the "Criminal Claim," with the Section 1983 Claims and the Conspiracy Claims, the "Federal Claims"); and (4) civil and criminal claims under New York State law (the "State Law Claims"). (ECF No. 45). Unlike the Complaint, however, the FAC seeks only monetary damages, not any prospective injunctive relief. (Compare ECF No. 1 at 10 (seeking money damages and "a relief from bias") with ECF No. 31 at 48 ("For the multitu[d]e of breaches, injuries, damage and loss listed above, I wish to make a final consolidated plead [sic] for compensatory relief of, $28,000,000.")).

On February 12, 2024, Defendants filed the Motion. (ECF No. 49). On March 12, 2024, Mr. Wade opposed the Motion. (ECF Nos. 70–72 (the "Opposition")). On March 27, 2024, Defendants filed their Reply. (ECF No. 74).

III. LEGAL STANDARDS

A. Motions to Dismiss

1. Rule 12(b)(1)

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167, 170 (2d Cir. 2008). A court may properly refer to matters outside the pleadings when considering the existence of jurisdiction on a Rule 12(b)(1) motion. See Kamen, 791 F.2d at 1010–11.

In a motion to dismiss pursuant to Rule 12(b)(1), "the defendant may challenge either the legal or factual sufficiency of the plaintiff's assertion of jurisdiction, or both." Robinson v. Gov't of Malaysia, 269 F.3d 133, 140 (2d Cir. 2001). A challenge to the legal sufficiency of jurisdiction is "based solely on the allegations of the complaint or the complaint and exhibits attached to it," and thus "plaintiffs have no evidentiary burden, for both parties can be said to rely solely on the facts as alleged in the plaintiffs' pleading." Katz v. Donna Karan Co., LLC, 872 F.3d 114, 119 (2d Cir. 2017). But when a defendant makes a factual challenge, the defendant can "proffer[ ] evidence beyond the plaintiffs' pleading." Id. (cleaned up). Plaintiffs opposing such a motion must "come forward with evidence of their own to controvert that presented by the defendant, or may instead rely on the allegations in their pleading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing." Id. (cleaned up).

2. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A complaint is properly dismissed where "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." Twombly, 550 U.S. at 558. When resolving a motion to dismiss, the Court must assume all well-pleaded facts to be true, "drawing all reasonable inferences in favor of the plaintiff." Koch v. Christie's Int'l PLC, 699 F.3d 141, 145 (2d Cir. 2012). That tenet, however, does not apply to legal

conclusions. See Iqbal, 556 U.S. at 678. Pleadings that offer only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555.

B. Pro se Considerations

"Where, as here, the plaintiff is pro se, his complaint must be construed 'liberally, reading it with special solicitude and interpreting it to raise the strongest claims that it suggests.'" Tsinberg v. City of New York, 20 Civ. 749 (PAE), 2021 WL 1146942, at *4 (S.D.N.Y. Mar. 25, 2021) (quoting J.S. v. T'Kach, 714 F.3d 99, 103 (2d Cir. 2013)). "This mandate applies with particular force when a plaintiff's civil rights are at issue." Id. (quoting Maisonet v. Metro. Hosp. & Health Hosp. Corp., 640 F. Supp. 2d 345, 348 (S.D.N.Y. 2009)). "Consistent with that approach, factual allegations made in a pro se plaintiff's opposition papers, or the attachments thereto, may be considered as supplementing the Complaint, at least to the extent they are consistent with the allegations in the Complaint." Id. (quoting George v. Pathways to Housing, Inc., No. 10 Civ. 9505 (ER), 2012 WL 2512964, at *6 n.7 (S.D.N.Y. June 29, 2012)).

"Pro se status, however, does not exempt a party from compliance with relevant rules of procedural and substantive law." Maisonet, 640 F. Supp. 2d at 348. "[E]ven a pro se plaintiff 'must state a plausible claim for relief.'" Tsinberg, 2021 WL 1146942, at *4 (quoting Walker v. Schult, 717 F.3d 119, 124 (2d Cir. 2013)). "The Court need not accept allegations that are contradicted by other matters asserted or relied upon or incorporated by reference by a plaintiff in drafting the complaint." Id. (quoting Fisk v. Letterman, 401 F. Supp. 2d 362, 368 (S.D.N.Y. 2005)).

IV. DISCUSSION

In the Motion, Defendants argue that (1) the Eleventh Amendment renders them immune from Mr. Wade's claims; (2) Mr. Wade lacks standing to sue; and (3) the FAC fails to state any viable federal claim and that the Court should decline to exercise supplemental jurisdiction over the State Law Claims. (ECF Nos. 50, 74). The Court analyzes the threshold questions of Eleventh Amendment immunity and standing before turning to Defendants' other arguments.

