UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

Meryl J. Nass, M.D., Plaintiff, v. **Maine Board of Licensure in Medicine**, et al. Defendants.	**Civil Action No. 1:23-cv-321-JDL**

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

In Fall 2021, the Maine Board of Licensure in Medicine announced in a position statement that physicians risk disciplinary action, such as suspension or revocation of their medical license, if they spread COVID-19 vaccine misinformation. (Compl. ¶ 17.) The position statement then tells physicians what viewpoints are allowed: physicians are encouraged to voice support for the vaccine, but "risk disciplinary action" for questioning it. (Compl. ¶¶ 17-22.) The question presented is whether federal courts have the power to remedy a state licensing board's censorship of and retaliation against disfavored speakers, as here.

On October 7, 2021, the Board notified Dr. Meryl J. Nass, M.D., that she was accused of spreading COVID-19 misinformation and demanded her response. (Compl. ¶¶ 33-34.) Dr. Nass is an expert in pandemics and biological warfare and has testified before Congress six times. (Compl. ¶¶ 28-29.) When Dr. Nass questioned the Board's power over her private speech, the Board responded, "you have communicated in your capacity as a physician in the interview and on the website that could allow patient and the public to view the information you provide as misleading and/or inaccurate." (Compl. ¶ 35.) After building complaint files all focused on misinformation, the Board held an executive session in January 2022, which Dr. Nass could "observe" only. (Compl. ¶¶ 36-52.) There, the Board voted unanimously to suspend Dr. Nass's license; order her to undergo a neuropsychological examination; issue her a "25-questions" letter demanding explanation for her statements; subpoena Dr. Nass's patient records, calendar, and patient list; and take other adverse actions. (Compl. ¶¶ 53-73.) These were all efforts to harass Dr. Nass into silence, ruin her reputation by falsely implying that she suffered from mental impairment, and make an example of her, in violation of the First Amendment.

STANDARD OF REVIEW

A complaint need only contain "a short and plain statement of the grounds for the court's jurisdiction . . . a short and plain statement of the claim showing that the pleader is entitled to relief; and a demand for the relief sought." *Parker v. Dall-Leighton*, 2017 U.S. Dist. LEXIS 202220, at *2 (D. Me. Dec. 8, 2017) (quoting Fed. R. Civ. P. 8(1)-(3)). "The Court assumes the truth of the complaint's well-pleaded facts and draws all reasonable inferences in the plaintiff's favor." *Id.* (citing *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 55 (1st Cir. 2012)). "A viable complaint need not proffer 'heightened fact pleading of specifics,' but in order to survive a motion to dismiss it must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A motion to dismiss based on an affirmative defense may be granted only if the record "leave no doubt" that the plaintiff's action is barred. *Blackstone Realty LLC v. FDIC,* 244 F.3d 193, 197 (1st Cir. 2001).

ARGUMENT

I. *Younger* Abstention is Inapplicable.

"[T]he pendency of a state-court action generally does not preclude a federal court from addressing the same subject matter." *Sirva Relocation, LLC v. Richie*, 794 F.3d 185, 191 (1st Cir. 2015). In fact, "federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Id.* (quoting *Co. River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976)). Discussing *Younger* abstention, the Supreme Court observed that "even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Sprint Communs., Inc. v. Jacobs*, 571 U.S. 69, 81-82 (2013) (quoting *Hawaii Hous. Authority v. Midkiff*, 467 U.S. 229, 236 (1984)).

The *Younger* abstention doctrine follows a three-step process.[1] The Court must first decide "whether the state proceedings are one of three types of 'exceptional circumstances' that the Supreme Court ruled define the scope of the *Younger* doctrine." *Tran v. Healey*, 2022 U.S. Dist. LEXIS 194198, at *9 (D. Mass. Sep. 13, 2022) (citing *Sirva Relocation, LLC,* 794 F.3d at 192). If so, the Court then considers whether the three *Middlesex* factors support abstention. *Sirva Relocation, LLC*, 794 F.3d at 193. "The three *Middlesex* factors are (1) whether there is an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) provides an adequate opportunity to raise federal challenges." *Tran*, 2022 U.S. Dist. LEXIS 194198, at *9 (citing *Middlesex*, 457 U.S. at 423, 432). Finally, "if these two steps leave the case on track for abstention, the court must take the third step and determine whether any of the isthmian exceptions to the *Younger* doctrine apply." *Id.*

