

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

17 4506

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
 Alston Alston
 and All Others Similarly Situated

(b) County of Residence of First Listed Plaintiff Philadelphia, PA
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Pro Se
 2836 W. Girard Ave.
 Philadelphia, PA 19130, 904-444-0311

DEFENDANTS
 The National Conference of Bar Examiners, PA Board of Law Examiners, NJ Board of Bar Examiners, Hon. Rebecca White Berch, Chair of The National Conference of Bar Examiners, et. al.

County of Residence of First Listed Defendant _____
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark
		LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
		IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation - Transfer 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 42 U.S.C. § 1983

Brief description of cause:
 Bar exams being graded arbitrarily, in conflict with scientific theory & practice, and in violation of 14th Amendment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE: 10/07/2017 SIGNATURE OF ATTORNEY OF RECORD: *A. Alston*

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

GAM

UNITED STATES DISTRICT COURT

17 4506

FOR THE EASTERN DISTRICT OF PENNSYLVANIA — DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar.

Address of Plaintiff: 2836 W. Girard Ave, Phila, PA 19130

Address of Defendant: NCBE, 302 S Bedford St, Madison, WI 53703-3622

Place of Accident, Incident or Transaction: Phila, PA & Atlantic City
(Use Reverse Side For Additional Space)

Does this civil action involve a nongovernmental corporate party with any parent corporation and any publicly held corporation owning 10% or more of its stock?
(Attach two copies of the Disclosure Statement Form in accordance with Fed.R.Civ.P. 7.1(a)) Yes No

Does this case involve multidistrict litigation possibilities? Yes No

RELATED CASE, IF ANY:

Case Number: _____ Judge _____ Date Terminated: _____

Civil cases are deemed related when yes is answered to any of the following questions:

- 1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes No
- 2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes No
- 3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes No
- 4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual? Yes No

CIVIL: (Place in ONE CATEGORY ONLY)

A. Federal Question Cases:

- 1. Indemnity Contract, Marine Contract, and All Other Contracts
- 2. FELA
- 3. Jones Act-Personal Injury
- 4. Antitrust
- 5. Patent
- 6. Labor-Management Relations
- 7. Civil Rights
- 8. Habeas Corpus
- 9. Securities Act(s) Cases
- 10. Social Security Review Cases
- 11. All other Federal Question Cases
(Please specify) _____

B. Diversity Jurisdiction Cases:

- 1. Insurance Contract and Other Contracts
- 2. Airplane Personal Injury
- 3. Assault, Defamation
- 4. Marine Personal Injury
- 5. Motor Vehicle Personal Injury
- 6. Other Personal Injury (Please specify)
- 7. Products Liability
- 8. Products Liability — Asbestos
- 9. All other Diversity Cases
(Please specify) _____

ARBITRATION CERTIFICATION

(Check Appropriate Category)

I, Alson Alston, counsel of record do hereby certify:
Pursuant to Local Civil Rule 53.2, Section 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs;
 Relief other than monetary damages is sought.

DATE: 10/10/2017 Alson Alston, pro se N/A
Attorney-at-Law Attorney I.D.#

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 10/10/2017 Alson Alston, pro se N/A
Attorney-at-Law Attorney I.D.#



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CASE MANAGEMENT TRACK DESIGNATION FORM

Alson Alston, et. al. :

CIVIL ACTION

v. :

National Conference of
Bar Examiners, et. al. :

NO. **17 4506**

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

- (a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. ()
- (b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ()
- (c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2.
- (d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ()
- (e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) ()
- (f) Standard Management – Cases that do not fall into any one of the other tracks. ()

<u>10/10/2017</u>	<u>Alson Alston, Pro se</u>	<u>N/A</u>
Date	Attorney-at-law	Attorney for
<u>904-444-0311</u>		<u>alalston@thenile.com</u>
Telephone	FAX Number	E-Mail Address



**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Alson Alston,
and All Others Similarly Situated,
Plaintiffs,

– against –

Civil Action No.: **17 4506**

The National Conference of Bar Examiners,

The Pennsylvania Board of Law Examiners,

The New Jersey Board of Bar Examiners,

Hon. Rebecca White Berch, Chair of The National
Conference of Bar Examiners,

Mr. C. Robert Keenan III, Esq., Chair of The
Pennsylvania Board of Law Examiners,

and

Ms. Elizabeth Wheeler, Esq., Chair of the New
Jersey Board of Bar Examiners,
Defendants.

