UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

M. PETER KUCK, individually and on behalf of others similarly situated,	:	
Plaintiffs,	:	**CASE NO.: 3:07-cv-1390(VLB)**
v.	:	
JOHN A. DANAHER, III, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, in his official and individual capacities, ALBERT J. MASEK, JR., COMMANDING OFFICER, CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, in his official and individual capacities,	:	
Defendants.	:	**APRIL 3, 2008**

PLAINTIFF'S BRIEF IN REPLY RE:
MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR JOINDER OF PARTY DEFENDANTS AND REQUEST FOR LEAVE OF COURT TO AMEND AND TO SUPPLEMENT COMPLAINT[1]

The Plaintiff M. Peter Kuck, by and through his undersigned counsel, hereby submits his brief in reply to a memorandum of law filed by Defendants opposing a request for leave filed by the Plaintiff on January 22, 2008, to amend the Complaint and a motion for joinder to add party defendants.

I. BACKGROUND SUMMARY

Plaintiff filed a Complaint in three counts on September 17, 2007. (doc. # 1.) Defendants moved for dismissal on November 30, 2007. (doc. # 13.) Plaintiff responded by Memorandum of Law opposing Defendant's Motion to Dismiss on January 22, 2008. (doc. # 18.) Plaintiff requested leave to file an amended complaint supplementing the Complaint with new allegations of fact acquired after September 17, 2007, through responses to Freedom of Information Act requests for email communications transmitted to and from the Board of Firearms Permit Examiners (BFPE) email accounts. (doc. # 19.) Plaintiff moved to join six additional parties based upon this newly acquired information, including (1) M. Jodi Rell, Governor, State of Connecticut, (2) Barbara Mattson, Detective, Thomas Karanda, Detective, Ronald A. Bastura, Sergeant, from the

[1] **Plaintiff's Reply Brief exceeds ten pages because it is two reply briefs consolidated into one. Plaintiff files a Motion for Joinder and a Request for Leave to File Amended Complaint. The Defendants responded in a consolidated memorandum and Plaintiff consolidates his reply.**

Connecticut State Department of Public Safety,[2] (3) Christopher R. Adams, BFPE Chairman, and (4) Susan Mazzoccoli, BFPE Executive Head.[3] Defendants filed a Memorandum of Law in Opposition to Plaintiff's motion for joinder and request for leave to amend on March 3, 2008. (doc. # 26.)

II. ARGUMENTS OF LAW

A. Plaintiff's Proposed Amended Complaint States Proper Claims for Relief

Plaintiff alleges in Counts One and Two of his proposed Amended Complaint a denial of his procedural and substantive due process rights, respectively, in violation of the Fifth and Fourteenth Amendments to the United States Constitution as guaranteed under Article First, § 15, of the Connecticut Constitution and the Second Amendment to the United States Constitution. (Am. Compl. ¶¶ 227, 236 (Ex. 1 to Pl.'s Mot. to Amend.)) Count Three of the proposed Amended Complaint alleges a violation of the First and Fourteenth Amendments to the United States Constitution. (Proposed Am. Compl. ¶ 240.)

1. Count Two - Substantive Due Process

Plaintiff alleges in his Complaint and proposed Amended Complaint in Count Two at paragraphs eighty-five (85) and two-hundred thirty-one (231), respectively, that "[t]he SFLU [State Licensing Firearms Unit (hereinafter, "SLFU")]'s imposition of barriers to gun possession in contravention of representative legislation is so outrageously arbitrary as to constitute a gross abuse of governmental authority." This allegation arises from the SLFU's demand that Plaintiff submit a birth certificate, United States passport, or voter registration card to establish citizenship or legal residency as a condition for renewal of his state permit. (Compl. ¶ 36) (Proposed Am. Compl. ¶ 47.) The DPS Defendants respond that "with respect to the non-renewal of plaintiff's

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[2] Detectives Mattson and Karanda and Sergeant Bastura in addition to Commissioner Danaher and Captain Masek are referred to as the "DPS Defendants" in this brief.