Applying this framework, abstention is improper for two reasons: (i) The *Middlesex* factors weigh against abstention because Dr. Nass lacks the opportunity to raise federal challenges in the Board proceeding, and (ii) the Board proceeding qualifies for the "brought in

[1] The First Circuit has not considered whether *Younger* abstention is analyzed under Rule 12(b)(1), 12(b)(6), or neither. *Christian Action Network v. Maine*, 679 F. Supp. 2d 140, 143 n.2 (D. Me. 2010). Considering defendants have neither offered evidence that would be improper to consider on a Rule 12(b)(6) motion, nor challenged the complaint's allegations, that distinction is likely irrelevant here. Plaintiff notes, however, that the stipulation of dismissal in *Nass v. Maine Board of Licensure in Medicine*, AUGSC-CV-22-21, was without prejudice. *See* **Ex. 1**.

bad faith, that is, for the purpose of harassment" exception to the *Younger* doctrine. *Sirva Relocation*, 794 F.3d at 192 (citing *Younger*, 401 U.S. at 53-54).

A. Lack of Opportunity to Litigate Federal Claims.

The Board proceedings do not provide an adequate opportunity for Dr. Nass to raise her constitutional challenges. *Middlesex*, 457 U.S. at 432. To start, Dr. Nass seeks a declaratory judgment and injunctive relief against the Board that the Board may not discipline a doctor for spreading so-called misinformation or disinformation, as threatened in the position statement. She also brings claims under § 1983 and the Maine Civil Rights Act (Counts 3 and 5) seeking damages and other relief for retaliating against Dr. Nass for her speech, and for trying to chill the future exercise of her speech through threats. This second set of claims focuses on the Board's pre-adjudicatory hearing conduct. (Compl. ¶¶ 17, 33-35, 48-49, 51-67, Exs. 1-5.) Finally, Dr. Nass seeks punitive damages (Count 6), contingent upon her prevailing on a predicate claim.

The Board proceeding adjudicates different issues. Although the Board at first alleged misinformation as grounds for discipline, it withdrew those grounds in response to Dr. Nass's motion to dismiss. (Compl. ¶¶ 78-81.) Nor will the Board proceeding decide whether its investigation and other conduct was driven by an unlawful motive. Instead, the Board proceeding focuses on whether Dr. Nass engaged in professional misconduct as alleged in the Third Amended Notice of Hearing. (Compl. ¶¶ 79-83.)

The Board proceeding also involves different parties, different relief, and different factfinders. The only parties to the Board proceeding are the State and Dr. Nass, while Dr. Nass's federal lawsuit names several Board members in their individual capacities. There is no jurisdiction for the Board to award Dr. Nass damages, injunctive relief, or a declaration that the position statement is unlawful. And even if Dr. Nass ultimately prevails in state court on a petition for review of agency action, the best she can achieve is vacatur of any final disciplinary action. Finally, Dr. Nass's opportunity for meaningful consideration of the facts is sharply limited by the Maine APA. Appellate review of the Board's ultimate decision will be for "errors of law, abuse of discretion, or findings not supported by substantial evidence in the record." *Gray v. Dep't of Pub. Safety*, 2021 ME 19, ¶ 10, 248 A.3d 212 (quoting *Palian v. Dep't of Health & Hum. Servs.*, 2020 ME 131, ¶ 10, 242 A.3d 164). Applying this standard, the reviewing court "will accept the facts found by the [administrative agency] unless they are unsupported by evidence in the record." *Id.* ¶ 29. The Law Court has even accepted at face value an agency's finding that it did not engage in viewpoint discrimination by finding that a professional license applicant's public criticisms of the agency conflicted with the licensing laws' "good moral character" requirement. *Id.* ¶ 35. In contrast, Dr. Nass's federal lawsuit will place the facts before a jury.

Courts have denied *Younger* abstention in like circumstances. In *Prevost v. Twp. of Hazlet*, for example, a police officer sued the town and several of its employees under § 1983 for conspiring to fire him without due process. 159 F. App'x 396, 397-98 (3d Cir. 2005). The Third Circuit held that a parallel state administrative proceeding did not justify *Younger* abstention because (i) the only party to the state administrative proceeding was the township, while the federal suit included the township and several of its employees, (ii) the state administrative proceeding "was limited to the question of whether the Township's termination of Prevost was in accordance with state statutes and regulations[,]" not whether the Town employees manipulated state regulations to deprive him of employment, and (iii) greater relief was available under § 1983 than the state proceeding. *Id.* at 398; *see also Saleem v. Bonds*, 2020 U.S. Dist.