VERIFIED COMPLAINT

Plaintiff Alson Alston, acting pro se, and with all others similarly situated, hereby complain of The National Conference of Bar Examiners (“NCBE”) and its Chair, The Pennsylvania Board of Law Examiners (“PA Board”) and its Chair, and The New Jersey Board of Bar Examiners (“NJ Board”) and its Chair (collectively, “Defendants”), demanding a trial by jury, as follows:

1. Alston completed the Pennsylvania and New Jersey bar examinations in 2015 and 2016, respectively.
2. Because the Defendants, arbitrarily and without basis in law or science, assigned scores to Alston that were below the respective passing cutoff scores, the Boards deemed Alston to have failed their bar exams.
3. However, the only statistically valid comparison to a bar exam cutoff score is a

measurement against Alston's entire score band, which is a range of scores above and below the exam score assigned to Alston by the NCBE, PA Board and/or NJ Board, and which accounts for implicit and external testing error on each bar exam.

4. The arbitrary decisions of the PA and NJ Boards in comparing their respective cutoff scores to Alston's assigned scores – instead of his score bands – violates Alston's procedural due process, substantive due process, and equal protection rights under the Fourteenth Amendment. It further implicates the Fifth Amendment's prohibition against a taking without just compensation. This deprivation of Alston's constitutional rights permits Alston to bring a claim under Section 1983 of the Civil Rights Act of 1871, as amended, now codified as 42 U.S.C. § 1983 ("Section 1983"); is a breach of the Defendants' duty of care stemming from their roles as semi-autonomous public administrators; and violates tort claims of defamation, negligence, and breach of contract.

5. The Defendants' actions led to the unlawful prevention of Alston attaining his licenses to practice law in PA and NJ, and caused significant losses in employment and financial well-being for him and his family, as well as damage to his reputation.

6. The purpose of this action is to put a judicial halt to Defendants' illegal and improper arbitrary grading decisions as applied against Alston and all similarly situated persons who have taken or will take the Pennsylvania or New Jersey bar exams and any bar exam components prepared by the NCBE.

THE PARTIES

7. Mr. C. Robert Keenan III, Esq. is the Chair of the Pennsylvania Board of Law Examiners, a semi-autonomous entity which operates under the authority of the Supreme Court of Pennsylvania. His address is the same as that of the PA Board, being Pennsylvania Judicial Center 601 Commonwealth Ave., Suite 3600, Harrisburg, PA 17120-0901, with phone number 717 231-3350.

8. Ms. Elizabeth Wheeler, Esq. is the Chair of the New Jersey Board of Bar Examiners, a semi-autonomous entity which operates under the authority of the Supreme Court of New Jersey. Her

address is the same as that of the NJ Board, being Richard J. Hughes Justice Complex, 25 W. Market Street 8th Floor, North Wing Trenton, NJ 08611, with phone number 609-815-2911.

9. Hon. Rebecca White Berch is the Chair of The National Conference of Bar Examiners, a non-profit entity contracted by the PA and NJ Boards to create and grade the multiple-choice portions of their respective bar exams that are the subject of the instant matter. Her address is the same as that of the NCBE, being 302 South Bedford Street, Madison, WI 53703-3622, with phone number 608-280-8550.

FACTS

1. Alston is a May 2015 graduate of a law school accredited by the American Bar Association (“ABA”), with a GPA in excess of 3.50, and has met all requirements to sit for the bar exams of Pennsylvania and New Jersey since May 2015.

2. Alston paid for and completed the PA bar examination given in July 2015. On October 9, 2015, the PA Board mailed to Alston what it determined to be his score on the exam (“PA Observed Score”). This was a single score that did not take into consideration any implicit error in the exam or error associated with the exam’s administration.