[3] Plaintiff moved to join these additional six party defendants pursuant to Rule 19 of the Federal Rules of Civil Procedure. Plaintiff's motion is suited to Rule 20 which states: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." Plaintiff requests that the motion for joinder filed on January 22, 2008, be converted to a motion to add party defendants filed pursuant to Rule 20 or that, in the alternate, Plaintiff is granted leave to file a motion to add the six party defendants.

pistol permit for failure to provide proof of citizenship or legal residency, as a matter of law, plaintiff simply has it wrong." (Defs.' Mem. of Law at 22.)

Section § 29-28(b) of the Connecticut General Statutes lists ten grounds for denial of an application for a state permit or temporary state permit.[4] Section 29-32b(b) incorporates these ten grounds listed in section 29-28(b) as grounds for denial of an application to renew a state permit.[5] State law mandates that the DPS Commissioner "investigate each applicant for renewal of a state permit to ensure that such applicant is eligible under state law for such permit or for renewal of such permit." Conn. Gen. Stat. § 29-29(d).[6] The only ground relevant to the DPS Defendants' denial of Plaintiff's state permit renewal application is found at section 29-28(b)(9), which states: "No state or temporary state permit to carry a pistol or revolver shall be issued under this subsection if the applicant … (9) is an alien illegally or unlawfully in the United States."

In denying Plaintiff's state permit renewal application, the DPS Defendants contend, as grounds for the denial, that there is "just and proper cause" to believe that Plaintiff is "an alien illegally or unlawfully in the United States." Conn. Gen. Stat. §§ 29-29(b)(9), 29-32b(b). The sole evidence that Plaintiff is "an alien illegally or unlawfully in the United States" is Plaintiff's refusal to provide a birth certificate, United States passport, or voter registration card upon demand. However, not one of the ten grounds for denial of a state permit renewal application enumerated in section 29-29(b) authorize the DPS Defendants to deny a state permit renewal application based

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[4] Section 29-29(b) provides, in relevant part: "No state or temporary state permit to carry a pistol or revolver shall be issued under this subsection if the applicant … (9) is an alien illegally or unlawfully in the United States, or (10) is less than twenty-one years of age." (emphasis in bold added.)

[5] Section 29-32b(b) provides: "Any person aggrieved by any refusal to issue or renew a permit or certificate under the provisions of section 29-28 or 29-36f, or by any limitation or revocation of a permit or certificate issued under any of said sections, or by a refusal or failure of any issuing authority to furnish an application as provided in section 29-28a, may, within ninety days after receipt of notice of such refusal, limitation or revocation, or refusal or failure to supply an application as provided in section 29-28a, and without prejudice to any other course of action open to such person in law or in equity, appeal to the board. On such appeal the board shall inquire into and determine the facts, de novo, and unless it finds that such a refusal, limitation or revocation, or such refusal or failure to supply an application, as the case may be, would be for just and proper cause, it shall order such permit or certificate to be issued, renewed or restored, or the limitation removed or modified, as the case may be. If the refusal was for failure to document compliance with local zoning requirements, under subsection (a) of section 29-28, the board shall not issue a permit."

[6] Section 29-29(d) provides: "The commissioner may investigate any applicant for a state permit and shall investigate each applicant for renewal of a state permit to ensure that such applicant is eligible under state law for such permit or for renewal of such permit."

upon that person's refusal to provide a birth certificate, United States passport, or voter registration card. Therefore, the DPS Defendants, in denying Plaintiff's state permit renewal application, hold that there is "just and proper cause" to find that Plaintiff is "an alien illegally or unlawfully in the United States" until he proves otherwise through submission of a birth certificate, United States passport, or voter registration card.