A. The Court Lacks Subject Matter Jurisdiction

1. Eleventh Amendment

Defendants first argue that the Eleventh Amendment bars Mr. Wade's claims, as those claims seek money damages and are raised against them in their official capacities. (ECF No. 50 at 15–17). Rather than opposing Defendants' argument, Mr. Wade proposes to amend the FAC to assert claims against Defendants in their individual capacities. (ECF No. 72 at 14) ("Now I see . . . that to continue I must add these defendants in their individual capacity.").[3]

a. Legal Standard

The Eleventh Amendment to the United States Constitution prohibits the "[j]udicial power of the United States" from extending 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. Thus, "as a general rule, state governments may not be sued in federal court unless they have waived their Eleventh Amendment immunity" or Congress has "abrogate[d] the states' Eleventh Amendment immunity . . . pursuant to its

[3] As explained below, amendment of the FAC to add individual capacity claims would be futile. (See § IV(B)(1)–(3), infra).

authority under Section 5 of the Fourteenth Amendment." Woods v. Rondout Valley Cent. Sch. Dist. Bd. Of Ed., 466 F.3d 232, 236 (2d. Cir. 2006). "The immunity recognized by the Eleventh Amendment extends beyond the states themselves to state agents and state instrumentalities that are, effectively, arms of a state." Id. A suit against an individual state official in his or her official capacity "is no different from a suit against the State itself[,]" and is thus barred by the Eleventh Amendment. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

"The Eleventh Amendment does not bar all claims against officers of the State, even when directed to actions taken in their official capacity and defended by the most senior legal officers in the executive branch of the state government." Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1982). A suit seeking only prospective injunctive relief against a state official—as opposed to retrospective monetary damages—is permissible notwithstanding the Eleventh Amendment. See Ex parte Young, 209 U.S. 123, 155–56 (1908) (collecting authorities supporting principle that a federal court has equitable jurisdiction to enjoin state officers from engaging in an act that violates the United States Constitution); see also P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (explaining that "Young and its progeny render the [Eleventh] Amendment wholly inapplicable to a certain class of suits"); Henrietta D. v. Bloomberg, 331 F.3d 261, 287 (2d Cir. 2003) (noting that the "Eleventh Amendment . . . does not preclude suits against state officers in their official capacity for prospective injunctive relief to prevent a continuing violation of federal law").

In addition, the Eleventh Amendment does not preclude a suit for monetary damages against state officials in their individual capacities. See Alden v. Maine, 527 U.S. 706, 757 (1999) (explaining that "a suit for money damages may be prosecuted against a state officer in his

individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally"); Hafer v. Melo, 502 U.S. 21, 25–31 (1991) (holding that state officers may be held personally liable for damages for actions in their official capacities).

b. Application

In the Aug. 2023 Order, the Court construed the Complaint as asserting claims against Defendant Rodriguez for prospective injunctive relief, which would be permitted under Ex parte Young and thus would not be barred by the Eleventh Amendment. (See ECF No. 8 at 4–5). Unlike the Complaint, however, the FAC does not include any allegations that plausibly seek prospective injunctive relief and seeks only monetary relief from Defendants in their official capacities. (See ECF No. 31 at 47). In fact, the FAC devotes 17 pages to Mr. Wade's calculation of monetary damages, (see ECF No. 31 at 31–48), and nowhere discusses prospective injunctive relief. Mr. Wade confirms as much in his Opposition, stating that the FAC's claims were asserted against Defendants solely in their official capacity and that, in response to the Motion, he proposes to add individual-capacity claims for money damages. (ECF No. 72 at 14) ("I must add these defendants in their individual capacity.").

Because "New York State has not waived its sovereign immunity[,] [n]or has Congress, through § 1983, abrogated the state's immunity," Johnson v. New York, No. 10 Civ. 9532 (DLC), 2012 WL 335683, at *1 (S.D.N.Y. Feb. 1, 2012) (citing Santiago v. N.Y. State Dep't of Corr. Servs., 945 F.2d 25, 31 (2d Cir. 1991)), the Eleventh Amendment bars Mr. Wade's claims for monetary relief against Defendants in their official capacities. See A.G. v. Green, 22-CV-6146L, 2023 WL 2573324, at *1 (W.D.N.Y. Mar. 20, 2023) (dismissing claims that sought only monetary relief

against state official in his official capacity); Day v. Gallagher, 151 F. Supp. 3d 253, 255 (D. Conn. 2015) (dismissing claims for money damages against all defendants in their official capacities); Clark v. Tosco Corp., No. Civ. A. 300CV1016JCH, 2000 WL 33116539, at *2 (D. Conn. Oct. 17, 2000) (same).