LEXIS 4331, at *10 (D.N.J. Jan. 8, 2020) (abstention improper when the plaintiff sought relief in federal court that was unavailable in state proceedings). *Kaul v. Christie*, 2017 U.S. Dist. LEXIS 102007, at *44-45 (D.N.J. June 30, 2017) (abstention improper when the plaintiff sought relief in federal court that was unavailable in state proceedings); *Fox v. Cheltenham Twp. Auth.*, 2012 U.S. Dist. LEXIS 83903, at *8 n.1 (E.D. Pa. June 18, 2012) (abstention improper "because the state administrative proceedings only allow Plaintiff the opportunity to challenge Dr. Rubin's decision on Plaintiff's MCA, do not provide Plaintiff with an opportunity to present his due process claim, and do not appear to allow Plaintiff to seek monetary damages"); *Williams Grp. Homes v. Ala. Dep't of Mental Health & Mental Retardation*, 2007 U.S. Dist. LEXIS 116750, at *13 (S.D. Ala. Nov. 2, 2007) (abstention improper to collateral claims, because "[w]hether the proceeding was brought because of an improper motive that violates the constitution is also collateral to the determination of the administrative proceeding"). *See also Washington v. Cty. of Rockland*, 373 F.3d 310, 319 (2d Cir. 2004) (observing that abstention would ordinarily not bar a plaintiff from bringing a federal lawsuit claiming that pending disciplinary charges were brought for retaliatory reasons); *Deters v. City of Poughkeepsie*, 150 F. App'x 10, 12 (2d Cir. 2005) (observing the same, as applied to a First Amendment retaliation claim). In short, Dr. Nass's federal claims are "of a wholly different character from the charges raised in the administrative disciplinary proceedings." *Washington*, 373 F.3d at 319.

Finally, the First Circuit's decision in *Bettencourt v. Bd. of Registration in Med.*, is not contrary. 904 F.2d 772, 775 (1st Cir. 1990). There, the Massachusetts Board of Registration in Medicine revoked the plaintiff's license to practice, and the plaintiff petitioned for review to the Massachusetts Supreme Judicial Court. *Id.* at 773. While the petition was pending before the SJC, the plaintiff also sued in federal court for violating due process and equal protection. *Id.* at 775. The First Circuit held that the plaintiff had an adequate opportunity to raise federal challenges in the state proceeding because Massachusetts' judicial review statutes provides a process to challenge such constitutional violations. *Id.* at 778.[2] But Dr. Nass is not challenging in this lawsuit whether she was afforded due process, nor is she seeking to enjoin or interfere with the ongoing proceedings, as in *Bettencourt.* Instead, she is seeking relief for the Board's pre-hearing investigatory conduct intended to retaliate against her, and to bring a pre-enforcement challenge to the position statement announced by the Board.

B. The Bad-Faith Exception Applies.

"[A] plaintiff may secure relief in the federal courts -- even though doing so would interfere with ongoing state-initiated proceedings -- by demonstrating 'bad faith, harassment, or any other unusual circumstance that would call for equitable relief.'" *Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 779 (1st Cir. 1990) (quoting *Younger*, 401 U.S. at 54). In *Gibson v. Berryhill*, 411 U.S. 564 (1973), for example, the Supreme Court applied the bias exception where the board members had a pecuniary interest in the dispute, even where there were state procedures for judicial review. *Esso Standard Oil Co. (P.R.) v. Mujica Cotto*, 389 F.3d 212, 218, 220 (1st Cir. 2004) (discussing *Gibson*).