Our state statutes place the burden on the DPS Defendants to provide "just and proper cause" prior to denying a state permit renewal application on the ground that a person is an "alien illegally or unlawfully in the United States." Conn. Gen. Stat. §§ 29-29(b)(9), 29-32b(b). The law does not place the burden on a person to prove to the DPS Defendants that the person is not "an alien illegally or unlawfully in the United States." Despite the DPS Defendants' position that Plaintiff "simply has it wrong" on his "non-renewal," the distinction between placing the burden on the DPS Defendants and placing the burden on the Plaintiff is an important distinction that defines no less than the status and relationship of an individual to his or her government.

If the government may deny rights based upon a person's status as an "alien illegally or unlawfully in the United States" and the government enforces this mandate to deny rights unless a person proves that he or she is not "an alien illegally or unlawfully in the United States," then rather than needing cause to deny a person his or her rights, the government may deny rights based on a person's refusal to prove that he or she has certain rights. The DPS Defendants, seek, invidiously, to place the burden on a person of proving that he or she is not "an alien illegally or unlawfully in the United States" rather than accepting its legislatively mandated burden of needing "just and proper cause" to deny a state permit on the ground that a person is "an alien illegally and unlawfully in the United States." If September 11, 2001, or various Homeland Security Acts necessitate a shift in this burden, our democratic-based government still requires that the shift occur as a result of the legislative process not as a product of law enforcement edict.

The DPS Defendants argue that the State has a compelling interest in ensuring that those with state permits are not "alien[s] illegally or unlawfully in the United States." If the State's interest in ensuring that persons with state permits are not "alien[s] illegally or unlawfully in the United States" is as compelling as argued in the State's memorandum, then the State would not

wait until a person holds his or her state permit for a five year period before ensuring, at the time of renewal every five years, that the person is not "an alien illegally or unlawfully in the United States." For such a compelling interest, the State should have a data system that informs when a person's becomes "an alien illegally or unlawfully in the United States." This would prevent a person from receiving a state permit, for example, on April 3, 2008, then becoming "an alien illegally or unlawfully in the United States" immediately following that date with the DPS Defendants unaware of that change until April 2, 2013, when that person fails to submit a birth certificate, United States passport, or voter registration card with his or her state permit renewal application. In addition, that person may still have one or more of these documents to submit to the DPS Defendants despite having become "an alien illegally or unlawfully in the United States between April 3, 2008, and April 2, 2013. The mere possession of one or more of these documents cannot satisfy the DPS Defendants that a person is not "an alien illegally or unlawfully in the United States" when such a compelling state interest, as alleged in the Defendants' opposition memorandum, exists. For this reason, section 29-29(d) mandates that DPS Defendants "investigate each applicant for renewal of a state permit to ensure that such applicant is eligible under state law for such permit or for renewal of such permit." Conn. Gen. Stat. § 29-29(d). One may reasonably argue that by simply asking for a birth certificate, United States passport, or voter registration card from a person applying for a state permit renewal, the DPS Defendants have abdicated their mandate to conduct an investigation by placing the burden on the person making application to conduct the DPS Defendants' investigation.

If the DPS Defendants do not have the resources or capacity to determine whether a person is "an alien illegally or unlawfully in the United States," then it is the executive branch's burden to approach the legislative branch to inform the duly elected members of that body that the State has no means of determining whether a person is "an alien unlawfully or illegally in the United States." The legislature may then decide to appropriate funds or take other measures so law enforcement may have a data base to determine whether a person is "an alien illegally or unlawfully in the United States."

The legislature also has the authority, granted to it through the democratic process, to amend section 29-28(b) so that a person's failure to present a birth certificate, United States passport, or voter registration card is one of the grounds to deny issuance or renewal of a state permit. The legislature could amend section 29-29(b) to indicate that the failure to provide a birth certificate, United States passport, or voter registration card upon application for a state permit renewal creates a rebuttable or irrebuttable presumption that a person is "an alien illegally or unlawfully in the United States." This amendment has not been proposed.