3. The PA Board attested, nonetheless, to the Supreme Court of Pennsylvania and to the general public, via its website, that the PA Observed Score **perfectly** represented Alston’s performance on its July 2015 bar exam and was **perfectly** representative of his knowledge of the subject matter tested.

4. On the basis of the PA Observed Score, the PA Board deemed Alston not to have passed the July 2015 bar exam. PA state law prohibits Alston from challenging the manner or means by which the PA Board graded his exam.

5. Alston paid for and completed the NJ bar examination given in February 2016, having taken the multiple-choice portions in Philadelphia, PA. In May 2016, the NJ Board provided to Alston what it determined to be his score on the exam (“NJ Observed Score”). This was a single score that did not

take into consideration any implicit error in the exam or error associated with the exam's administration.

6. The NJ Board, nonetheless, attested to the Supreme Court of New Jersey and to the general public, via its website, that the NJ Observed Score **perfectly** represented Alston's performance on its February 2016 bar exam and was **perfectly** representative of his knowledge of the subject matter tested.

7. On the basis of the NJ Observed Score, the NJ Board deemed Alston not to have passed the February 2016 bar exam. NJ state law prohibits Alston from challenging the manner or means by which the NJ Board graded his exam.

8. The respective Boards created Alston's PA and NJ Observed Scores by combining the essay and multiple-choice sections of each of the exams. The multiple-choice sections, called Multistate Bar Examinations ("MBEs"), were created and graded by the NCBE, while the essay sections were created and graded by the respective Boards.

9. The NCBE assigned Alston a single score for each of the two above-referenced MBEs ("Observed MBE Scores") and those single scores did not take into consideration any implicit error in that exam component or error associated with the exam component's administration.

10. Nonetheless, the NCBE attested to each Board that the single score it assigned to Alston **perfectly** represented his performance on the given MBE and was **perfectly** representative of his knowledge of the subject matter being tested. When Alston challenged the MBE scores, the NCBE recertified both scores.

11. The NCBE stated that the standard deviation was 16.1 for the July 2015 MBE and 15.0 for the February 2016 MBE. In the theory and practice of standardized testing –bar exams are clearly standardized tests – standard deviations are used to represent, in whole or in part, the error implicit in the tests and error associated with a test's administration on a specific date. Thus, the NCBE tacitly admits to errors in its MBEs that could be on the order of +/- 15 (i.e., a 30-point swing).

12. Neither the PA Board nor the NJ Board has published standard deviations for the essay sections or combined sections of their respective exams. Failure to publish such information maintains a public fiction that the exams are perfect measures of the test-taker's knowledge of the subject matter being tested. However, upon information and belief, the standard deviations for each of the exams were in excess of, respectively, 15 points on the 400-point PA scale and 7.5 points on the 200-point NJ scale.

13. Axiomatically and pursuant to current standardized testing theory and practice, neither the MBE sections nor the essay sections can perfectly measure a test-taker's knowledge of subject matter, ability, competency or anything else that the exams may be attempting to measure.

14. Because there is error implicit in every bar exam and error is introduced during the administration of the exams, the observed scores provided by the NCBE, PA Board and NJ Board all contain an error component and are not perfect measures of anything.

15. Only by providing a range of values above and below the observed scores (the entire range being known as a "score band"), can the error in the exams be quantified, identified, disclosed and accounted for.

16. Only the score band, then, captures the test-taker's true performance on the exam (including his/her knowledge of the subject matter being tested), though the scientific evidence is clear that no single number within that band can categorically be demonstrated to represent that true performance. Thus, picking a single number from within that band cannot be proven to be the true score or true representation of the test-taker's knowledge of the subject material, so is merely an arbitrary and statistically erroneous selection.

17. Because the score band represents the only accurate characterization of a test-taker's performance on a bar exam, the entire band must be compared to the bar passage cutoff score to determine whether a test-taker has passed the exam. So long as the bar passage cutoff score is within the score band, a test-taker must be deemed to have met that cutoff score and passed the exam.