Accordingly, the Eleventh Amendment applies and Court lacks subject matter jurisdiction over Mr. Wade's Federal Claims to the extent that they seek monetary damages against Defendants in their official capacities.[4]

2. Standing

Defendants also argue that Mr. Wade lacks standing—and therefore, the Court lacks subject matter jurisdiction—for three reasons: (1) to the extent that the FAC identifies any cognizable injury, that injury was suffered by Owl, not Mr. Wade himself; (2) Mr. Wade has not alleged that Defendants' actions resulted in any disparate treatment based on race or gender; and (3) Owl's unsuccessful bid was not fairly traceable to the challenged conduct—Defendants' use of the DPQ. (ECF No. 50 at 17–24). Because the second and third arguments demonstrate that Mr. Wade lacks standing and would apply equally were Owl a plaintiff, the Court need not address Defendants' first argument.

a. Legal Standard

"[T]he irreducible constitutional minimum" of Article III standing "consists of three elements." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). A plaintiff must have "(1) suffered

[4] Although, as noted above, the Eleventh Amendment does not preclude the Court from exercising subject matter jurisdiction over any claims against Defendants in their individual capacities (see § IV(A)(1)(a), supra), for the reasons set forth in the remainder of this Report and Recommendation, Mr. Wade has not, and cannot, plausibly allege such a claim. (See §§ IV(B)(1)–(2), infra).

an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id. Determining whether a party has demonstrated an injury in fact—which Defendants put at issue here—requires application of a two-step analysis. A court must ask whether (1) the asserted injury is "concrete and particularized" and (2) is "actual or imminent." Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663 (1993). To satisfy the second standing element—traceability—a plaintiff "must demonstrate a causal nexus between the defendant's conduct and the injury." Chevron Corp. v. Donzinger, 833 F.3d 74, 121 (2d. Cir. 2016). Finally, to satisfy redressability, a plaintiff must show that the relief he or she seeks "would serve to . . . eliminate any effects of the alleged legal violation that produced the injury in fact." Soule v. Conn. Assoc. of Schools, Inc., 90 F.4th 34, 47 (2d Cir. 2023).

b. Application

The FAC asserts two injuries: (1) Defendants' disparate treatment of Mr. Wade on the basis of his race or gender, (see ECF No. 31 at 13 ("I have been deprived of my fundamental rights and liberties in respect to my race and gender."), and (2) Mr. Wade's monetary loss from failure to secure the Contract, (see ECF No. 31 at 42 ("To reinstate me fully, as competitive within the current public business environment . . . would require a monetary denomination above $19.5 million."). Each may constitute a cognizable injury for the purposes of Article III standing. See City of Jacksonville, 508 U.S. at 666 (explaining that plaintiff need not prove that he or she would have ultimately been awarded a public works contract absent alleged discrimination and need only show that he or she was denied the ability "to compete on an equal footing in the bidding process," for "the injury in fact . . . is the denial of equal treatment resulting from the

imposition of [a] barrier, not the ultimate inability to obtain the benefit"); Carter, 822 F.3d at 55 explaining that "'[e]ven a small financial loss suffices'" to allege injury in fact) (quoting Nat. Res. Def. Council, Inc. v. U.S. Food & Drug Admin., 710 F.3d 71, 85 (2d Cir. 2013)). As explained below, however, the FAC does not plausibly allege Defendants treated Mr. Wade differently based on his race or gender, and any monetary loss Mr. Wade suffered by failing to secure the Contract is not fairly traceable to Defendants' challenged conduct, the use of the DPQ.

i. Disparate Treatment Based on Race or Gender

First, the FAC and the documents it incorporates fail to plausibly allege that Defendants' use of the DPQ treated Mr. Wade differently based on his race or gender. Indeed, the DPQ does not solicit any information about these traits and instead merely asks questions about each applicant's business practices. (See ECF No. 51-1 at 56–57). Although the DPQ inquires how much revenue an applicant has previously paid to MWBE firms, it does not offer any advantage for MWBE applicants or disadvantage for non-MWBE applicants for based on race or gender. (Id.) Consequently, because the FAC alleges no basis from which to infer that Mr. Wade was not "on [ ] equal footing in the bidding process," he cannot establish an injury vis-à-vis unequal treatment in the RFP process. City of Jacksonville, 508 U.S at 666; cf. MediGrow, LLC v. Natalie M. LaPrade Med. Cannabis Comm'n, 487 F. Supp. 3d 364, 374-75 (D. Md. 2020) (granting motion to dismiss claim that plaintiff was on "unequal footing" for cannabis licenses where complaint merely "launche[d] a general challenge to [an] equity points system without explaining how that system produces discriminatory results").

ii. Traceability to Challenged Conduct

In the alternative, the Court construes the FAC as asserting that Mr. Wade is alleging that he was injured by failing to secure the Contract and its concomitant monetary benefits. (See ECF No. 31 at 42–43) (alleging that Mr. Wade has suffered "Career Interruption" and "Delayed Opportunities" by failing to secure the Contract). Even assuming Mr. Wade has been harmed financially by not receiving the Contract, this injury is not fairly traceable to Defendants' challenged conduct—use of the DPQ. "[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury[.]" Texas v. Lesage, 528 U.S. 18, 21 (1999). As summarized above (see § II(A)(2), supra), each RFP bidder who received a score of less than 55 points on the Technical Proposal Evaluation was deemed ineligible to receive the Contract. (See ECF No. 51-1 at 24). Owl received a score of 17.67 points on its Technical Proposal (see ECF No. 51-6 at 2), and therefore fell almost 40 points below the threshold at which its Bid could have been considered. Thus, even assuming Owl should have been awarded two points for the DPQ, Owl still fell far short of the eligibility threshold. In other words, even if Owl had received the full two possible points on the DPQ, its Bid still did not garner enough points to be eligible for the Contract.