In Connecticut, our legislature has allocated the burden to the State to demonstrate that a person is "an alien illegally or unlawfully in the United States" if the State intends to deny an application for a state permit on that basis. The DPS Defendants have shifted this burden without the authority of our democratic representatives. In Plaintiff's case, where the DPS Defendants have denied renewal of a state permit, not because the DPS Defendants have any just or proper cause to believe that Plaintiff is an alien illegally or unlawfully in the United States but because the Plaintiff has not presented evidence that he is not an alien, the DPS Defendants grossly abused their governmental authority. If the DPS Defendants have just cause to believe that Plaintiff is an alien unlawfully or illegally in the United States then DPS has failed to act on the knowledge. The Plaintiff remains in his position as the Governor's appointed member of the Board of Firearms Permit Examiners despite the DPS Defendants' contention that there is "just and proper cause" to believe that Plaintiff is "an alien illegally and unlawfully in the United States." The Plaintiff has not been questioned by the Immigration and Naturalization Service or any other federal agency having jurisdiction over illegal immigration despite the DPS Defendants' contention that there is "just and proper cause" to believe that Plaintiff is "an alien illegally and unlawfully in the United States."

2. Count One - Procedural Due Process

Defendants allege that "[t]he primary force behind the motion to dismiss was the structural fact that the Board adjudicated administrative appeals from the denial of pistol permits, not the Department of Public Safety." (Defs.' Mem. at 2.) Plaintiff alleges that the delay between the denial or revocation of a state permit and a hearing before the Board would not occur but for the DPS Defendants' gross abuse of their authority to deny and revoke state permits and the

condonation of Chairman Adams' and Mazzoccoli of these abuses. The proposed Amended Complaint alleges in detail the communications and agreements between Chairman Adams and Mazzoccoli and the SLFU that allowed the DPS Defendants to deny and revoke state permits without cause and avoid accountability for the decisions to deny and revoke state permits. The Defendants write that "plaintiff's amended complaint reads like a gripe sheet of all slights and disagreements, perceived or real, between plaintiff, his Board Chair, and frankly, anyone else involved with the firearm permit appeal process."[7] (Defs.' Mem. at 13.) The Defendants argue that "the backlog is purely a result of numbers -- large numbers of appeals being filed every year and a limited number of appeals that the Board can reasonably hear." (Defs.' Mem. at 6.) Plaintiff's proposed Amended Complaint alleges facts to support his claim that the numerous appeals arise from the denial and revocation of state permits without "just and proper cause."

The appeals to the BFPE do not arise from any proceeding or adjudication. The appeals arise from the denial or revocation of a state permit by state law enforcement officers assigned to the SLFU.[8] The backlog of appeals arises from the numerous cases in which there was no "just and proper cause" to deny or revoke a state permit. In any tribunal, when there is an increase in appeals it is not unreasonable to look at the entity being appealed from to determine why appellants believe that the time and resources necessary to the appeal process are worth the expenditure. The DPS Defendants have no reasonable expectation of proving that Plaintiff is "an alien illegally or unlawfully in the United States" at Plaintiff's hearing date on November 13, 2008. If the BFPE heard the majority of appeals and upheld the decision of the DPS Defendants to deny

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[7] Plaintiff names and references only one member (other then Plaintiff) of the seven-member BFPE in his Complaint and proposed Amended Complaint. See section 29-32b(a) ("There shall be established a Board of Firearms Permit Examiners, within the Department of Public Safety for administrative purposes only, hereinafter referred to as the board, to be comprised of seven members appointed by the governor to serve during his term and until their successors are appointed and qualify. … "). Plaintiff does not name or reference any counsel appearing before the Board on behalf of the DPS Defendants. Plaintiff does not name the administrative assistant assigned to the BFPE.