18. An independent scientific analysis of Alston's observed scores for the above exams indicates that any cognizable score band for Alston's performance on those exams demonstrates that Alston easily met the cutoff scores and, therefore, passed both exams.

19. There would appear to be thousands of similarly situated law school graduates who completed the above or other recent bar exams in PA and NJ, were told that they had failed those exams by the respective Boards, but whose score bands reveal that they did, in fact, pass their bar exams. Ironically, there is no statistically significant difference between their performance and those of thousands of currently practicing lawyers whose observed scores were only slightly above the cutoff scores, therefore deemed passing. Thus, admitting those improperly failed persons to the bar in PA or in NJ will only add more competent and capable attorneys, increasing access to legal representation by many populations that are currently under-served.

JURISDICTION AND VENUE

20. Jurisdiction is proper, pursuant to 28 U.S.C. section 1331 (federal question jurisdiction), 28 U.S.C. § 1361 (mandamus jurisdiction), 28 U.S.C. § 1343(a)(3) (Section 1983 jurisdiction), and 28 U.S.C. § 1367 (supplemental jurisdiction).

21. The PA Board, NJ Board and the NCBE are analogous to a university that receives a portion of its funding from state resources and, therefore, are semi-autonomous state-related institutions that are subject to federal jurisdiction on Fourteenth Amendment and Section 1983 claims, as are the individual defendants acting in their official capacities. See Samuel v. Univ. of Pittsburgh, 375 F. Supp. 1119, 1127-28 (W.D. Pa. 1974) rev'd in part, 538 F.2d 991 (3d Cir. 1976) ("Penn State is best described as a semi-autonomous state institution. . . . the Commonwealth does not exercise such actual or potential control over the operations of Penn State as to render that institution a state instrumentality as that term is meant in a Section 1983 context. . . . jurisdiction exists over the individual and corporate university defendants under both Section 1983 and the Fourteenth Amendment"). Also analogously, neither the Boards nor the NCBE are immune, pursuant to the Eleventh Amendment. Id. at 1128

(“Since the three universities function autonomously from the state and have been found to be persons under Section 1983, the defense of sovereign immunity is unavailable to them.”). The individual defendants are not immune, for the purposes of injunctive and declaratory relief only, due to the legal fiction that their enforcement of unconstitutional actions are enforcement measures by the state. Id. at 1129 (“Declaratory and injunctive relief against the enforcement, by state officials, of an allegedly unconstitutional statute is precisely what is sought in this case. The mandate of *Ex Parte Young* requires this Court to accept federal jurisdiction over the defendant state officials.”).

22. The semi-autonomous nature of the Boards (and, therefore, their contractor, the NCBE) is also reflected in the traditional national consensus that the legal profession is to be largely self-regulating, though influenced by the states, when necessary.

23. The actions alleged here are not proscribed by any federal law intended to be the exclusive remedy, so Section 1983 is not preempted. *Molinelli-Freytes v. Univ. of Puerto Rico*, 727 F. Supp. 2d 60, 64 (D.P.R. 2010) (“Where Congress truly intended a statute’s remedial scheme to be the exclusive avenue through which a plaintiff may assert his claim, then the Court should find that the statute preempts claims under 42 U.S.C. § 1983.”) (internal quotation marks omitted).

24. Venue is proper, pursuant to 28 U.S.C. § 1391(a)(2), because the events giving rise to the claims herein occurred, in substantial part, in this judicial district.

COUNT 1
VIOLATION OF ALSTON’S DUE PROCESS RIGHTS
UNDER THE FOURTEENTH AMENDMENT

25. The Defendants have violated Alston’s substantive and procedural due process rights.

26. Several of Alston’s fundamental rights are implicated here and guaranteed by substantive due process.¹ Alston has a fundamental right to engage in the legal profession as a lawyer. *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923) (holding that there is a