A comparable situation arose in Dunnet Bay Const. Co. v. Borggren, 799 F.3d 676 (7th Cir. 2015). There, the Dunnet Bay Construction Company ("Dunnet Bay") did not receive a public works contract despite having submitted the lowest bid. Id. at 695. In denying the bid, state officials observed that Dunnet Bay had failed to meet a "Disadvantaged Business Enterprise" ("DBE") goal in its application. Id. at 692. The Seventh Circuit nevertheless concluded that

Dunnet Bay had not been injured by that determination, and thus lacked standing, because, although Dunnet Bay was the lowest bidder, its bid was still 16% over the project threshold, and state officials rejected the project in part on that basis. Id. at 695. In other words, "Dunnet Bay suffered no injury because of the DBE program[.]" Id. (emphasis added). Dunnet Bay thus supports the proposition that a bidder, like Mr. Wade here, lacks standing to challenge a diversity initiative related to a public works contract if the bidder would not have received the contract even if it had satisfied the initiative because the alleged injury was not fairly traceable to the initiative.

* * *

Because Mr. Wade has failed to establish that he has Article III standing to assert his claims, the Court lacks subject matter jurisdiction over this case, and I therefore respectfully recommend that the Motion be GRANTED and the FAC be dismissed without prejudice.[5]

B. The FAC Fails to State a Claim

Defendants argue that the FAC fails to allege facts sufficient to support Section 1983 claims under the Equal Protection Clause or Due Process Clauses of the Fourteenth Amendment. As explained below, the Court agrees, and further concludes that Mr. Wade has not plausibly alleged his entitlement to relief on the Conspiracy Claims or the Criminal Claim.

1. Section 1983 Claims

In the FAC, Mr. Wade asserts that Defendants violated several of his constitutional rights, including his rights to equal protection and due process. (ECF No. 31 at 8). In the Motion,

[5] Owl is not a named plaintiff in the FAC, but even if it were, it would equally lack standing because (1) the DPQ does not discriminate against firms or their operators with respect to race or gender, and (2) the use of the DPQ was not determinative of Owl's failure to secure the Contract. (See §§ IV(A)(2), supra).

Defendants argue that these claims are unsupported by factual allegations sufficient to avoid dismissal.

a. Legal Standard

"Section 1983 grants a right of action to any citizen of the United States or other person within the jurisdiction thereof who has been deprived of any rights, privileges, or immunities secured by the Constitution or federal law by a person acting under color of state law." Hirsch v. City of New York, 300 F. Supp. 3d 501, 508 (S.D.N.Y.) (quoting 42 U.S.C. § 1983), aff'd, 751 F. App'x 111 (2d Cir. 2018) (summary order); see Pridgen v. Jail, No. 22 Civ. 2294 (ER), 2022 WL 1082411, at *1 (S.D.N.Y. Apr. 6, 2022) ("Section 1983 provides that an action may be maintained against a 'person' who has deprived another of rights under the 'Constitution and Laws.'") (quoting 42 U.S.C. § 1983). To state a Section 1983 claim, "a complaint must allege that the defendant (1) deprived the plaintiff of rights secured by the Constitution and laws of the United States, (2) while acting under color of state law." Chamberlain v. City of White Plains, 986 F. Supp. 2d 363, 381 (S.D.N.Y. 2013); see also Lurch v. Chaput, No. 16 Civ. 2517 (AT), 2022 WL 889259, at *5 (S.D.N.Y. Mar. 25, 2022). "In order to state a claim under [Section] 1983, a plaintiff must allege that he was injured by either a state actor or a private party acting under color of state law." Ciambriello v. Cnty. of Nassau, 292 F.3d 307, 323 (2d Cir. 2002).

"To act under color of state law or authority for purposes of Section 1983, a defendant must 'have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" Savarese v. City of New York, 547 F. Supp. 3d 305, 337 (S.D.N.Y. 2021) (quoting Monsky v. Moraghan, 127 F.3d 243, 245 (2d Cir. 1997)). The Court must assess whether the alleged constitutional violations "have been committed by a

person acting under color of state law." Cornejo v. Bell, 592 F.3d 121, 127 (2d Cir. 2010) (quoting Pitchell v. Callan, 13 F.3d 545, 547 (2d Cir. 1994)). The burden is on the plaintiff to "indicate that the challenged action was 'fairly attributable to the State.'" Vasquez v. Garcia, 432 F. Supp. 3d 92, 97 (D. Conn. 2019) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982)).

b. Equal Protection Claim

Mr. Wade alleges that Defendants' use of the DPQ resulted in Owl losing points on its Bid based on his race and/or gender (the "Equal Protection Claim"). (See ECF No. 31 at 9 ("[Defendants] have subjected me and caused me to subject others to the deprivation of rights and privileges secured by the Constitution of the United States, federal and state laws. They have done so in an arbitrary and capricious manner, in regards to my race and gender.")). Defendants argue that Mr. Wade has not alleged an equal protection violation because the FAC does not support any inference that he was subjected to intentional discrimination based on his race or gender. (ECF No. 50 at 24–31).