[8] Cf.: "Plaintiff seeks to hold the DPS defendants liable for their litigation position vis-à-vis his permit, but their actions are entitled to absolute immunity." (Defs.' Mem. at 14.) The DPS Defendants are no more entitled to absolute immunity than police officers making an arrest. The fact that a police officer later testifies about the arrest does not mean his or her conduct in effecting the arrest is entitled to absolute immunity. Similarly, the DPS Defendants denied and revoked state permits. They may later recount their actions before the BFPE but this does not entitle their actions in denying and revoking the state permits to absolute immunity.

and revoke state permits then a record would exist of the DPS Defendant' decisions and this record would be subject to scrutiny. As alleged, this is not the case.[9] Instead, the majority of cases are "settled" by the DPS Defendants. This allows the appeals to remain pending for between one and two years awaiting appeal to the BFPE. Then, prior to being heard by the BFPE, the appeals are "settled" by the DPS Defendants.

The DPS Defendants are not prosecutors.[10] They have no authority under state statute to return a state permit once it has been revoked. The DPS Defendants may issue a state permit. Conn. Gen. Stat. § 29-28a(b). The DPS Defendants may deny a state permit. Conn. Gen. Stat. § 29-28(b). The DPS Defendants may deny the renewal of a state permit. Conn. Gen. Stat. §§ 29-28(b), 29-32b(b). When a state permit is denied or revoked, the person seeking or holding the state permit must appeal to the BFPE.

> **On such appeal the board shall inquire into and determine the facts, de novo, and unless it finds that such a refusal, limitation or revocation, or such refusal or failure to supply an application, as the case may be, would be for just and proper cause, it shall order such permit or certificate to be issued, renewed or restored, or the limitation removed or modified, as the case may be, determine the facts, de novo, and unless it finds that such a refusal, limitation or revocation, or such refusal or failure to supply an application, as the case may be, would be for just and proper cause, it shall order such permit or certificate to be issued, renewed or restored, or the limitation removed or modified, as the case may be.**

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[9] See Proposed Amended Complaint at ¶¶ 196, 197:

"196. The actual number of cases presented to the Board for review or hearing during fiscal year 2006-07 was forty (40).

197. In previous fiscal years, the number of new appeals, the number of appeals resolved, and the number of appeals resolved at hearings before the Board included for:

FY 2005-06: 281 New Appeals; 281 Appeals Resolved; 72 Appeals presented to Board.
FY 2004-05: 295 New Appeals; 265 Appeals Resolved; 76 Appeals presented to Board.
FY 2003-04: 300 New Appeals; 166 Appeals Resolved; 52 Appeals presented to Board.
FY 2002-03: 299 New Appeals; 150 Appeals Resolved; 43 Appeals presented to Board.
FY 2001-02: 313 New Appeals; 109 Appeals Resolved; 39 Appeals presented to Board."

[10] Cf.: "Finally, with respect to the non-renewal of plaintiff's pistol permit for failure to provide proof of citizenship or legal residency, as a matter of law, plaintiff simply has it wrong. *See* Def. Mem. at 13. Nonetheless, only the DPS defendants (current and proposed) had any role in that decision, and indeed, the ultimate responsibility lies with Commissioner Danaher. In this respect, Commissioner Danaher and the SFLU staff serve as prosecutors for the state. Their decision not to renew, though subject to challenge before the Board, is protected by absolute immunity." (Defs. Mem. at 22.) In this sense, Department of Motor Vehicle personnel are prosecutors when they suspend an individual's license. Police officers are prosecutors when they arrest individuals. Neither is the case. SLFU personnel are witnesses for the prosecution, not the prosecution itself.

Conn. Gen. Stat. § 29-32b(b). The DPS Defendants, unlike the BFPE, do not have the authority to restore a state permit. The DPS Defendants may issue or renew a state permit but such action requires a new application not a mere "settlement."