¹ Substantive due process provides that the Due Process Clause of the Fourteenth Amendment applies to the protection of all fundamental rights. *Lawrence v. Texas*, 539 U.S. 558, 593 (2003); *Duncan v. State of La.*, 391 U.S. 145, 154 (1968);

fundamental right “to engage in any of the common occupations of life”). Alston has a fundamental right to contract to take a bar exam and have it graded in a non-arbitrary manner. Id. (holding that there is a fundamental “right to contract”). Alston has a fundamental right and responsibility to provide for and protect the health and well-being of himself and his family.²

27. The Defendants’ actions, including the arbitrary selection of failing scores for Alston when - passing scores for him were available, depriving him of relevant liberties, represent state interference with Alston’s fundamental rights. See Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (holding that constitutional rights must not be arbitrarily undermined). Those actions have violated and continue to violate Alston’s substantive due process rights because they infringe fundamental rights.

28. The Defendants’ actions also infringe other rights that are guaranteed by procedural due process. For instance, Alston has a property interest in his law degree, a degree whose only essential value is as a prerequisite for being admitted to the practice of law.³ The arbitrary nature of grading his exam so that only a failing score is assigned to him and not one of the many passing scores which were in Alston’s score bands, without notification of Alston that this occurred was, at minimum, a procedural due process violation. Alston should have been informed that this procedure was occurring and that he could appeal such actions to the state Supreme Court, but state laws in both PA and NJ bar appeals of grading matters. To the extent that the Defendants were following such laws, then those laws should be deemed unconstitutional, as well.

WHEREFORE Plaintiff respectfully demands as follows:

Benton v. Maryland, 395 U.S. 784, 794 (1969); Palko v. State of Connecticut, 302 U.S. 319, 325 (1937).

² See Meyer, 262 U.S. at 399 (holding that there is a fundamental right to “establish a home . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”); Ingraham v. Wright, 97 S. Ct. 1401, 1413, n.41, n.42 (1977); Charles E. Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property", 4 Harv. L. Rev. 365, 376-77 (1891).

³ A property interest is a fundamental right protected by procedural due process. See Roth, 408 U.S. at 577 (“To have a property interest . . . , a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient

a. Declaratory relief in the form of a judicial determination that:

- i. The use of a single score on bar exams and their components is scientifically invalid and arbitrary;
- ii. Only the use of score bands by the Defendants on all bar exams and exam components is scientifically and legally permissible;
- iii. Alston's due process rights have been violated by the activities of the Defendants and that these violations are ongoing.

b. Injunctive relief to prevent the Defendants from giving a single observed score to each test-taker on bar exams and their components and to prevent Defendants from subjecting Alston to unusual or improper measures as a result of this lawsuit;

c. Mandamus relief in the form of an order directing the Defendants to provide score bands on all bar exams and their components, to publish standard deviations for all bar exams and their components, and to deem Alston's scores on the July 2015 PA bar exam and February 2016 NJ bar exam to be passing.

d. Any other relief which the learned Court deems just and proper.

COUNT 2
VIOLATION OF ALSTON'S EQUAL PROTECTION RIGHTS
UNDER THE FOURTEENTH AMENDMENT AND VIOLATION OF HIS FIFTH
AMENDMENT RIGHTS

29. All paragraphs above are incorporated by reference herein.

30. As demonstrated in Count 1, the Defendants violated numerous of Alston's constitutional rights, inflicting significant injury upon him. The Defendants' actions are also equal protection violations.

31. The Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989

institution of property to protect those claims upon which people rely in their daily lives . . .").

(1920). There are two classes of test-takers that are treated differently and unequally by the Boards and their Chairs, with Alston being in the first such class. Class A consists of those whose observed scores fall just **below** the passing cutoff scores; Class B consists of those whose observed scores fall **at or just above** the passing cutoff scores. The difference in the actual performance of the two classes, however, is not statistically significant.

32. The PA and NJ Boards arbitrarily select a **single, failing score** instead of a valid passing score for those in Class A. The Boards arbitrarily select a **single, passing score** instead of a valid failing score for those in Class B.

33. This unequal and arbitrary treatment prevents those in Class A from practicing the lawful profession for which they are trained and violates their property rights in their law degree by preventing them from exploiting said degree or so diminishing the value of that degree that there is, effectively, a taking without just compensation, in violation of the Takings Clause.

