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United States District Court, S.D. New York.

Elsa GULINO, Mayling Ralph, Peter Wilds, and Nia Greene, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
The BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, Defendant.

96 CIV. 8414
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Signed 07/18/2016

INTERIM REPORT AND RECOMMENDATION

JOHN S. SIFFERT, Special Master

***1** TO THE HONORABLE KIMBA M. WOOD, United States District Court Judge. John S. Siffert, SPECIAL MASTER

Plaintiffs move to modify two injunctions, previously entered in this case, to direct the New York State Education Department to grant full State teaching certification to class members who have completed all the requirements for licensure other than passing the Liberal Arts and Sciences Test. I recommend that the Court **DENY** the motion because (1) the State Education Department is immune from the requested injunctive relief; (2) the All Writs Act does not authorize this intrusion into State policing power; and (3) the requested relief is not necessary and appropriate to aid the Court's Title VII jurisdiction.

I. BACKGROUND

The facts of this case are set forth fully in previous opinions by the District Court over the course of this litigation. *See, e.g.*, *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.* (*Gulino I*), 201 F.R.D. 326 (S.D.N.Y. 2001) (Motley, J.); *Gulino v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.* (*Gulino V*), 907 F. Supp. 2d 492 (S.D.N.Y. 2012) (Wood, J.). I recite only those facts relevant to this Interim Report and Recommendation.

A. Case History

Plaintiffs filed this Title VII class action on November 8, 1996, on behalf of those African American and Latino teachers who lost or were denied permanent teaching positions in New York City public schools as a result of failing either the Core Battery Exam ("NTE") or the Liberal Arts and Sciences Test ("LAST"). Cmplt. ¶ 64–65. Plaintiffs alleged that the use of these two tests to make employment decisions violated Title VII because the tests had a disparate impact on minorities and were not properly validated. *Id.* ¶¶ 3, 8. The complaint named the Board of Education of the City School District of the City of New York ("BOE") and the New York State Education Department ("SED") as defendants and alleged that both qualified as employers under Title VII.[1] According to the complaint, the SED administered the tests and required teachers to pass the tests as a condition of licensure. *Id.* ¶ 63. The BOE, in turn, demoted teachers who failed the tests to substitute status and denied them permanent teaching positions. *Id.* ¶ 14.

At summary judgment, Plaintiffs moved for a declaration that the SED was an employer under Title VII, and the SED cross-moved for a declaration that it was not. The District Court granted Plaintiffs' motion and held that the SED was an employer subject to Title VII.[2] *Gulino v. Bd. of Educ. of City Sch. Dist.* (*Gulino II*), 236 F. Supp. 2d 314, 332 (S.D.N.Y. 2002). Relying on case law from the Ninth Circuit, the Court reasoned that the level of control the SED exercised over the operation of local schools satisfied the broad definition of 'employer' under the interference test: Although the SED was not a direct employer, it interfered with and significantly affected Plaintiffs' employment and access to employment opportunities.[3] *Id.* The SED participated fully in the subsequent bench trial. Following the trial, the District Court concluded that neither the BOE nor the SED violated Title VII because the LAST was job-related,

even though it was not properly validated. *Gulino v. Bd. of Educ. of City Sch. Dist.* (*Gulino III*), No. 96-cv-8414, 2003 WL 25764041 (S.D.N.Y. Sept. 4, 2003).

***2** On appeal, the Second Circuit vacated the District Court's determination that the LAST was job-related and remanded so that the District Court could apply the five-part test it outlined in *Guardians Association v. Civil Service Commission*, 630 F.2d 79 (2d Cir. 1980). *Gulino v. Bd. of Educ. of City Sch. Dist.* (*Gulino IV*), 460 F.3d 361 (2d Cir. 2006). It also reversed the District Court's ruling that the SED qualified as an employer and dismissed the SED from the suit. *Id.* at 374–79. The Second Circuit contrasted the BOE's hiring functions, which rendered it an employer, with the SED's licensing function, which did not render it an employer:

> While SED's interest is in assuring the quality of teachers, it does not hire them. The purpose of BOE, on the other hand, is the education of students in the New York City public schools, and BOE hires and compensates teachers as a means of accomplishing that objective.

Id. at 381. The Second Circuit also questioned the Ninth and D.C. Circuits' expansive reading of the interference test on which the District Court rested its decision. *See Ass'n. of Mexican-Am. Educators v. California*, 231 F.3d 572 (9th Cir. 2000) (*en banc*); *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). It observed that this reading subjected the State to Title VII jurisdiction merely for performing its core state function of regulating public schools. This raised constitutional concerns because it threatened to alter the usual constitutional balance between the States and the Federal government without an unmistakably clear statutory directive. *Gulino IV*, 460 F.3d at 375–76. The Second Circuit ultimately determined that it did not need to decide this constitutional issue because the statute did not apply to the SED "in the context presented." *Id.* at 376.

On remand, the SED promptly moved to intervene in the case as a plaintiff to seek three declaratory rulings.[4] *See Opinion & Order*, Dkt. No. 237 (Sept. 17, 2009). The BOE supported the motion, while Plaintiffs opposed the motion. *Id.* The Court denied the motion because the Second Circuit had already conclusively determined several of the issues SED raised and because the BOE would adequately protect the SED's remaining interest in the litigation. *Id.* The Court did grant the SED amicus curiae status.

After briefing in which the SED fully participated as amicus,[5] the Court found that the LAST was not job-related and that the BOE's use of that test to make employment decisions violated Title VII. Following that decision, Plaintiffs moved for injunctive relief and proposed injunction language. The court held a hearing on October 7, 2014. The SED participated in this hearing and offered alternative injunction language. Following additional discussion between the parties and the SED, the parties jointly submitted revised injunction language on November 17, 2014. On November 24, 2014, the Court adopted the language and enjoined the BOE "from using the failure of any [LAST] examination administered on or before February 13, 2004 in making any employment determinations for class members." *Order*, Dkt. No. 530, at 2 (Nov. 24, 2014). The injunction further provides that class members who meet all the certification requirements other than passing the LAST will be "deemed to be certified" for the purposes of employment by the Defendant. *Id.* On December 28, 2015, the Court entered a second injunction that enjoined the BOE from using the LAST-2—the successor test to the LAST (hereinafter "LAST-1") that the Court also found to be discriminatory—to make any employment decisions. *See Order*, Dkt. No. 707 (Dec. 28, 2015). That injunction tracks the language of the LAST-1 injunction and provides a similar mechanism by which class members who failed the LAST-2 can be "deemed to be certified" for purposes of employment with the BOE.