Prosecutors, unlike the DPS Defendants, have statutory authority to plea bargain, to decline prosecution, and to move for dismissal of criminal cases. Each of these actions must be conducted on the record, and, in all but exempt cases under the youthful offender statute or in juvenile session, in public and open court. Conn. Gen. Stat. § 54-76h. In the particular matter of driving under the influence, the prosecutor must provide a reason on the record if the charge is reduced, nolled, or dismissed. Conn. Gen. Stat. § 14-227a(f).[11] This places a check and balance on the government's ability to keep matters off the record that may deserve scrutiny such as arrests for which there is not probable cause or cases which cannot be proven and merit dismissal. In "settling" state permit cases, the DPS Defendants avoid such scrutiny and this allows denials and revocations without just cause to create a backlog of pending appeals before the BFPE. It also allows the DPS Defendants to exercise their authority unchecked. Both of these results allowed the DPS Defendants to deny Plaintiff his state permit renewal application on the ground that Plaintiff is "an alien illegally and unlawfully in the United States." The BFPE cannot, under our present state statutes, uphold this decision. Nonetheless, Plaintiff has been compelled to wait from April 16, 2007, until November 13, 2008, for the BFPE to hear his case.[12]

The proposed Amended Compliant demonstrates Chairman Adams and Mazzoccoli's complicity in hiding from public scrutiny the gross abuse of authority by the DPS Defendants.[13]

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[11] Section 14-227a(f) provides: "If a person is charged with a violation of the provisions of subsection (a) of this section, the charge may not be reduced, nolled or dismissed unless the prosecuting authority states in open court such prosecutor's reasons for the reduction, nolle or dismissal."

[12] See Defs.' Mem. at 12 ("Plaintiff incorrectly contends that SLFU illegal settles administrative cases to which it is a party, even though it has not offered to settle plaintiff's administrative appeal, plaintiff is not entitled to such a settlement and plaintiff does not even allege he is entitled to such a settlement.") Plaintiff's claim is that the DPS Defendants have no authority to settle matters pending before the BFPE. In the context, no appellant is "entitled" to a settlement.

[13] See Proposed Amended Complaint at ¶¶ 184, 185:

"184. Adams told Mazzoccoli that Plaintiff would "flip" when he learned that only six (6) appeals were scheduled for hearing and asked Mazzoccoli if the Department would add more appeals to the schedule.

185. Although it was too late for Mazzoccoli to send timely notices to appellants for April, 2007, hearings, she told Adams: 'Too late to send hearing notices, but I can adjust the agenda to

Chairman Adams and Mazzoccoli made it possible for the DPS Defendants to create and maintain a backlog of cases having no just and proper cause that would avoid scrutiny through "settlements" that the DPS Defendants had no authority to enter.

B. Younger Doctrine and First Amendment Retaliation Claim

Plaintiff's claims in his Complaint and Proposed Amended Complaint are similar to the claims in Cullen v. Fliegner, 18 F.3d 96, 101 (2d Cir. 1994). In Cullen, the Second Circuit upheld the district court's permanent enjoinment of an administrative disciplinary proceeding against a school teacher accused of handing out fliers less than one-hundred feet from school property as a violation of state law. Cullen at 100. A disciplinary panel established pursuant to New York State Education Law heard the school's evidence and denied the school teacher's motion to dismiss. The school teacher moved to dismiss on First Amendment grounds. The school teacher then filed a federal action claiming a violation of his First Amendment right to free speech. The district court permanently enjoined the school board from continuing with the administrative disciplinary proceeding and awarded attorney's fees. See Diamond '"D" Construction Corp. v. McGowan, 282 F.3d 191, 199 (2d Cir. 2002).[14]

The Second Circuit found that the school board's haphazard notice of the one-hundred foot rule and a lack of notice or signage, its disregard of the statutory notice requirement, the school teacher's previous challenges to the school board's authority, and the fact that the school teacher, although he knew of the boundary, was never advised or provided notice merited a permanent injunction to prevent the school board from proceeding with the hearing. The district

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show cases resolved at the meeting instead of prior to the meeting. I can easily adjust 3 cases, 040-06, 073-06 and 278-05, that were just issued permits last week. Let me know and I will change the agenda and call Det. Mattson. I'm positive she won't mind.'"