The complaint plausibly alleges that the Board suffers from institutional bias against Dr. Nass. The Board ordered Dr. Nass to undergo a neuropsychological examination without any arguable statutory cause; implemented an immediate order of suspension; issued expansive and

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[2] *Bettencourt*'s value is further limited because the opinion does not describe what, if any, arguments were raised regarding the third *Middlesex* factor, other than "implicit assertions" that the Massachusetts courts might reject the plaintiff's arguments, and an analogy to a distinguishable case. *Bettencourt*, 904 F.2d at 779 (discussing *Planned Parenthood League v. Bellotti*, 868 F.2d 459 (1st Cir. 1989)).

unnecessary subpoenas; and propounded about 50 questions requiring her to explain the basis of many of her public statements. (Compl. ¶¶ 33-35, 48-49, 51-67, Exs. 2-5.) Each defendant voted to implement these actions in executive session, while the deliberations referred to Dr. Nass's "harmful opinions[,]" her departure from "mainstream" beliefs, and her spreading of "misinformation" on social media. (Compl. ¶¶ 52-54.) As it began pursuing Dr. Nass, the Board announced its hostility to speakers it perceives as spreading misinformation in its position statement: "Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license." (Compl. ¶ 17.) Indeed, as investigation evolved, the Board's assistant attorneys general and staff traded notes about Dr. Nass's protected speech as she advocated for her educated beliefs, added notes about misinformation to the "complaint file" after Dr. Nass spoke at a public hearing before the Maine Board of Pharmacy, and the Board eventually charged Dr. Nass for allegedly spreading misinformation. (Compl. ¶¶ 33-50, 74-80.) Then there is the Board chair, who serves as a director to the Federation of State Medical Boards, which prepared the position statement, and which has its own policy objectives and even an "advocacy office" in Washington D.C. (Compl. ¶¶ 23-26, 103), and engaged in unbecoming behavior during the hearing (Compl. ¶¶ 104-109.) And finally, the Board flouted its own policies by paying an expert witness $500 per hour, while representing to another State agency that its experts are paid a "maximum" of $175 per hour for hearing time and $125 per hour for consultation and preparation. (Compl. ¶¶ 96-99.) Collectively, these facts show that the Board proceeding is a biased endeavor undeserving of *Younger* abstention.

C. The Case Should Be Stayed If *Younger* Abstention Applies.

A stay is more appropriate than dismissal in cases in which the plaintiff is seeking damages, as here. *Keenan v. Town of Sullivan*, 2023 U.S. Dist. LEXIS 174886, at *19 (D. Me. Sep. 29, 2023). Likewise, if the Court believes that *Younger* may apply, the most thoughtful and cautious approach is to stay proceedings, because the Maine courts' M.R. Civ. P. 80C analysis may inform this Court's ultimate ruling. Finally, if the Court dismisses, it should do so without prejudice. *See, e.g.*, *Christian Action Network*, 679 F. Supp. 2d at 150.

II. The Eleventh Amendment Does Not Bar Prospective Relief.

The complaint does not seek damages against the Board and its members in their official capacities, because such damages are barred by the Eleventh Amendment. But other forms of relief are available. This Court recently explained, "[n]otwithstanding Eleventh Amendment immunity, the *Ex parte Young* doctrine allows 'suit[s] challenging the constitutionality of a state official's action' and permits federal courts to grant prospective injunctive relief against a state official 'to prevent a continuing violation of federal law.'" *Griffin v. Univ. of Me. Sys.*, 2023 U.S. Dist. LEXIS 142979, at *20 (D. Me. Aug. 16, 2023) (*Green v. Mansour*, 474 U.S. 64, 68 (1985)). "Accordingly, in 'a [section] 1983 action . . . a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury.'" *Id.* (quoting *Quern v. Jordan*, 440 U.S. 332, 338, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979)). "The *Ex parte Young* exception may apply if a 'complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

The motion to dismiss does not explain how Dr. Nass's non-monetary federal claims are barred by the Eleventh Amendment, and the defendants have therefore waived that argument. *Collins v. Marina-Martinez*, 894 F.2d 474, 481 n.9 (1st Cir. 1990). Despite this waiver, there is no Eleventh Amendment bar to Dr. Nass's non-monetary federal claims for relief against the Board (Count 1 and Count 2). Those claims are a pre-enforcement constitutional challenge to the enforceability of an announced Board policy of disciplining doctors for spreading misinformation in Counts 1 and 2. (Compl. ¶¶ 17, 111-113, 118-125.) Although the Board once tried to discipline Dr. Nass on misinformation grounds, those grounds were abandoned. (Compl. ¶¶ 73-79.) Dr. Nass's requested relief, therefore, is to *prospectively* enjoin the Board from enforcing the position statement so that the Board cannot again try to discipline her for engaging in "unprofessional conduct" or "disruptive behavior" by allegedly spreading misinformation.