***3** The injunctions provide a pathway by which class members who never passed the LAST can be hired by the BOE, but they do not entitle class members to state certification nor do they assure them of a job with the BOE. To qualify for full state certification, class members must meet all the current state certification requirements, including passing the Academic Literacy Skills Test ("ALST"), a successor exam to the LAST that the Court found to be nondiscriminatory. To be hired by the BOE, class members must submit to the normal hiring process required for all prospective teachers. Under the injunctions, the BOE and its hiring principals retain discretion over all final hiring decisions—being "deemed to be certified" only renders class members eligible for employment. Since entering the injunctions, the Court has so ordered twenty-two joint stipulations deeming 125 class members certified for purposes of employment with the BOE. Of those 120 claimants, twelve have been hired as teachers with the BOE.

B. Present Motion

On February 17, 2016, Plaintiffs moved to modify the Court's LAST injunctions to require that the SED grant full certification to class members who have completed all the requirements for licensure other than passing the LAST-1 or LAST-2. The Court ordered the SED to show cause before me why the injunctions should not be modified as Plaintiffs requested. *See Order to Show Cause for Injunctive Relief*, Dkt. No. 727 (Feb. 17, 2016). I held a hearing on April 14, 2016, at which the SED and Plaintiffs both appeared. The BOE participated in the hearing, but did not take a position on the motion or submit any briefing. Following that hearing, I requested additional briefing from the SED and Plaintiffs on whether any court has held in the course of this litigation that the use of the LAST violates the Fourteenth Amendment's Equal Protection Clause. This briefing was submitted on May 5, 2016.[6]

II. DISCUSSION

Plaintiffs allege that various factors have prevented many class members who have been "deemed to be certified" pursuant to the LAST injunctions from achieving permanent teaching positions with the BOE. Primarily, they assert that BOE hiring personnel do not understand or appreciate what it means to be "deemed to be certified" under the LAST Injunction, and therefore have been unable or unwilling to hire class members. Plaintiffs attribute this in part to the fact that the SED online portal does not list class members as being certified, which they claim has sowed confusion among BOE administrators who normally verify an applicant's eligibility through the online portal.[7] Plaintiffs further allege that the 'deemed certified' status has created a stigma that scares off hiring personnel. Lastly, they claim that the current 'deemed certified' stipulated methodology is inadequate because some class members have not been able to secure jobs with private employers that require State certification as a condition of employment; and because some class members have not been able to enroll at certain graduate programs, which likewise require State certification as a condition of admission.

Plaintiffs assert that these impediments will persist unless and until class members are granted full State certification. Accordingly, Plaintiffs' solution to the problems they identify is to modify the current injunctions pursuant to the Court's power under the All Writs Act, 28 U.S.C. § 1651, to direct the SED to grant eligible class members State certification.

***4** The SED opposes the motion on several grounds: (1) It asserts that the Eleventh Amendments divests the Court of jurisdiction to enjoin the SED as Plaintiffs request; (2) it asserts that even if the Court has jurisdiction to enjoin it, the relief sought would violate the Tenth Amendment; (3) it asserts that notwithstanding the constitutional issues, the statutory requirements for the All Writs Act are not met here; and (4) it asserts that even if the Court finds that the All Writs Act's requirements are satisfied here, it should exercise its discretion to deny the request. The BOE does not oppose the motion.

I agree with the SED on its first three arguments. An injunction commandeering the SED to certify class members would violate the Tenth and Eleventh Amendments. Even if the Constitution did not bar the relief sought, an injunction certifying class members would not be a proper remedy under the All Writs Act because it is not necessary and appropriate to aid the Court in remedying the harm caused by the BOE's discriminatory employment decisions. I do not reach a recommendation on how the Court should exercise its discretion, since I believe it does not have the constitutional or statutory right to do so.

A. The Court Lacks Jurisdiction to Grant the Requested Relief.

The threshold question is whether the Court has jurisdiction to enjoin the SED. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). The SED argues that it is immune from suit under the Eleventh Amendment because it is acting in its sovereign capacity and Congress has not abrogated that immunity here. Plaintiffs respond that the Eleventh Amendment does not shield the SED from an order directing it to certify class members because, by refusing to certify class members, the SED is intentionally discriminating against class members in violation of the Fourteenth Amendment. Because there has been no determination that the SED has acted unconstitutionally—and because Plaintiffs cannot raise this claim for the first time under the All Writs Act—I recommend that the Court find that the Plaintiffs' requested relief is barred by the Eleventh Amendment.

1. Jurisdiction Conferred by the All Writs Act.

As an initial matter, the SED argues that the All Writs Act cannot expand the jurisdiction beyond the Court's existing Title VII jurisdiction and the All Writs Act cannot provide an independent basis of jurisdiction over a non-party. According to the SED, the Court's ability to issue an injunction under the All Writs Act is "limited by the Court's grant of authority under Title VII." *Mem. of Law by the N.Y.Dep't of Educ. SED in Opp. to the Order to Show Cause for Injunctive Relief*, Dkt. No. at 742, at 9 (Mar. 25, 2016). The SED overstates the law on this point.

The All Writs Act provides: "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." 28 U.S.C. § 1651(a). The SED is correct that the All Writs Act does not provide an independent basis of jurisdiction. *United States v. Tablie*, 166 F.3d 505, 506–07 (2d Cir. 1999). This just means, however, that if the Court lacks jurisdiction to hear a case, it cannot rely on the All Writs Act to provide it jurisdiction. *See id.* (holding that where court otherwise lacked jurisdiction to vacate conviction, it could not rely on All Writs Act to do so). It does not mean that the All Writs Act can never be used to *extend* a court's existing jurisdiction. Where a Court has jurisdiction, the All Writs Act provides ancillary jurisdiction that can be used to enjoin third parties not covered by the original grant of jurisdiction. *See, e.g.*, *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985); *see also United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174–76 (1977) (holding that All Writs Act provided ancillary jurisdiction to enjoin third party telephone company to assist in surveillance authorized under Federal Rules of Criminal Procedure). As the Supreme Court noted, the "power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice." *N.Y. Tel. Co.*, 434 U.S. at 174. In fact, a central utility of the All Writs Act is that it authorizes the Court to issue writs that go beyond its present jurisdiction and enjoin non-parties. As the Second Circuit explained:

> ***5** An important feature of the All-Writs Act is its grant of authority to enjoin and bind non-parties to an action when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction. The power to bind non-parties distinguishes injunctions issued under the Act from injunctions issued in situations in which the activities of the third parties do not interfere with the very conduct of the proceeding before the court.

Baldwin-United Corp., 770 F.2d at 338 (internal citations omitted). Indeed, if the grant of authority under the All Writs Act was co-extensive with the authority courts already possessed, then the All Writs Act largely would be a nullity.