i. Legal Standard

The Fourteenth Amendment right to equal protection of the law is "essentially a direction that all persons similarly situated be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); accord Disabled Am. Vets. v. U.S. Dep't of Vets. Affs., 962 F.2d 136, 141 (2d Cir. 1992). To state a claim under the Equal Protection Clause, a plaintiff must allege purposeful discrimination directed to an identifiable or suspect class. See Giano v. Senkowski, 54 F.3d 1050, 1057 (2d Cir. 1995); Mangum v. City of New York, No. 15 Civ. 8810 (PAE), 2016 WL 4619104, at *8 (S.D.N.Y. Sept. 2, 2016) ("To prove an equal protection violation under § 1983, a plaintiff must prove (1) [that he], compared with others similarly situated, was selectively treated; and (2) that

such selective 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.") (quoting Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 234 (2d Cir. 2004)). A plaintiff can prove purposeful discrimination in three ways: (1) by identifying a law's express (or facial) classification of individuals based on race or gender, see, e.g., Hayden v. County of Nassau, 180 F.3d 42, 48 (2d Cir. 1999); (2) by proving that a facially neutral law is applied in a discriminatory manner, see, e.g, Jana-Rock Const., Inc. v. New York State Dep't of Econ. Dev., 438 F.3d 195, 204 (2d Cir. 2006); or (3) by proving that an official action was motivated by discriminatory animus and resulted in discriminatory effect, see id. Here, Mr. Wade concedes that the second basis for liability does not apply in this action, (see ECF No. 72 at 25), so the Court focuses on the first and third theories and concludes that the FAC does not state a claim under either.

ii. Application

a) Facial Classification

A statute or policy employs a "facial classification" when it explicitly distinguishes between people based race or gender. See, e.g., Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (invalidating a miscegenation statute that, on its face, prohibited interracial marriages); Adarand Const., Inc. v. Pena, 515 U.S. 200, 227 (1995) (concluding that a federal set-aside program that provided financial incentives to hire minority subcontractors created a race-based distinction subject to strict scrutiny); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282–84 (1986) (invalidating a school board plan that utilized race-based preferences in teacher lay-offs).

Here, Mr. Wade argues that Defendants, through the DPQ, created an unconstitutional classification based on race and gender. (See ECF 31 at 9 ("[Defendants] have subjected me . . . to the deprivation of rights and privileges secured by the Constitution . . . in regards to my race and gender."). But a simple reading of the DPQ negates Mr. Wade's assertion. Far from inquiring about any bidder's race, gender, or other protected traits, the DPQ solicits information about bidders' business practices, including whether the bidder employs a diversity officer and how much, if any, of the revenue it generated in the previous fiscal year was directed to MWBE subcontractors or partners. (ECF No. 51-2 at 2–3). Thus, an official's scoring of the DPQ does not—in fact, cannot—result in any differential treatment based on a bidder's race or gender. Use of the DPQ therefore does not support an Equal Protection Claim under the "facial classification" test.

The Second Circuit's decision in Hayden v. County of Nassau, 180 F.3d 42 (2d Cir. 1999), is instructive. There, the Nassau County Civil Service Commission and Nassau County Police Department administered an entrance exam designed to minimize discriminatory impact on minority applicants. Id. at 46. A class of "68 white and Latino applicants, male and female," sued to prevent its use, arguing that the county had "expressly treated applicants differently because of their race." Id. at 46–48. The Second Circuit disagreed, finding that the County's desire to minimize discriminatory impact through use of the exam did not amount to an equal protection violation because the exam "was administered and scored in an identical fashion for all applicants." Id. at 48. "Nassau County's intent, without anything more," the court reasoned, "does not implicate an express, racial classification." Id. The Second Circuit also distinguished the police entrance exam from "select affirmative action tools, such as quota systems, set-aside

programs, and differential scoring cutoffs, which [do] utilize express racial classifications and which prevent non-minorities from competing for specific slots or contracts." Id. at 49.

Here, as in Hayden, it is undisputed that the DPQ and MWBE program are tools intended to combat inequity in particular spheres—there, the hiring of law enforcement officers, here, racial and gender-based inequity in government contracting. See Hayden, 180 F.3d at 48. But where, as here, such tools are administered in a neutral fashion and do not inquire about a bidder's race or gender, the motivation behind their use alone does not plausibly allege a race or gender-based classification to support an Equal Protection Claim. See id.

b) Discriminatory Animus and Effect

The Court similarly concludes that the FAC fails to state an equal protection claim under a "discriminatory animus and effect" theory. To succeed under this theory, it is not enough to show that a law or official action was intended to benefit a particular class of person; rather, discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); see also Washington v. Davis, 426 U.S. 229, 245–46 (1976) (concluding that racially-neutral police officers' examination designed to test the level of an applicant's verbal skills did not exhibit purposeful discrimination, despite disproportionate adverse effects on Black candidates).