Dr. Nass also seeks in Count 3 to restrain the defendants from engaging in future acts of retaliation. She will remain subject to the Board's jurisdiction long after the adjudicatory hearing is over, and all appeals exhausted. The complaint alleges an ongoing scheme of retaliation and harassment, and the Board's position statement makes clear that Dr. Nass is likely to face future instances of retaliation and harassment if she speaks in a way the Board dislikes. This prospective relief is not barred by the Eleventh Amendment. *Civil Rights Corps. v. Pestana*, 2022 U.S. Dist. LEXIS 81969, at *30 (S.D.N.Y. May 5, 2022).

III. Absolute Immunity is Inapplicable.

The law presumes qualified, not absolute, immunity suffices to protect governmental officials in performance of their duties. *Knowlton v. Shaw*, 704 F.3d 1, 5 (1st Cir. 2013) (quoting *Burns v. Reed*, 500 U.S. 478, 486-87 (1991)). That said, "[j]udges and prosecutors are entitled to absolute immunity when functioning in their official capacities." *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978)). This immunity "*may* apply to licensing boards when the board members' roles are 'functionally comparable' to those of judges." *Guzman-Rivera v. Lucena-Zabala*, 642 F.3d 92, 96 (1st Cir. 2011) (emphasis added) (citing *Butz*, 438 U.S. at 508 and *Bettencourt*, 904 F.2d at 783-84). But immunity "is not available to either prosecutors or agency officials whose actions are primarily administrative or investigative in nature and unrelated to their functions as advocates in preparing for the initiation of a prosecution or for judicial proceedings." *Knowlton*, 704 F.3d at 5; *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (no absolute immunity for prosecutors when performing investigative functions); *Burns v. Reed*, 500 U.S. 478, 495-96 (1991) (no absolute immunity for prosecutors giving legal advice to investigators). Courts employ a "functional approach" in considering absolute immunity looking at the "nature of the function performed" rather than the "identity of the person performing it[,]" and the official claiming absolute immunity bears the burden of proof. *Knowlton*, 704 F.3d at 5. As explained below, the defendants are entitled to neither judicial nor prosecutorial immunity.

i. Judicial Immunity.

Officials claiming absolute immunity for judicial conduct must prove three things. First, the officials must "perform a traditional 'adjudicatory' function, in that they decide facts, apply law, and otherwise resolve disputes on the merits (free from direct political influence)[.]" *Guzman-Rivera v. Lucena-Zabala*, 642 F.3d 92, 96 (1st Cir. 2011) (cleaned up). Second, the matters the officials decide must be "sufficiently controversial that, in the absence of absolute immunity, they would be subject to numerous damages actions[.]" *Id.* (cleaned up). And third, the officials must "adjudicate disputes against a backdrop of multiple safeguards designed to protect [a litigant's] constitutional rights." *Id.* (cleaned up).

Disciplinary matters before the Board progress through two phases: investigation and adjudication. The Board "shall investigate a complaint" on its own motion or upon receipt of a written complaint. 32 M.R.S. § 3282-A. Upon receipt of a complaint, the Board must notify the licensee of the content of the complaint as soon as possible, and the licensee must respond within 30 days. 32 M.R.S. § 3282-A(1). After reviewing the complaint and response, the Board can (i) enter a consent agreement, which may be used to "terminate a complaint investigation," (ii) accept a voluntary surrender, or (iii) "[i]f the board concludes that modification or nonrenewal of the license is in order, the board shall hold an adjudicatory hearing in accordance with Title 5, chapter 375, subchapter 4." 32 M.R.S. § 3282-A(1)(A)-(C). The Board may also issue subpoenas "[i]n aid of [its] investigative authority" and "in accordance with the terms of Title 5, section 9060, except that the authority applies to any stage of an investigation and is not limited to an adjudicatory proceeding." 10 M.R.S. §§ 8001-A(4); 8003-A(1).