There are limits, however, to the extent that the All Writs Act can expand the ancillary jurisdiction of courts.[8] As Plaintiffs concede, the All Writs Act "cannot be used to grant a court jurisdiction over an issue that court would otherwise be prohibited from hearing." *Pls.' Reply Mem. of Law in Further Supp. of Pls' Mot. for Injunctive Relief by Way of Modification of Injunctions* (*Reply Mem.*), Dkt. No. 748, at 2 (Apr. 8, 2016). For instance, the Act cannot provide jurisdiction over immigration issues where the Immigration and Nationality Act divested the court of jurisdiction to hear such claims, *see Hoever v. Dep't Homeland Sec.*, 637 Fed. Appx. 565, (11th Cir. 2016) (unpublished), or to remove a case to federal court where 28 U.S.C. § 1441 prohibits such removal, *see Sygenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) (noting that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling"). Thus, while the All Writs Act may expand a Court's jurisdiction to "fill[ ] the interstices of federal judicial power when those gaps threate[n] to thwart the otherwise proper exercise of federal courts' jurisdiction," the All Writs Act cannot provide jurisdiction where federal law—be it a statute or the Constitution—prohibits that exercise of federal jurisdiction. *Sygenta Crop Protection, Inc.*, 537 U.S. at 32 (quotation marks and citation omitted).

Here, the Court has jurisdiction under Title VII and has issued orders pursuant to Title VII's grant of authority to remedy employment discrimination. To the extent

non-parties are frustrating those orders, the All Writs Act provides a mechanism by which the Court can exert jurisdiction over those individuals—but only if federal law does not otherwise bar the Court from exercising jurisdiction in that matter. As the SED correctly points out, the Eleventh Amendment bars the relief Plaintiffs seek.

2. The Eleventh Amendment Bars the Relief Plaintiffs Seek.

The Eleventh Amendment bars claims in federal court against States in their sovereign capacity for monetary and injunctive relief. It provides:

> 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.

U.S. Const. amend. XI. Eleventh Amendment immunity extends to political agencies of the State and has previously been extended to the SED. *See Bd. of Educ. of the Pawling Cent. Sch. Dist. v. Schutz*, 290 F.3d 476, 479–80 (2d Cir. 2002); *Sherman v. Harris*, No. 11 Civ. 4385, 2012 WL 4369766, at *5–6 (E.D.N.Y. Sept. 24, 2012).

***6** Eleventh Amendment immunity is not absolute. The Supreme Court has recognized two exceptions where a State can be sued in its non-representational capacity as a sovereign: (1) Congress may authorize a suit against a State pursuant to its power under Section 5 of the Fourteenth Amendment to enforce that Amendment; and (2) a State may waive its sovereign immunity by consenting to suit. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 US 666, 670 (1999). Relevant here, the Supreme Court has recognized a third limited caveat to state sovereign immunity: Under *Ex parte Young* and its progeny, a plaintiff may sue a state official for prospective injunctive relief where the official is acting contrary to the Constitution or federal law. *Ex parte Young*, 209 U.S. 123, 159–60 (1908). In that situation, the official is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* at 160. None of these exceptions is available here.

a. *Congressional Abrogation*

As an initial matter, the All Writs Act was not passed under Congress' Section 5 power and does not abrogate sovereign immunity. *See Baldwin-United Corp.*, 770 F.2d at 340 ("The All-Writs Act, which is itself limited by the jurisdiction of the federal courts, cannot be used to circumvent or supersede the constitutional limitations of the Eleventh Amendment."). By contrast, Title VII was passed pursuant to Congress' Section 5 power and provides a limited abrogation of sovereign immunity—but only in situations where the state was acting as an employer. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Lopez v. Massachusetts*, 588 F.3d 69, 83 (1st Cir. 2009); *Noesen v. Med. Staffing Network, Inc.*, 232 Fed.Appx. 581, 585 (7th Cir. 2007) (unpublished). Because the Second Circuit already found that the SED was acting pursuant to its police power and that its licensing determinations fall beyond the reach of Title VII, Title VII's exception does not apply here.

b. *Consent to Suit*

Nor has the SED consented to suit.[9] *See Coll. Sav. Bank*, 527 U.S. at 675–76 (recognizing that a State's sovereign immunity is "a personal privilege which it may waive at pleasure"). A state may consent to suit by making an explicit, clear declaration that it intends to submit itself to the Court's jurisdiction or by invoking federal jurisdiction through its conduct in litigation. *See id.* (noting that the test for waiver is "a stringent one" and that the decision to waive immunity must be "altogether voluntary on the part of the sovereignty"); *see also Lapides v. Bd. of Regents of the Univ. Sys.*, 535 U.S. 613, 620 (2002). When a State successfully moves to intervene in a case, it voluntarily invokes the Court's jurisdiction and waives its Eleventh Amendment immunity at least with respect to those claims it asserts as intervenor. *See Clark v. Barnard*, 108 U.S. 436, 447–48 (1883); *see also Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) ("[W]here a state

voluntarily become[s] a party to a cause and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment.").

***7** Had the District Court granted the SED's 2008 motion to intervene, the SED would have crossed the line from passive participant to willing actor and waived its Eleventh Amendment immunity.[10] *See id.* Because that motion was denied, this case raises a new issue—whether a State's *unsuccessful* motion to intervene constitutes a consent to suit such that the State can be brought back into the suit at a later time against its wishes. Neither side has cited any case law involving a denial of a motion to intervene.[11] However, the cases involving waiver-by-litigation premise the waiver on a State actually appearing as a party and submitting its rights for judicial determination. *See, e.g.*, *Gunter*, 200 U.S. at 284–85 (considering whether State became "in substance and effect" a party to the case and whether State voluntarily submitted its rights for judicial determination); *Lapides*, 535 U.S. at 619 (citing *Gunter* for the proposition that a State's "voluntary appearance" in federal court waives Eleventh Amendment immunity); *Biomedical Patent Mgmt. Corp. v. Cal., Dep't of Health Servs.*, 505 F.3d 1328, 1333 (Fed. Cir. 2007) ("[B]y intervening and asserting claims ... in the 1997 lawsuit, DHS voluntarily invoked the district court's jurisdiction and, thus, waived its sovereign immunity for purposes of that lawsuit."); *Bd. of Regents of Univ. of Wisc. Sys. v. Phoenix Int'l Software, Inc.*, 653 F.3d 448, 462 (7th Cir. 2011) ("Waivers by litigation conduct depend on whether the state has made a voluntary change in behavior that demonstrates it is no longer defending the lawsuit and is instead taking advantage of the federal forum."). Thus, it is the actual intervention in the case as a willful actor taking advantage of the federal forum that triggers the waiver of immunity. *See Clark*, 108 U.S. at 447–48. Here, the SED did not re-enter the litigation, even though it sought to do so. The SED's failed motion was not an invocation of federal jurisdiction, but rather only a request to invoke that jurisdiction. The SED did not submit its rights for judicial determination and never voluntarily litigated its rights as a party after being dismissed from the case by the Second Circuit. Consequently, it was not required to consent to the Court's jurisdiction and did not waive its Eleventh Amendment immunity.