[14] "In *Cullen,* a case much relied upon by Diamond D, a teacher was disciplined after he distributed leaflets opposing the re-election of certain school board members. Cullen argued that the proceeding against him was initiated in retaliation for the exercise of his First Amendment rights. Cullen sued in federal court to stop the disciplinary proceedings, and the district court issued an injunction. On appeal, Cullen argued that *Younger* should not apply because the disciplinary proceeding was brought in bad faith. We affirmed the district court's injunction, holding that the district court's findings of a "past history of personal conflict" between Cullen and the school board, and the "strictly *ad hominem* " manner in which the school board had disciplined him were sufficient to establish that the school board disciplinary proceeding was retaliatory in nature and calculated to chill First Amendment expressive activity critical of the school board. *Cullen,* 18 F.3d at 104. Therefore, we concluded, "[b]ecause the State of New York cannot have a legitimate interest in the disciplinary proceeding, permitting it to continue would not serve the purposes of the *Younger* doctrine...." *Id*." Diamond "D" at 199.

court found that the school board "had a 'past history of personal conflict' with the school teacher, and their corresponding desire 'to do something about' him rose to the 'level of animus.'" Cullen at 104.

On appeal the school board argued that the "district court should have abstained from deciding Appellee's constitutional claims." Cullen at 103. In Cullen, the court found all three factors present for the district court to abstain pursuant to Younger v. Harris, 401 U.S. 37, 91 (1971). The district court "based its determination not to abstain upon the applicability of the 'bad faith' exception to this case [Younger v. Harris] …" Cullen at 103 n. 4. Although the "bad faith" exception to the Younger abstention doctrine requires that the Plaintiff, in this case, demonstrate that he has no reasonable expectation of a favorable outcome, "[i]ntervention would still be warranted upon a showing of 'bad faith, harassment or any other exceptional circumstance that would call for equitable relief."' Cullen at 103. In the context of a motion to amend or a motion to dismiss, when the Defendants argue that Plaintiff's current and proposed claims should be dismissed pursuant to Rule 12(b)(6) or that the Court should abstain from some of Plaintiff's requests for relief, Plaintiff responds by referring to detailed allegations of the proposed Amended Complaint to demonstrate the personal conflict and animus demonstrated by the DPS Defendants, Chairman Adams, and Mazzoccoli, with the Governor's involvement, toward Plaintiff.[15] The

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[15] For example, the Proposed Amended Complaint alleges by the following paragraphs:

"26. Mazzoccoli is assigned to the Connecticut State Department of Administrative Services and is supervised directly by Governor Rell.

112. In April, 2007, Adams and Mazzoccoli initiated contacts with Maryann Boord, Governor Rell's Director of Boards and Commissions in the Office of the Governor.

113. Previously, by letter dated January 25, 2007, Plaintiff, in response to an inquiry from Director Boord, indicated to Director Boord that he wished to continue his service on the Board.

114. Together, Adams and Mazzoccoli drafted a letter to the Office of the Governor to oppose and subvert Plaintiff's reappointment to the Board.

115. Adams and Mazzoccoli tried to find out personal information about Plaintiff to present to the Governor's office as cause to not reappoint him.

119. Mazzoccoli defended the Department against Plaintiff's efforts to reduce the backlog, writing to the Governor's office that the review of appeal cases is just small part of Department duties and the Department did not have the time or manpower to better address the issue.

120. Adams reviewed Mazzoccoli's draft letter to the Governor with approval and indicated he would look at it more closely and meet with Mazzoccoli.

131. In July, 2007, Mazzoccoli reported to Adams that Detective Mattson and Detective Karanda attempted to meet with Director Boord at the Governor's office but Director Boord convinced the detectives that she had enough information and would send a letter to the YCGG requesting a list of three (3) names in nomination for Plaintiff's position on the Board as the YCGG representative.

allegations justify this Court's refusal to abstain under the conditions adequately set forth for purposes of pleading in the proposed Amended Complaint. The denial of Plaintiff's state permit renewal application occurred to 'retaliate for or to deter constitutionally protected conduct, or … otherwise … in bad faith or for the purpose to harass." Cullen at 103-104.