Separately, the Board may "compel a physician to submit to a mental or physical examination by a physician or another person designated by the board" upon a "a complaint or allegation that an individual licensed under this chapter is or may be unable to practice medicine with reasonable skill and safety to patients by reason of mental illness, alcohol intemperance, excessive use of drugs, narcotics or as a result of a mental or physical condition interfering with the competent practice of medicine." 32 M.R.S. § 3286. A physician's failure to submit as directed is treated as an admission absent certain exceptions and may even lead to the summary imposition of disciplinary action upon the complaint. *Id.* The statute does not require the Board to provide the physician with advanced notice, nor does it afford the physician the option of objecting, offering contrary evidence, or otherwise appearing in opposition. *Id.*

Turning to the facts here, the complaint seeks damages for the Board's investigative conduct. 32 M.R.S. § 3282-A(1)(C). Although the complaint alleges facts from the adjudicative hearing, those facts are intended to bolster the plausibility of the complaint's allegations that the Board members are biased against Dr. Nass and that their pre-adjudicative actions were motivated by retaliatory animus. At an executive session on January 11, 2022, the Board unanimously voted to "further investigate" (their words, not ours) by (i) issuing a complaint on three new assessment and direction matters; (ii) ordering Dr. Nass to undergo a neuropsychological evaluation, without any supporting evidence of an impairment; (iii) telling her she must voluntarily convert her license to inactive, or face an immediate suspension; (iv) subpoenaing records from Dr. Nass; (v) propounding a "25-questions letter" to Dr. Nass; and (vi) obtaining experts to review the complaints. (Compl. ¶¶ 46-54, 135.) One Board member stated that the purpose of the 25-questions letter was to better understand how Dr. Nass got to her conclusions and the subpoenas were to gather additional records, all of which the experts could review. (Compl. ¶ 54.) The Order Directing Evaluation was issued that day; the subpoenas and the Order of Immediate Suspension were issued the next day, and the 25-questions letter the day after that. (Compl. ¶¶ 60-68.) And earlier, the Board threatened all doctors with disciplinary action for spreading "misinformation." (Compl. ¶ 17.)

Against this backdrop, the Board members do not meet the First Circuit's three-step test for judicial immunity. First, the Board members were not deciding facts, applying law, or otherwise resolving disputes free from political influence. *Guzman-Rivera*, 642 F.3d at 96. By their own words, the Board members were exercising the Board's investigative authority. (Compl. ¶¶ 46-54, 135.) When arguing "the Complaint repeatedly describes the BOLIM's conduct associated with the ongoing adjudicatory hearing[,]" (Defs.' Mot. at *14), the motion to dismiss ignores paragraphs 46 to 54 of the complaint, alleging the above actions. An exhibit to the defendants' own motion even calls the subpoenas investigatory. (Defs.' Mot. to Dismiss, Ex. B at **2-4.) The Board members' conduct did not become adjudicatory until January 24, 2022, when the Board issued a notice of hearing.

Second, the Board members' investigatory conduct is not "sufficiently controversial that, in the absence of absolute immunity, they would be subject to numerous damages actions[.]" *Id.* In this sense, there is no convincing reason why absolute rather than qualified immunity would be necessary to guard Board members, as with other public officials exercising non-adjudicative functions. *Buckley*, 509 U.S. at 273; *Burns*, 500 U.S. at 495-96.

Third, the Board members were not "adjudicate[ing] disputes against a backdrop of multiple safeguards designed to protect [a litigant's] constitutional rights." *Guzman-Rivera*, 642 F.3d at 96 (cleaned up). In *Bettencourt,* the First Circuit found this element met because "the parties litigate in the context of a sophisticated, truly adversarial process[;]" there was a prosecutor and the physician could be represented; the hearing was recorded; the hearing officer issues a written decision relying on precedents; and the regulations permit oral testimony, documentary evidence, and cross-examination. 904 F.2d at 783; *see also N. Berwick v. Jones*, 534 A.2d 667, 670 (Me. 1987) (discussing the essential elements of an adjudicatory hearing). Unlike *Bettencourt*, the proceedings here involved no adversarial process: there was no prosecutor; no defense counsel; no transcript; no public scrutiny; no notice of what adverse actions the Board was entertaining (such as the neuropsychological examination or immediate suspension); no opportunity to offer evidence; and no cross-examination or opportunity to challenge evidence. Instead, Dr. Nass could merely observe as everything unfolded. *See* 32 M.R.S. § 3286. And contrary to the Board members' argument, subchapter 4 of the Maine APA provides no safeguards because subchapter 4 deals only with adjudicatory hearings.

ii. Prosecutorial Immunity.