This accords with the underlying principle that governs waivers-by-litigation: namely, that the waiver of Eleventh Amendment immunity occurs when the state gains a strategic advantage by selectively invoking its sovereign immunity. *See Lapides*, 535 U.S. at 622–23 ("In large part the rule governing voluntary invocations of federal jurisdiction has rested upon the problems of inconsistency and unfairness that a contrary rule of law would create."). *See also In re Charter Oak Assocs.*, 361 F.3d 760, 767 (2d Cir. 2004). Because the SED did not actually intervene in the case, it did not gain any unfair advantage that would support a finding of voluntary waiver. *Cf. Beaulieu v. Vermont*, 807 F.3d 478, 490–91 (2d Cir. 2015) (finding no waiver of state's general immunity because state engaged in no prejudicial conduct).

***8** It is my conclusion that Plaintiffs have not satisfied their burden of establishing sovereign immunity waiver. *Coll. Sav. Bank*, 527 U.S. at 675–76; s*ee also Biomedical Patent Mgmt. Corp.*, 505 F.3d at 1339 (holding that waiver through litigation conduct must be "clear"). Here, the SED was willing to give up its sovereign immunity on the condition that the Court rule on its requests for three declaratory judgments; however, its motion to re-enter as a plaintiff was denied. *Cf. Beers v. Arkansas*, 61 U.S. 527, 529 (1858) (holding that a state "may prescribe the terms and conditions on which it consents to be sued"). Accordingly, I recommend against finding that the SED consented to suit.

c. *Ex Parte Young*

Plaintiffs' remaining claim that the Eleventh Amendment does not apply is rooted in *Ex parte Young* and its progeny. Under Plaintiffs' theory, the SED is stripped of its immunity here because it is acting in direct violation of the Fourteenth Amendment's Equal Protection Clause. As the Supreme Court has explained, notwithstanding the Eleventh Amendment, federal courts have the power to prospectively enjoin state officials from acting unconstitutionally or in violation of federal law:

> [The *Ex Parte Young*] doctrine has existed alongside our sovereign-immunity jurisprudence for more than a century, accepted as necessary to permit the federal courts to vindicate federal rights. It rests on the premise—less delicately called a "fiction,"—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for

> sovereign-immunity purposes. The doctrine is limited to that precise situation, and does not apply when the state is the real, substantial party in interest, as when the judgment sought would expend itself on the public treasury or domain, or interfere with public administration."

Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 254–55 (2011) (internal citations and quotation marks omitted). "[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.' " *Id.* (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.,* 535 U.S. 635 (2002)). Plaintiffs fail to meet this standard because this action does not allege ongoing constitutional violations by state officials and because it is too late now for Plaintiffs to assert such a violation under the auspices of the All Writs Act.[12]

This action seeks redress for violations of Title VII based on the BOE's discriminatory employment practices. The Second Circuit has held that Title VII does not reach the conduct of the SED officials who acted pursuant to the State's police powers and who were not the class members' employers. Plaintiffs concede in their supplemental submission to me that "no Court has ever been asked whether the use of the LAST to make licensing—as opposed to employment —decisions is unconstitutional." *Pls.' Supplemental Br.*, Dkt. No. 761-1, at 2 (May 5, 2016). Because there has been no allegation or determination that SED officials are violating federal law in issuing licenses pursuant to valid state laws and regulations, the proposed order amounts to interference with public administration and goes beyond the relief available under *Ex parte Young. See Stewart*, 563 U.S. at 254–55.

***9** In this regard, Plaintiffs reliance on *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), is misplaced. There, the Second Circuit affirmed a district court order joining the Governor of New York and the Commissioner of the Department of Correctional Services as defendants to a claim brought pursuant to 42 U.S.C. § 1983 where the State defendants' conduct, specifically their refusal to transfer prisoners, was part of the underlying constitutional violation the court already had found. *Id.* at 52. Because the State officials were contributing to the unconstitutional overcrowding of city detention centers, the Eleventh Amendment did not shield them from an injunction directing them to transfer the inmates. *Id.* Here, in contrast, the Second Circuit determined that the state officials were *not* a part of any alleged ongoing constitutional violation. Thus, the State retains its Eleventh Amendment immunity with respect to any injunctions stemming from the Title VII claims.

Plaintiffs contend that this is not law of the case barring the relief sought, because the SED's continued refusal to certify class members for statewide licensure constitutes a separate, distinct intentional violation of the class members' Fourteenth Amendment rights. Plaintiffs further claim that this violation arises after class members were "deemed to be certified" for employment in City schools pursuant to the Court's injunctions. Plaintiffs theory is that, by not treating 'deemed certified' class members identically to teachers who passed the LAST, the SED is intentionally denying class members state licenses on the basis of their race.[13] Plaintiffs' first raised this new Constitutional claim in their reply memorandum in support of its present motion to rebut the SED's claim that it is immune under the Eleventh Amendment.

Plaintiffs are correct that the Eleventh Amendment would not bar an action against the New York Commissioner of Education to redress an ongoing intentional constitutional violation. But in structuring this new claim to avoid the reach of the Eleventh Amendment's protective shield, Plaintiffs have maneuvered themselves outside the ambit of the All Writs Act. The Act only expands a court's jurisdiction to "fill[ ] the interstices of federal judicial power," *see Sygenta Crop Prot., Inc.*, 537 U.S. at 32, and is limited to issuing writs in aid of the "jurisdiction otherwise obtained," *N.Y. Tel. Co.*, 434 U.S. at 172. This new claim is not tied to filling the gaps in the Court's existing Title VII jurisdiction, under which the State is immune; it presupposes a whole new claim that should be the subject of a separate action brought under 42 U.S.C. § 1983. Whether or not this is a viable claim,[14] it is a separate claim that raises new legal and factual arguments unrelated to the Court's Title VII jurisdiction.[15] I have not found and Plaintiffs have not offered any case law to support their position that the All Writs Act permits parties to bootstrap in a separate constitutional claim under a different constitutional theory. *Cf. In re Tennant*, 359 F.3d 523 (D.C. Cir. 2004) (All Writs Act injunction not available where petitioner had not taken initial steps that would form basis for court's jurisdiction).