34. The relief requested is identical to that indicated for Count 1 above, with the addition that further declaratory relief be granted, stating that Alston's equal protection and Fifth Amendment rights have been violated by the activities of the Defendants and that these violations are ongoing.

COUNT 3 VIOLATIONS ACTIONABLE UNDER SECTION 1983

35. All paragraphs above are incorporated by reference herein.

36. Section 1983 permits courts to grant relief when federally protected rights have been violated by persons acting under color of state law, including "any rights, privileges or immunities secured by the Constitution." 42 U.S.C. § 1983. See also Lynch v. Household Fin. Corp., 405 U.S. 538, 547, 92 S. Ct. 1113, 1120, 31 L. Ed. 2d 424 (1972). Property rights are civil rights actionable under Section 1983. Id. at 543-45. Pursuant to the discussion above, the following of Alston's constitutional rights, infringed by the Defendants, are actionable under Section 1983:

- a. Equal protection violations stemming from the arbitrary acts of the PA and NJ

Boards and the NCBE in selecting a single, **failing** score for Alston's class of test-takers, instead of one of the many passing scores in their respective score bands, as the Boards and NCBE did for the class of test-takers who had an observed passing score;

- b. His substantive due process rights, including engaging in the legal profession as a lawyer; his right to protect the lives and health of his family; his right to contract to sit for a bar exam;
- c. His procedural due process rights, including the right to notification and a hearing regarding the arbitrary selection of a failing exam score for him when valid passing scores for him were available;
- d. His Fifth Amendment right to protect his property interest in his law degree from a taking without just compensation, including the diminution of the value of that law degree without just compensation.

37. As demonstrated above, the Defendants are all persons within the meaning of Section 1983.

38. The Defendants were the **proximate** and **but-for** causes of the constitutional violations.

39. Since we have shown that state actors acting under color of state law infringed Alston's Fourteenth Amendment rights, Section 1983 is available as a remedy. Gomez v. Toledo, 446 U.S. 635, 640, 100 S. Ct. 1920, 1923, 64 L. Ed. 2d 572 (1980) ("By the plain terms of § 1983, two-and only two-allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.").

40. The relief requested is identical to that indicated for Count 2 above.

**COUNT 4
NEGLIGENCE**

41. All paragraphs above are incorporated by reference herein.

42. The Defendants have a general duty of care stemming from their roles in assessing the competencies of applicants to the law professions. More specifically, the Defendants owed Alston a general duty of care to prevent foreseeable risk or harm due to the actions of the Defendants and a duty of care under the “state-created danger” theory. Gerdes v. Booth & Flinn, 300 Pa. 586, 591, 150 A. 483, 485 (1930) (“When there is danger of an injury to the person or property of one through the act or omission of another, the latter is under duty to use reasonable care to avoid such injury.”).

43. The Defendants breached their duties by applying scientifically invalid, arbitrary means of assessing Alston’s academic preparedness. In falsely deeming Alston to have failed the indicated bar exams, the Defendants are all the proximate cause of Alston’s injuries. All defendants are the but-for cause of Alston’s injuries because had any one of them employed the proper measures – score bands – Alston would have ceased being injured by their actions. The injuries Alston suffered are cataloged above.

44. The relief requested is identical to that indicated for Count 2 above, except that the declaratory relief is omitted.

**COUNT 5
DEFAMATION**

45. All paragraphs above are incorporated by reference herein.

46. Through the actions of the Defendants, Alston has been saddled with the stigma of not having passed his PA and NJ bar exams on his first attempts, while, in fact, he did pass the exams on those attempts. This false statement of failing the exams was, effectively, published on the websites of the Boards. There are other elements of defamation which will have to be established later in the proceedings, for merely asserting intentionality or recklessness on the part of the Boards at this early stage of the proceedings could allow Alston to be deemed unfit to be an attorney by either or both of

the Boards.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: Philadelphia, PA
October 7, 2017

/s/ Alson Alston



(Signature)

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ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Bar Exam Test-Taker Sues Over 'Unlawful' Scoring Method](#)