Here, as discussed above, the DPQ and MWBE program were designed to combat racial and gender-based inequities in New York state's public contracting sphere. (See § II(A)(1), supra). The FAC does not plausibly allege, however, that the DPQ was implemented "because of" a desire to disadvantage white and/or male applicants such as Mr. Wade. Feeney, 442 U.S. at 279. To

find an equal protection violation under these circumstances would be to equate the state's desire to lessen inequity in public contracting with an intent to discriminate against non-minority applicants like Mr. Wade. That conclusion, Hayden warns, "could seriously stifle attempts to remedy discrimination" because, "[i]f employers or governmental entities fear that they will be charged with discriminating against non-minorities, they will shy away from all proper efforts to rectify prior discrimination." Hayden, 180 F.3d at 51. Mr. Wade has therefore also failed to plausibly allege an Equal Protection Claim based on a discriminatory animus theory.

Accordingly, the Court respectfully recommends that the Equal Protection Claim be dismissed for failure to state a claim.

c. Due Process Claim

Throughout his submissions, Mr. Wade claims that Defendants' use of the DPQ violated his rights to due process under the Fifth and Fourteenth Amendments (the "Due Process Claim"). (See, e.g., ECF No. 31 at 8, 10). As an initial matter, because Mr. Wade challenges the behavior of state, not federal, officials, only the Fourteenth Amendment's Due Process Clause is relevant to the Due Process Claim. See Dusenbery v. United States, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without due process of law."). Accordingly, the Court evaluates whether Mr. Wade has plausibly alleged a Fourteenth Amendment Due Process Claim.

i. Legal Standard

The Fourteenth Amendment's Due Process Clause provides, in pertinent part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

U.S. Const. amend. XIV § 1. Any due process claim—whether substantive or procedural in nature—must be predicated on the existence of a recognized life, liberty, or property interest. See T'Kach, 714 F.3d at 105 ("To plead a violation of procedural due process, . . . a plaintiff must first identify a property right, second show that the government has deprived him of that right, and third show that the deprivation was effected without due process."); Royal Crown Day Care LLC v. Dep't of Health and Mental Hygiene of City of N.Y., 746 F.3d 538, 545 (2d Cir. 2014) ("Under the law governing substantive due process, [plaintiff] has to prove that: (1) it had a valid property interest in its permit to operate a day care center; and (2) defendants infringed on that property right in an arbitrary or irrational manner."). Whether the plaintiff has alleged that he was deprived of a protected interest is thus a threshold determination. See Morales v. New York, 22 F. Supp. 3d 256, 276 (S.D.N.Y. 2014).

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). The Constitution itself does not create property interests that are subject to procedural due process protection. See, e.g., Edwards v. Penix, 388 F. Supp. 3d 135, 141 (N.D.N.Y. 2019). Rather, "[p]rotectible property interests 'are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law.'" Empire Transit Mix, Inc. v. Giuliani, 37 F. Supp. 2d 331, 335 (S.D.N.Y. 1999) (quoting Roth, 408 U.S. at 577).

ii. Application

The FAC fails to allege that Mr. Wade had any protected interest in being awarded the Contract or identify a source of law under which a protectable interest in the Contract existed. Courts considering similar claims have uniformly found that no such interest exists. See, e.g., Autotech Collision Inc. v. The Inc. Vill. of Rockville Ctr., 673 F. App'x 71, 74 (2d Cir. 2016) (summary order) (upholding dismissal of due process claim, observing that "New York law holds that '[n]either the low bidder nor any other bidder has a vested property interest in a public works contract'") (quoting Conduit & Found. Corp. v. Metro. Transp. Auth., 66 N.Y.2d 144, 148–149 (1985)); Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1343, 1351–52 (2d Cir. 1994) (stating that, under New York law, no due process claim for lost profits is cognizable because "bidders lack property rights in future contracts to be awarded under competitive bidding procedures"). Mr. Wade's failure to plausibly allege a protectible interest in being awarded the Contract is thus fatal to his Due Process Claim.

Accordingly, the Court respectfully recommends that the Due Process Claim be dismissed for failure to state a claim.

2. Conspiracy Claims

In support of the Conspiracy Claims under 42 U.S.C. §§ 1985(3) and 1986, Mr. Wade alleges that Defendants, as members of the same state agency, are "necessarily [ ] liable for redress as conspirators who have deprived [him] directly and indirectly of equal protection and privileges under the law." (ECF No. 31 at 21). Defendants argue that Mr. Wade's claims are barred by the intra-corporate conspiracy doctrine and fail to plausibly allege any basis for relief. (ECF No. 50 at 31–33).

a. Legal Standard

Section 1985(3) prohibits conspiring "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." Zhang Jingrong v. Chinese Anti-Cult World All., 287 F. Supp. 3d 290, 297 (E.D.N.Y. 2018) (quoting 42 U.S.C. § 1985(3)). "To state a civil rights conspiracy under § 1985(3), a plaintiff must allege: 1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." Gray v. Town of Darien, 927 F.2d 69, 73 (2d Cir. 1991).