The Defendants rely on Diamond "D" Construction Cop. V. McGowan, 282 F.3d 191 (2d Cir. 2002) to argue that the "delays and harms suffered by plaintiff in Diamond "D" far outweigh anything alleged by plaintiff her." (Defs.' Mem. at 17.) In Diamond "D", the Second Circuit recognized a second exception to the Younger abstention doctrine when "extraordinary circumstances" exist. Diamond "D" at 201 (citing Moore v. Sims, 442 U.S. 415, 433 (1979)). This standard is met when "a state administrative agency 'was incompetent by reason of bias to adjudicate the issues pending before it …'" Diamond "D" at 201 (quoting Gibson v. Berryhill, 411 U.S. 564, 577 (1973)). The exception applies when (1) there is "no state remedy available to meaningfully, timely, and adequately remedy the alleged constitutional violation"; and (2) there is a finding that the "litigant will suffer 'great and immediate' harm if the federal court does not intervene." Diamond "D" at 201 (quoting Trainor v. Hernandez, 431 U.S. 434, 441-42 and n. 7 (1977)).

In Diamond "D", the Second Circuit addressed whether the Diamond "D" company alleged "extraordinary circumstances" from the "fact that Diamond D's viability as a business [was] being imminently threatened by the DOL's arbitrary withholdings and by the undue delays that have been associated with the investigation and the hearing process." Diamond "D" at 201. The district court concluded that exceptional circumstances were present because: (1) there was no state process that could remedy the alleged constitutional violation in a timely manner; and (2) the imminent destruction of Diamond D's business was a "great and immediate" harm that justified injunctive relief." Id. The Second Circuit vacated the district court decision and concluded that

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124. Mazzoccoli told Adams: 'Our relationship with DPS has been further damaged and there are at least 3 local officers who are very angry with a remark made by Peter [Kuck]. Every officer in the room made an audible groan and one officer asked if he could have a copy of the transcript. I received a call from Maryann Boord at home and spoke with her this morning I told her about some of what Peter [Kuck] did yesterday.'"

the application of this exception was inappropriate because "while DOL was dragging its feet, Diamond D was free to file a mandamus proceeding in the Appellate Division to compel the DOL to provide expeditious post-deprivation review as required by the prevailing wage law." Diamond "D" at 202.[16] The Second Circuit did not vacate the district court's refusal to abstain in Diamond "D" based on a finding that the "delays and harms suffered" by Diamond "D" company were not exceptional. Instead the Second Circuit vacated the district court's decision not to abstain based on the availability of an alternate mandamus proceeding. Our state statutes in Connecticut do not provide for a proceeding similar to New York State's Article 78 mandamus proceeding.[17]

III. CONCLUSION

For the foregoing reasons, arguments of law, and incorporating the allegations of fact and claims found in Plaintiff's proposed Amended Complaint, Plaintiff respectfully requests that the Court grant his request for leave to file the proposed Amended Complaint attached as Exhibit 1 to his request for leave and that the Court allow Plaintiff to join the six additional party defendants named in that amended pleading.

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[16] **"Article 78, which supplanted the common law writs of certiorari, mandamus, and prohibition under New York law, permits judicial review of actions by state and local agencies and officers. See N.Y.C.P.L.R. §§ 7801-7806 (McKinney 1994)." Jolly v. Coughlin, 76 F.3d 468, 472 n. 1 (2d. Cir. 1996).**

[17] **In Connecticut, section 52-485(a) provides: "The superior court may issue a writ of mandamus in any case in which a writ of mandamus may by law be granted, and may proceed therein and render judgment according to rules made by the judges of the superior court or, in default thereof, according to the course of the common law." Case law limits the availability of the writ to circumstances when (1) the law imposes on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other specific adequate remedy." Morris v. Congdon, 277 Conn. 565, 569 (2006).**

PLAINTIFFS
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CERTIFICATION OF SERVICE

I HEREBY CERTIFY THAT on April 3, 2008, a copy of the foregoing Plaintiff's Brief in Reply was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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