"[A] state official who performs prosecutorial functions, including the initiation of administrative proceedings that may result in legal sanctions, is absolutely immune from damages actions." *Goldstein v. Galvin*, 719 F.3d 16, 26 (1st Cir. 2013); *see also Wang v. N.H. Bd. of Registration in Med.*, 55 F.3d 698, 701 (1st Cir. 1995). The difference here is that no adversarial proceeding had begun at the time of the challenged conduct, so the Board members could not have been exercising any prosecutorial functions at that time. The Board's conduct here is more like that in *Buckley* and *Burns*, where no formal adjudicatory process had started, and the prosecutors were aiding in the investigation. 509 U.S. at 273; 500 U.S. at 495-96. This is true even for the order to undergo a neuropsychological examination. Because that order involved no opportunity to be heard or object, it is closer to an investigative tool than an adversarial process involving a prosecutor. Finally, although *Wang* may provide prosecutorial immunity for issuing the notice of adjudicatory hearing, Dr. Nass is not seeking damages for that specific act.

IV. The Board Members Do Not Benefit from Qualified Immunity.

Qualified immunity involves a two-step inquiry: "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation." *Maldonado v. Fontanes*, 568

F.3d 263, 269 (1st Cir. 2009); *see also Irish v. Fowler*, 979 F.3d 65, 76 (1st Cir. 2020). Although qualified immunity may be decided at the pleadings stage, it is "often decided after some factual development at summary judgment[.]" *Irish v. Maine*, 849 F.3d 521, 523 (1st Cir. 2017) (vacating a dismissal for further factual development). Qualified immunity does not apply here because the complaint plausibly alleges the defendants violated Dr. Nass's First Amendment rights, and that the unconstitutionality of the defendants' behavior is clearly established.

Dr. Nass easily overcomes the first prong of qualified immunity. The First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. Const., amend. I; *see also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating freedom of speech and the press to the States). "Government actors offend the First Amendment when they retaliate against an individual for constitutionally protected speech." *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 16 (1st Cir. 2011). "[T]he threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" is also unlawful. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). "In order to establish a prima facie case of First Amendment retaliation, a plaintiff must show: (1) that 'he or she engaged in constitutionally protected conduct'; (2) that 'he or she was subjected to an adverse action by the defendant'; and (3) that 'the protected conduct was a substantial or motivating factor in the adverse action.'" *Macdonald v. Brewer Sch. Dep't*, 2023 U.S. Dist. LEXIS 5601, at *40 (D. Me. Jan. 12, 2023) (quoting *Pollack v. Reg'l Sch. Unit 75*, 2016 U.S. Dist. LEXIS 10826 (D. Me. Jan. 27, 2016)).

Each element is met. First, Dr. Nass spoke extensively about the governmental response to the pandemic, often critically, to the public, lawmakers, regulatory bodies, and the Board itself. (Compl. ¶¶ 30-33, 35-38, 40, 50, 52, 73.) Second, Dr. Nass faced several adverse actions, as discussed earlier. (Compl. ¶¶ 17, 33-35, 48-49, 51-67, Exs. 2-5.) And finally, for the reasons described in Part I.B, the complaint plausibly alleges that censorship and retaliation was a substantial or motivating factor. She has thus alleged plausible claim for relief.

The second prong of qualified immunity asks whether "the unlawfulness of [the defendant's] conduct was 'clearly established at the time.'" *Irish*, 979 F.3d at 76 (quoting *Wesby*, 138 S. Ct. at 589). This is a two part inquiry that asks first "whether the precedent is 'clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply[,]'" and second, "whether '[t]he rule's contours [were] so well defined that it is clear to a reasonable [official] that his conduct was unlawful in the situation he confronted.'" *Id.* (quoting *Wesby*, 138 S. Ct. at 590); *see also Norton v. Rodrigues*, 955 F.3d 176, 184 (1st Cir. 2020).

"A rule is clearly established either when it is dictated by controlling authority or a robust consensus of cases of persuasive authority." *Id.* (internal quotations omitted). Consensus among the circuits is unnecessary, and law from sister circuits "is sufficient to clearly establish a proposition of law when it would provide notice to every reasonable officer that his conduct was unlawful." *Id.* Ultimately, "[t]he salient question . . . is whether the state of the law [at the time of the defendants' conduct] gave [them] fair warning that their alleged treatment of [the plaintiffs] was unconstitutional." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). Locating a case with "materially similarly facts" is unnecessary to defeat qualified immunity. *Id.* In an obvious case, even general principles of constitutional law can suffice. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004).