***10** Finally, because Plaintiffs' requested relief under this claim is available under a separate statute, namely 42 U.S.C. § 1983,[16] they cannot seek relief under the All

Writs Act. Rather, they must seek the relief under that statute. *See Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985) ("Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate."). Accordingly, the Court does not have jurisdiction to hear Plaintiffs' new claim under the guise of the All Writs Act, and Plaintiffs cannot use this claim to circumvent the State's Eleventh Amendment immunity with respect to the current action.

B. Tenth Amendment Precludes the Requested Relief

The SED also claims that an order directing the State to certify class members violates the Tenth Amendment. Because the proposed order would intrude on the State's licensing power without a clear statement of Congressional intent and would commandeer state officials in violation of the Tenth Amendment, I recommend that the Court deny Plaintiffs' motion on this ground as well.

The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Amendment embodies the principles of federalism inherent in the Constitution and codifies the system of dual sovereignty in which States retain all powers not expressly granted to the federal government. *See New York v. United States*, 505 U.S. 144, 156 (1992); *The Federalist* No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). The Tenth Amendment limits the federal government's ability to invade those traditional areas reserved to the state and prohibits the federal government from either issuing "directives requiring the States to address particular problems" or commandeering "the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997).

The Tenth Amendment does not bar all federal intrusions into a state's police power. For instance, it does not provide protection where the State exercises its police power unconstitutionally. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 7 (1967); *Orleans Parish Sch. Bd. v. Bush*, 242 F.2d 156, 163 (5th Cir. 1957). Additionally, Congress can legislate on areas where they have plenary authority and displace state regulatory schemes, provided, however, that it includes a clear statement of its intent to alter the usual constitutional balance. *See Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

1. The All Writs Acts Does Not Authorize Federal Intrusions into State Police Powers.

The SED argues that a court order directing it to certify class members runs afoul of the Tenth Amendment because it interferes with a state licensing scheme unrelated to the federal interest in remedying employment discrimination. It notes that the Second Circuit already found that the State licensing scheme represents a "core state function" and that federal intrusion into this state function would raise federalism concerns, *Gulino IV*, 460 F.3d at 376, and cites Ninth and Second Circuit case law for the proposition that federalism concerns require that state licensing decisions be left to the state and not dictated by federal courts, *see United States v. Sterber,* 846 F.2d 842, 843–44 (2d Cir. 1988) (vacating order directing defendant to surrender pharmacist license and questioning whether a federal district judge can require a defendant to give up a state-granted professional license where the state provides a comprehensive regulatory system); *United States v. Pastore*, 537 F.2d 675 (2d Cir. 1976). The SED asserts that because the Court lacks authority to suspend a license, it certainly lacks authority to require the State to issue licenses.[17]

***11** It is not necessary, however, to go so far, because the standard of review requires only an initial determination of whether the proposed intrusion would alter the "delicate balance" between the federal and state sovereigns. *See Gulino IV*, 460 F.3d at 375. Where Congress intends to authorize such interference, "it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quotation omitted); *see also Gulino IV*, 460 F.3d at 375 (noting this "rule has been employed in a wide range of cases in which federal courts are asked to define the reach of Congressional enactments that threaten to upset the delicate balance of federalism"). The All Writs Act contains no such clear expression of unmistakably clear intent to "alter the usual constitutional balance between the States and the Federal Government." *Gregory*, 501

U.S. at 460–61 (quotation omitted). To the contrary, the All Writs Act states that any writ issued must be "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *accord In re Diet Drugs Products Liab. Litig.*, 369 F.3d 293, 297 (3d Cir. 2004) (noting that federalism concerns may circumscribe a court's power under the All Writs Act). Indeed, an injunction under the All Writs Act in these circumstances would upend established principles of federalism.

2. The Proposed Order Would Violate the Tenth Amendment.

The proposed order also transgresses on the Supreme Court's limitation that: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. That is precisely what the Plaintiffs would have the Court do by issuing the injunction. Moreover, the requested relief does not act on a private individual, but rather directly conscripts state officers and impermissibly commands them to exercise the state's police powers to further federal aims. *See Printz*, 521 U.S. at 935; *New York*, 505 U.S. at 161.[18] Notably, the order does not seek voluntary compliance from the state officers, which is permissible under the Tenth Amendment, but orders that the Commissioner of Education "*shall* direct" the SED to issue class members written provisional certificates and update the State databases and websites within ten days of receiving a document signed by the Court stating that a class member has satisfied the terms of the injunction. *Reply Mem.*, Dkt. No. 748, App. A (emphasis added). While Title VII authorizes suits against individuals, including state officers who engage in employment discrimination, it cannot authorize orders against the State itself. *See New York*, 505 U.S. at 166 (holding that the Constitution "confers upon Congress the power to regulate individuals, not States"). As the Second Circuit found here, the state officials are not engaged in discrimination and are engaged in core state functions. *Gulino IV*, 460 F.3d at 375. Thus, an action compelling the SED officials to certify class members is a direction against the State, not individuals, and lies beyond the Federal government's authority.

No doubt, forcing the SED to certify class members here could help alleviate the vestiges of the BOE's discriminatory practices, which would further Title VII's twin statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). But the Tenth Amendment's prohibitions do not turn on the worthiness of the federal cause. New York is an "independent and autonomous political entit[y]" that must remain accountable to its own citizens. *Printz*, 521 U.S. at 920, 928. Redirecting its lawful licensing power to serve these federal goals, however important, would interfere with this accountability and intrude on its sovereignty.

***12** Plaintiffs claim that, notwithstanding the above, the Court can direct the SED to certify class members because the SED's current refusal to certify class members violates the Equal Protection Clause of the Fourteenth Amendment. This is a variation of the argument they advance for abrogating sovereign immunity, and it fails for the same reasons. If the proposed injunction was based on constitutional violations by the State, the Tenth Amendment would serve no impediment. *See Milliken v. Bradley*, 433 U.S. 267, 291 (1977) ("The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment."). But it was the BOE acting in its capacity as an employer, not the SED, that violated federal law. There has been no finding that the SED has acted unconstitutionally, and Plaintiffs cannot now bootstrap an Equal Protection claim via the All Writs Act. *See supra* Part II.B.

C. The Relief Plaintiffs Seek Is Not Necessary or Appropriate.

Even putting the constitutional obstacles aside, I recommend that the Court deny the motion. While some of the discretionary factors weigh in Plaintiffs' favor, Plaintiffs do not satisfy the statutory requirements because the relief they seek is not necessary or appropriate to remedy the harm caused by the Board of Education's discriminatory employment decisions.