A plaintiff asserting a conspiracy claim under Section 1985(3) must plausibly allege "some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." Webb v. Goord, 340 F.3d 105, 110 (2d Cir. 2003). "A plaintiff must also show 'with at least some degree of particularity, overt acts which the defendants engaged in which were reasonably related to the promotion of the claimed conspiracy.'" Simpson ex rel. Simpson v. Uniondale Union Free Sch. Dist., 702 F. Supp. 2d 122, 133 (E.D.N.Y. 2010) (quoting Thomas v. Roach, 165 F.3d 137, 146 (2d Cir. 1999)). In addition, because discriminatory intent is an element of a Section 1985(3) claim, "the Deprivation Clause requires that a plaintiff belong to a protected class." Zhang, 287 F. Supp. 3d at 297.

Section 1986 does not bestow any substantive rights but rather provides a remedy for violations of Section 1985. See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp., 7 F.3d 1085, 1088 (2d Cir. 1993).

b. Application

Mr. Wade has failed to state a plausible conspiracy claim for three reasons. First, the Conspiracy Claims are barred by the intra-corporate conspiracy doctrine. Under the intra-corporate conspiracy doctrine, the "employees of a single corporate or municipal entity, each acting within the scope of his or her employment, are legally incapable of conspiring together." K.D. ex rel. Duncan v. White Plains Sch. Dist., 921 F. Supp. 2d 197, 210 (S.D.N.Y. 2013). This doctrine is inapplicable when "individuals within a single entity . . . are pursuing personal interests wholly separate and apart from the entity." Id. Here Defendants are all employees of a single entity—the New York Department of State—and the FAC does not allege that they took any action outside the scope of their employment in accepting, grading, or denying Owl's bid. See id. (holding that intra-corporate doctrine barred Section 1985 conspiracy claim where "the Complaint [did] not allege [defendants] were acting solely in their personal interests"); Broich v. Inc. Vill. of Southampton, 650 F. Supp. 2d 234, 247 (E.D.N.Y. 2009) (same).

Second, the FAC fails to allege facts from which the Court could infer that Defendants entered into any "agreement, express or tacit," to violate Mr. Wade's constitutional rights. Webb, 340 F.3d at 110. At best, the FAC offers the conclusory allegation that Defendants "ha[d] knowledge that the wrongs conspired to be done . . . were to be committed." (See ECF No. 31 at 21). The Opposition adds that the rejection letter Mr. Wade received "constitutes not only intent but, also embodies a coherent meeting of the minds." (ECF No. 72 at 27). But these statements are unsupported by factual allegations and are therefore merely "recitation[s] of the elements of a cause of action" insufficient to state a claim. Twombly, 550 U.S. at 555. As discussed above, Mr. Wade has failed to plausibly allege an underlying constitutional violation. (See §§ IV(B)(1),

supra). Dismissal of his Section 1985 claim is therefore appropriate. See Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir. 1997) ("A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss."); Nnebe v. City of New York, No. 22 Civ. 3860 (VEC) (SLC), 2023 WL 2393920, at *19 n.13 (S.D.N.Y. Jan. 30, 2023) ("[H]aving failed to allege an underlying constitutional violation, . . . any conspiracy claim would fail as a matter of law."), adopted by, 2023 WL 2088526 (S.D.N.Y. Feb. 17, 2023); Ahmad v. New York City Health and Hosps. Corp., No. 20 Civ. 675 (PAE), 2021 WL 1225875, at *31 (S.D.N.Y. Mar. 31, 2021) (dismissing § 1985 conspiracy claim where complaint contained only "conclusory recitations of the statutory elements").

Third, having failed to state a Section 1985(3) claim, Mr. Wade is not entitled to relief under § 1986. See Stewart v. John Dempsey Hosp., No. 303-cv-1703, 2004 WL 78145, at *3 (D. Conn. Jan. 9, 2004) ("[A] prerequisite for an actionable claim under section 1986 is a viable claim under section 1985.").

Accordingly, the Court respectfully recommends that the Conspiracy Claims be dismissed for failure to state a claim.

3. Criminal Claim

The FAC cites to at least one federal criminal statute—18 U.S.C. § 245(b)(2). (See ECF No. 31 at 7, 27–28). As a private citizen Mr. Wade may not institute criminal proceedings against any Defendant. See Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); McCrary v. County of Nassau, 493 F. Supp. 2d 581, 588 (E.D.N.Y. 2007) ("A private citizen does not have a constitutional right to compel government officials to

arrest or prosecute another person."). Accordingly, the Court respectfully recommends that the Criminal Claim also be dismissed for failure to state a claim.[6]

C. Supplemental Jurisdiction

Having found that the FAC fails to state any viable federal claim for relief, all that remain are the State Law Claims. Defendants ask the Court to decline to exercise supplemental jurisdiction over the State Law Claims. (See ECF No. 50 at 33).

A "district court may decline to exercise supplemental jurisdiction over a claim" where it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). "[I]n 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." Alexander v. JP Morgan Chase Bank, N.A., No. 19 Civ. 10811 (OTW), 2021 WL 1061833, at *5 (S.D.N.Y. Mar. 18, 2021) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)).