At the outset, Dr. Nass should not have to show that the law is clearly established. Qualified immunity is designed to protect officials making split-second decisions, not "calculated choices about enacting or enforcing unconstitutional policies[.]" *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting the denial of certiorari). The policy justification for qualified immunity is undermined in cases like this, where the actor can deliberate and consult legal counsel. But even so, the Board members violated clearly established law.

The prohibition on First Amendment retaliation is well-established. Over 15 years ago, the Supreme Court reminded us that "[o]fficial reprisal for protected speech offends the Constitution because it threatens to inhibit exercise of the protected right, and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (cleaned up, internal citations omitted); *see also Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998); *Perry* v. *Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). This is also true for threats of punishment, as with the position statement here. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); *Backpage.com, LLC v. Dart*, 807 F.3d 229, 235 (7th Cir. 2015). And it makes no difference that Dr. Nass is a doctor because there is no First Amendment exception for professional speech. *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2374 (2018). Nor does it matter that the Board thinks Dr. Nass's beliefs are wrong. *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

The Board members' effort to jam their actions into a regulation on professional conduct is hopeless because the Supreme Court has made clear that officials cannot simply relabel speech as conduct to avoid the First Amendment. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). This includes imposing restrictions that, although facially neutral, "cannot be 'justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message [the speech] conveys[.]'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Whether phrased in terms of speech or conduct, a regulation is content based if one must "'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)). As the Eleventh Circuit explained, relabeling speech as conduct, as the Board members seek to do here, is "a dubious constitutional enterprise" that is "susceptible to manipulation." *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) (law prohibiting conversion therapy) (internal quotation omitted); *see also Wollschlaeger v. Governor*, 848 F.3d 1293, 1317 (11th Cir. 2017).

Caselaw gives fair warning to the Board that it cannot skirt the First Amendment by relabeling speech as conduct. That effort is no different than in *Cohen v. California*, where the Supreme Court considered whether a statute prohibiting "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct" was content-neutral when applied to a person wearing a jacket bearing the words "Fuck the Draft" in a courthouse. 403 U.S. 15, 18-19, 26 (1971). Like the statutes here, the disturbing the peace statute did not expressly regulate speech. Yet the Supreme Court held that "[t]he conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public[.]" *Id.; see also Holder v. Humanitarian Law Project* 561 U.S. 1, 26 (2010) (holding that a prohibition on "knowingly providing material support" to terrorist organizations was content-based, despite not expressly referencing speech); *R. A. V. v. St. Paul*, 505 U.S. 377, 391 (1992) (holding that an ordinance prohibiting fighting words uttered "on the basis of race, color, creed, religion or gender" was facially unconstitutional, even though fighting words are not speech);

Honeyfund.com, Inc. v. DeSantis, 2022 U.S. Dist. LEXIS 147755, at *20 (N.D. Fla. Aug. 18, 2022) (holding that a law prohibiting mandatory training on critical race theory was content-based).

The unconstitutionality of the Board members' conduct should be especially obvious because they are committing viewpoint discrimination. Viewpoint discrimination is "an egregious form of content discrimination" targeting the "particular views taken by speakers on a subject[,]" rather than speech about a particular subject matter. *Rosenberger*, 515 U.S. at 829; *see also Reed*, 576 U.S. at 163. As the Supreme Court has held, "[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011); *see Rosenberger*, 515 U.S. at 829 ("government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction"). Here, the Board announced its plan to punish disfavored viewpoints, such as COVID-19 vaccine "misinformation" and statements that are "inaccurate" or not "consensus-driven for the betterment of public health[,]" while encouraging counter-speech on the same subjects carrying the Board's preferred message. (Compl. ¶¶ 17-22.). Doctors are encouraged to take to social media to quote the AMA COVID-19 Guide in support of the "fight" against misinformation, but "risk disciplinary action" for criticizing the COVID-19 vaccine. The unconstitutionality of singling out disfavored views for disfavored treatment, as here, should be obvious to any reasonable official.

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"'[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,' *Abrams* v. *United States*, 250 U. S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2375. The motion to dismiss should be denied.

Date: November 8, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on the date set forth below, I electronically filed the above document with the Clerk of Court using the CM/ECF system which caused a copy of this document to be served electronically on all registered parties and counsel of record.

Dated: November 8, 2023

/s/ Tyler J. Smith

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