1. Plaintiffs' Requested Relief Is Not Necessary or Appropriate.

The All Writs Act authorizes federal courts to issue such commands "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *N.Y. Tel. Co.*, 434 U.S. at 172. The Act should be applied flexibly to permit courts access to those writs designed to achieve "the rational ends of law" and not just to those situations where the court "could not otherwise physically discharge its ... duties." *Id.*; *see also United States v. Catoggio*, 698 F.3d 64, 67 (2d Cir. 2012) (per curiam). Even under the All Writs Act's flexible standard, the requested relief is neither necessary nor appropriate to aid in the Court's Title VII jurisdiction.

Accepting Plaintiffs factual allegations as true,[19] Plaintiffs have not demonstrated that an injunction against the State is needed to aid the Court's effort to eliminate the discriminatory effects of the BOE's hiring decisions. According to Plaintiffs' papers, the class members' difficulties getting hired are primarily the result of BOE employees' unwillingness to consider the merits of class members' applications. This includes BOE administrators who refuse to acknowledge the legitimacy of the 'deemed certified' stipulated methodology and those who are simply confused by the fact that class members are not listed as certified on the State websites. *See Mem. of Law in Supp. of Pls.' Mot. for Injunctive Relief*, Dkt. No. 728, at 7 (Feb 17, 2016). If so, the proper course of action here is to seek relief from—and enforcement actions against—the BOE because it is the BOE, not the SED, that is frustrating the Court's orders. An appropriate remedy could be to order training and educate BOE employees so that they understand the 'deemed certified' stipulated methodology and properly implement it. Plaintiffs claim that any attempt to educate BOE hiring personnel about class members would only backfire because it would provide more hurdles to their hiring and further stigmatize class members. I do not accept Plaintiffs' reasoning however, because it assumes that BOE hiring personnel will actively resist any training and purposefully evade any direction from the BOE and the Court.[20]

***13** In addition to not targeting those individuals actually frustrating the Court's injunction, the proposed order goes beyond what is necessary to remedy the harm caused by the BOE's employment decisions and provides class members benefits unrelated to their Title VII claim. An order directing the SED to certify class members would admittedly put class members on equal footing with other teaching applicants before the BOE. But it would do more than that—it would render them eligible to teach in school districts across the state, and possibly in those other states that have reciprocity with New York. None of those other school districts have been found to have discriminated against class members and all currently follow a lawful licensing scheme based on a test that this Court has found to be non-discriminatory. If no other option existed, the fact that class members would reap a benefit to which they are not entitled might not, by itself, be a sufficient reason to deny Plaintiffs' motion. But more targeted relief is available: An injunction against the BOE and its hiring personnel requiring them to treat class members the same as other teaching applicants would directly address the harm the class members suffered without the overreach inherent in Plaintiffs' proposed order.

Similar reasoning applies with equal force to rebut Plaintiffs' claim that an injunction against the State is required to render class members eligible to be hired by non-BOE vendors and to enroll in certain Masters' programs. Plaintiffs assert that both the private vendors and the Masters' programs require state certification as a condition of employment or enrollment and that, absent state certification, class members will continue to be saddled by the discriminatory consequences of failing the LAST. Even if that is true, this is not an omnibus discrimination action, and that harm is unrelated to the Title VII employment discrimination claim against the BOE.[21]

Plaintiffs' Title VII claim entitles them only to injunctive relief that makes them whole for the BOE's discriminatory hiring practice; and the All Writ Act permits the Court to issue writs in aid of securing that relief. Neither Title VII nor the All Writs Act entitles class members to be hired by private employers or to enroll in Masters' programs. Those purported harms do not flow from the BOE's hiring decisions. If the BOE had acted lawfully and hired the class members despite their inability to pass the LAST and obtain state certification—as the District Court and Second Circuit said it should have—the class members still would not have been eligible to work for the private vendors or to enroll in the Masters' programs. Those opportunities were conditioned on State *certification* and not BOE *employment.* Simply put, the inability of class members to secure these jobs or enroll in these programs is not a vestige of the BOE's past discriminatory practice—it is a consequence of a licensing program that has not been deemed unconstitutional and the practices and preferences of the vendors and colleges. If Plaintiffs believe that the private vendors and colleges acted unlawfully by requiring employees and enrollees to pass the LAST, the proper course is to file suit against those entities.[22]

2. Discretionary Factors.

***14** The All Writs Act commits to the Court's discretion whether to issue writs. *See Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126, 130 (2d Cir. 2015). The SED asserts that the Court should exercise its discretion not to do so. But, if this were simply a matter of discretion, it would be a close call on whether to recommend that the Court grant the motion.

While the statute does not provide guidance on how Courts should exercise this discretion, one recent magistrate judge opinion outlines three relevant factors based on the Supreme Court's decision in *New York Tel. Co.*:

> 1. the closeness of the relationship between the person or entity to whom the proposed writ is directed and the matter over which the court has jurisdiction;
>
> 2. the reasonableness of the burden to be imposed on the writ's subject; and
>
> 3. the necessity of the requested writ to aid the court's jurisdiction.

In re Apple, Inc., No. 15-MC-1902 (JO), 2016 WL 783565, at *6–7 (Feb. 29, 2016). Taken together, these factors are in near equipoise, and it would be rational to conclude that the equities tip in Plaintiffs' favor.

The first factor, closeness, cuts strongly in favor of issuing the injunction. The SED is no stranger to this case. It has played an active role in this litigation, first as a defendant and then as an amici. Moreover, it sanctioned and administered the licensing tests at the center of this controversy. Under these circumstances, the SED is not "so far removed from the underlying controversy that its assistance could not be permissibly compelled."[23] *N.Y. Tel. Co.*, 434 U.S. at 174.

The second factor also favors Plaintiffs' request. While I have explained that legal barriers prevent the court from requiring the SED to certify class members, once the principles of federalism and police powers are put to the side, there would be little burden on the SED to implement the actual mechanics of certifying class members. In fact, the SED has likely undertaken a much greater burden in modifying its normal procedures for class members, including redesigning its website and the TEACH website to list class members in a separate " 'deemed certified' section.

The third factor, on the other hand, may weigh in SED's favor to deny the motion, but possibly not enough to outweigh the other factors. As explained *supra*, the requested relief may not be required because there are alternative remedial measures available that can be directed at the BOE, other school districts, and graduate programs. On the other hand, there is merit to Plaintiffs' argument that it is inefficient to require Plaintiffs to bring multiple, additional law suits, to cure the harm that has flowed from the SED's mandated, discriminatory test.

Because I believe the law bars the court from exercising its discretion, I decline to recommend how the court should do so.

III. CONCLUSION

For the foregoing reasons, I recommend that Plaintiffs' motion be **DENIED**.