Having found that Mr. Wade lacks Article III standing and that the FAC fails to plausibly allege any claim over which the Court has subject matter jurisdiction, I respectfully recommend that the Court decline to exercise supplemental jurisdiction over, and dismiss without prejudice, Mr. Wade's State Law Claims. See Daniel v. City of New York, No. 20 Civ. 11028 (PAE), 2021 WL 5988305, at *11 (S.D.N.Y. Dec. 16, 2021) (declining to exercise supplemental jurisdiction over state law claims "[h]aving dismissed all of [the plaintiff's] federal claims"); Loren v. City of New

[6] To the extent that Mr. Wade also invokes New York State criminal statutes (see ECF No. 31 at 27–28), the same conclusion follows.

York, 16 Civ. 3605 (PAE), 2017 WL 2964817, at *5 (S.D.N.Y. July 11, 2017) (same); Harmon v. New York Cnty. Dist. Atty's Office, No. 13 Civ. 1711 (PAE), 2014 WL 1044310, at *10–11 (S.D.N.Y. Mar. 17, 2014) (same).

D. Leave to Replead

On March 12, 2024, after receiving Defendants' Motion, Mr. Wade filed a "Motion to Add Parties," seeking to add claims for monetary damages against Rodriguez, Ashton, and Traina in their individual capacities and to add an official capacity claim against non-party Sandra Nolan. (ECF No. 67 (the "Motion to Add")). On March 19, 2024, the Court denied the Motion to Add, stating that, "[t]o the extent Mr. Wade seeks to amend the FAC, he may file a motion for leave to do so after the Court resolves" Defendants' Motion. (ECF No. 73 at 2).

Federal Rule of Civil Procedure 15(a)(2) provides that "leave to amend a complaint shall be 'freely' given when 'justice so requires,' though a district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party.'" Santiago v. Pressley, No. 10 Civ. 4797 (PAE), 2011 WL 6748386, at *5 (S.D.N.Y. Dec. 23, 2011) (quoting McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200–01 (2d Cir. 2007)). "A court should generally grant a pro se plaintiff 'leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.'" Brown v. Volpe, No. 15 Civ. 9004 (PAE), 2017 WL 985895, at *8 (S.D.N.Y. Mar. 13, 2017) (quoting Cuoco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000)).

Although a pro se litigant like Mr. Wade would ordinarily be permitted to amend his pleading, the Court concludes that allowing such an amendment is not warranted here. First, Mr. Wade has already had one opportunity to amend with both guidance from the Court about

which claims were potentially viable and a preview of Defendants' arguments in support of the prior motion to dismiss. (See ECF Nos. 8, 20–22). This militates against offering Mr. Wade another attempt to state a claim. See Tsinberg, 2021 WL 1146942 at *12 (dismissing pro se plaintiff's claims with prejudice and without leave to amend where he "already had one opportunity to amend, and did so after" being made aware of pleading deficiencies); Green v. Niles, No. 11 Civ. 1349 (PAE), 2012 WL 987473, at *7 (S.D.N.Y. Mar. 23, 2012) (denying leave to amend where plaintiff's amended complaint "was undertaken after [he] had gained a preview of defendants' arguments in support of a motion to dismis[s]" and included at least one allegation "made in response to the Court's identification of factual deficiencies" in his previous pleading). Second, for the reasons discussed in section IV(A)(2), above, Mr. Wade cannot establish standing, and the Court lacks subject matter jurisdiction over any of his claims, such that further amendment of the pleadings would be futile. See Patane v. Clark, 508 F.3d 106, 113 n.6 (2d Cir. 2007) ("A district court may properly deny a motion to amend when it finds that amendment would be futile.") (citing Foman v. Davis, 371 U.S. 178, 182 (1962)); Pirri v. Cheek, No. 19 Civ. 180 (PAE), 2019 WL 3936798, at *3 (S.D.N.Y. Aug. 20, 2019) ("The Court finds that both amendments would be futile and therefore denies Pirri's motion to amend.").

V. CONCLUSION

For the reasons set forth above, the Court respectfully recommends that the Motion be GRANTED for lack of subject matter jurisdiction, or, in the alternative, for failure to state a claim. The Court also respectfully recommends that the exercise of supplemental jurisdiction over the State Law Claims is not warranted, and that those claims be DISMISSED WITHOUT PREJUDICE.

Finally, because amendment would be futile, the Court respectfully recommends that leave to amend be denied and the Federal Claims be DISMISSED WITH PREJUDICE.

Defendants shall promptly serve a copy of this Report and Recommendation on Mr. Wade and file proof of service on the docket.

Dated: New York, New York
June 28, 2024

SARAH L. CAVE
United States Magistrate Judge

* * *

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See also Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen (14) days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), (d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Engelmayer.

FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), (d), 72(b); Thomas v. Arn, 474 U.S. 140 (1985). If Mr. Wade does not have access to cases cited in this Report and Recommendation that are reported on Westlaw, he/she may request copies from Defendant's/Respondent's counsel. See Local Civ. R. 7.2.