IV. OBJECTIONS

Pursuant to the Court's Amended Order of Appointment, the parties are hereby directed that if they have any objections to this Interim Report and Recommendation, they must, within fourteen days from today, make them in writing, file them with the Clerk of the Court, and send copies to the chambers of the Honorable Kimba M. Wood, United States District Judge, to the offices of the undersigned, and to any opposing parties. Any requests for an extension of time for filing objections must be directed to Judge Wood.

All Citations

Not Reported in Fed. Supp., 2016 WL 7320775

Footnotes

1 Specifically, Plaintiffs alleged that the SED was an employer because it a) regularly employed fifteen or more persons; b) established the minimum standards for certified positions in the public schools; c) administered the NTE and the LAST; d) interfered with the Plaintiff class's ability to obtain licensure and permanent employment and retain their license and employment rights with the City School District by mandating the NTE and the LAST as a condition of employment; and e) controlled the ability of its agents to license Plaintiffs by way of its NTE requirement and its credentialing process. Cmplt. ¶ 70.

2 Plaintiffs alleged that the SED qualified as an employer under three tests: 1) the interference test; 2) the joint-employer test; and 3) the agent/instrumentality test. Because it found that the SED qualified as an employer under the first test, the Court did not consider the other two tests. *Gulino v. Bd. of Educ. of City Sch. Dist.* (*Gulino II*), 236 F. Supp. 2d 314, 332 (S.D.N.Y. 2002).

3 Specifically, it found that the SED had "a direct hand in the employment of City teachers," including that it participated in recruitment, closely regulated professional development, and even set the maximum hours teachers can be required to teach on a daily basis. *Gulino II*, 236 F. Supp. 2d at 332.

4 Specifically, the Movants, which included the New York State Board of Regents and the New York State Commissioner of Education as well as the SED, sought declaratory judgments that: "(1) the LAST is effected pursuant to the State's licensing authority and police powers, and so is not subject to challenged under Title VII; (2) the Board is required to comply with the State's licensing procedures and Plaintiffs cannot challenge a state licensing requirement by bringing a Title VII action against an employer bound to follow state law; and (3) to the extent the LAST is subject to Title VII challenge, it is job-related." *Opinion & Order*, Dkt. No. 237, at 5 (Sept. 17, 2009). In denying the motion, the Court noted that the Second Circuit already had found (1) that the LAST could be subject to a Title VII challenge and (2) that the BOE was not protected from Title VII liability even though it was following the mandates of state law. *Id.* at 6–7.

5 The SED submitted a remand memorandum (Dkt. No. 251), a sur-reply memorandum (Dkt. 291), and a Supplemental Memorandum of Law (Dkt. No. 302).

6 On May 19, 2016,the SED submitted an additional, unprompted letter addressing arguments Plaintiffs had raised for the first time in their May 5, 2016 submission.

7 Plaintiffs and the SED continue to discuss the redesign of the website. According to the most recent progress update, the SED reported to Plaintiffs that the TEACH website now reflects the certification status of " 'deemed certified' class members. Plaintiffs have provided the SED information on the most recently certified class members and are awaiting confirmation that their status has been updated.

8 Put differently, the proper question is not whether the Court can bind non-parties through the All Writs Act. It can. The question is whether it can bind *this* non-party under *these* circumstances.

9 Plaintiffs first raised the argument that the SED had consented to suit in response to the Draft Interim Report & Recommendation I circulated to the parties in accordance with the Scheduling Plan. *See* Dkt. No. 461. Even if issues not raised before a magistrate judge or Special Master may be deemed waived in some situations, *see U.S. Bank Nat. Ass'n v. 2150 Joshua's Path, LLC*, No. 13-CV-1598, 2014 WL 4542950, at *2 (E.D.N.Y. Sept. 10, 2014); Note, Deciphering De Novo Determinations: Must District Courts Review Objections Not Raised Before a Magistrate Judge?, 111 Colum. L. Rev. 1557 (2011), the issue was raised before me and I choose to address it.

10 The SED argues that even if the Court had granted its motion, that would not waive Eleventh Amendment immunity here because (a) it sought only to defend the State's licensing power and (b) any waiver would not extend to the new claims that Plaintiffs assert here. While the Court need not decide these issues because the State never successfully invoked federal jurisdiction, I am skeptical of the SED's arguments. First, the SED sought to intervene as a *plaintiff* in the remand proceedings and sought affirmative relief in the form of declaratory judgments. *See Mem. of Law in Supp. of Mot. to Intervene* (*Intervention Mem.*), Dkt. No. 224, at 3 (Oct. 1, 2008). Second, where a State voluntarily invokes federal jurisdiction, its waiver extends to those issues, including compulsory and at least some permissive counterclaims, related to the claim that formed the basis of its waiver. *See In re Charter Oak Assocs.*, 361 F.3d 760, 768 (2d Cir. 2004). The SED's proposed complaint would have submitted to the Court

issues surrounding the State's "independent and continuing interest in protecting its authority to promulgate and enforce licensing requirements." *Intervention Mem.* at 3. The relief Plaintiffs seek arises from the same set of issues, and if the SED's proposed complaint had become operative, it is possible that Plaintiffs current request would have been in the nature of a permissive, if not compulsory, counterclaim.

11 Outside the motion to intervene, the SED's involvement in this litigation has been defensive and does not give rise to any inference that it waived its immunity from federal suit. *See Mohegan Tribe v. State of Conn.*, 528 F. Supp. 1359, 1366–67 (D. Conn. 1982) ("It is now well established that merely appearing and defending on the merits does not constitute waiver of a state's eleventh amendment immunity."). The SED did not file any counterclaims and appeared before the Court to defend the ALST at the Court's request. The SED is also entitled to raise its Eleventh Amendment immunity defense now even though it did not do so earlier in the litigation. *See Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974).

12 Under *Ex parte Young*, the proper remedy is to seek an injunction against those state officials disobeying federal law, not against the State itself or its agencies, which still retain their sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985). Plaintiffs' Order to Show Cause and original proposed injunction sought an injunction not against the individual officials, but against the SED. After the SED pointed out this deficiency, Plaintiffs modified their proposed injunction to direct the New York Commissioner of Education to require the SED to certify the class members. *See Reply Mem.*, App. A & B.

13 In their May 5, 2016 supplemental submission, Plaintiffs also asserted that the SED is violating their Fourteenth Amendment rights by denying them their substantive due process right to pursue their chosen profession. *See Pls.' Supplemental Br.*, Dkt. No. 761, at 3 (May 5, 2016). This new argument fails to pierce the SED's sovereign immunity for the same reasons as their Equal Protection claim: it is a distinct claim from the Title VII claim that has never been raised previously and cannot now be raised under the auspices of the All Writs Act.

14 While I do not recommend that the Court reach the merits of this claim, I note that Plaintiffs face several obstacles. Most notably, the SED's current licensing regime requires all claimants to pass a test, the ALST, that this Court found to be nondiscriminatory. Plaintiffs' papers do not adequately explain how the SED's decision to "affirmatively recognize[ ] eligible class members as deemed certified" for purposes of employment with the BOE in accordance with the Courts' injunctions transforms an otherwise non-discriminatory licensing regime into one that is intentionally discriminatory.

15 This conclusion is underscored by the fact that this claim is not predicated on the SED frustrating or refusing to implement the Court's injunctions. *Cf. N.Y. Tel Co.*, 434 U.S. at 174 (holding that All Writs Act provides jurisdiction over third parties that are frustrating a court's orders). The claim is actually premised on the SED *heeding* the Court's injunctions: Plaintiffs state that the SED has "affirmatively recognize[d] eligible class members as deemed certified and therefore qualified in New York City public schools." *Pls.' Ltr. to Special Master* at 2 (June 20, 2015). But having done so, according to the Plaintiffs, the SED cannot refuse to grant class members full State certification, even though that remedy was not available under the Court's original Title VII jurisdiction.

16 The statute provides:

> 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....

42 U.S.C. § 1983; *see also Pauk v. Bd. of Trs. of City Univ. of N.Y.,* 654 F.2d 856, 865 (2d Cir. 1981) ("[W]hen § 1983 provides a remedy, an implied cause of action grounded on the Constitution is not available.").

17 The SED overlooks, however, that the Second Circuit distinguished the cases it cites in *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004). There, the Second Circuit held that the government could suspend a defendant's medical license pursuant to 21 U.S.C. § 853 where the defendant used his medical license as property to commit narcotics crimes. It noted that neither *Sterber* nor *Pastore* reached the constitutional question, and reasoned that the license forfeiture did not violate the Tenth Amendment because it had "only a *de minimis* effect on the state's acknowledged authority to regulate the practice of medicine." *Id.* at 190. *Singh* muddies the SED's argument that the Court has no power to interfere in state licensing schemes: The case makes clear that limited federal entanglement with state licensing power may be constitutionally permissible, but that some greater level of

intrusion could violate the Tenth Amendment. *Id.*; *see also United States v. A-Abras Inc.*, 185 F.3d 26, 28 (2d Cir. 1999) (noting that the dividing line between federal power and state sovereignty is a "turbulent and unsettled area").
Singh does not scuttle the SED's position, though, because the requested relief here goes beyond the relief the Circuit upheld in *Singh.* In *Singh*, the State retained the power to issue a new license and could simply undo the federal order if it desired. 390 F.3d at 190. Here, implicit in Plaintiffs' request is the assumption that the State will not revoke class members' licenses once granted. This not only removes the ultimate licensing decisions from the State, but also it requires that the State license individuals who have not meet the current non-discriminatory requirements, including passing the ALST. This arguably represents a much greater intrusion into the State's licensing power than the intrusion in *Singh*, and it may not be *de minimis.* It is not necessary to reach this issue, however, because, as described in Part II.B.2 *infra*, the order violates the anti-commandeering principle set forth in *Printz*, 521 U.S. 898.

18 While *Printz* and *New York* tackle situations in which Congress directed the commandeering of the state officials, their rulings are equally applicable to the present situation. "The Supreme Court observed the healthy balance between state and federal sovereignties is an obligation of all government officials." *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 127 (2d Cir. 2007), *aff'd in part, rev'd in part sub nom. Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519 (2009) (citing *United States v. Lopez*, 514 U.S. 549 (1995)); *see also Strahan v. Coxe*, 127 F.3d 155, 169 (1st Cir. 1997) (noting that "the commands of the Tenth Amendment apply to all branches of the federal government, including the federal courts").

19 As a threshold issue, Plaintiffs submission falls short of establishing that there is a harm that needs to be addressed by extending the injunction to the State. Plaintiffs submit the affidavit of Plaintiffs' attorney Rachel Stevens describing the hiring experiences and the difficulties nine class members encountered in obtaining permanent teaching positions. Plaintiffs attribute these difficulties to the actions of the BOE hiring personnel who they claim "do not understand or appreciate what it means to be 'deemed certified' under the LAST injunction, and have therefore been unable or unwilling to hire [class members]." *Pls.' Mem. of Law* at 7. Plaintiffs do not, however, attach the declaration of any class member or any other evidence that would permit me to conclude that this is in fact the case. At oral arguments, I asked the SED whether it would stipulate to the facts contained in the Stevens Declaration. It responded by letter that it could not so stipulate because it lacked "knowledge or information sufficient to form a reasonable belief as to the truth or falsity of these allegations." *SED Ltr. to Special Master*, (May 5, 2016).
Even crediting the experiences of the nine class members described in the affirmation, I am left to speculate whether their failure to be hired was the result of BOE hiring personnel misapprehending or ignoring the court's injunction or whether it was the result of the natural hiring process. The Court's injunctions do not require that the BOE hire class members. BOE hiring personnel could abide by and give full effect to the injunctions and still elect not to hire class members for a variety of legitimate, nondiscriminatory reasons. Without additional evidence, I cannot discount this possibility. Similarly, I am also left to speculate whether the experiences of these nine class members are representative of the entire class population such that a supplemental order is needed to ensure that class members receive a fair opportunity at employment with the BOE. I do not recommend that the Court deny the motion on this ground or seek additional submissions from the Plaintiffs. Even if Plaintiffs are correct that BOE hiring personnel are frustrating the effective implementation of the Court's injunction, the proper remedy is to seek an order directed at those officials, not the SED.

20 This may occur, of course. If it does, the proper course of action would be for the BOE to take appropriate action against those individuals who flaunt the court orders.

21 Regardless of who is at fault for the class members' current predicament, the best hope for an efficient resolution likely lies with voluntary collaboration between the various entities involved. At oral argument, I asked the SED whether it could assist class members seeking permanent teaching positions, including those seeking admission to graduate degree programs. On May 5, the SED responded that after considering the issues it had "reached out to plaintiffs' counsel for clarification on which programs the class members applied to and were allegedly denied, to assess potential steps SED could take." *SED Ltr. to Special Master* at 2 (May 5, 2016). The SED stated that it "is willing to engage in discussions with counsel for the plaintiff class and the City to assist in resolving any outstanding employment issues for the class members." *Id.*

22 Even if class members' inability to enroll in these Masters' programs or work for these vendors was attributable to the BOE's Title VII violations, the proper remedy is an injunction deeming class members certified for those purposes. Similarly, if these entities are frustrating the LAST injunctions, Plaintiffs should seek an injunction against these entities, rather than the SED.

23 As noted *supra*, there are multiple reasons why its assistance could not be compelled—namely the Tenth and Eleventh

Amendments —but distance from the controversy is not one of them.

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