IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS EDUCATIONAL FOUNDATION, Plaintiff, v. AMERICAN BOARD OF INTERNAL MEDICINE, AMERICAN BOARD OF OBSTETRICS & GYNECOLOGY, AMERICAN BOARD OF FAMILY MEDICINE, and ALEJANDRO MAYORKAS, in his official capacity as the Secretary of the U.S. Department of Homeland Security, Defendants.	)	Case No. 3:22-cv-240

REPLY BY PLAINTIFF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS EDUCATIONAL FOUNDATION IN SUPPORT OF ITS MOTION FOR LEAVE TO AMEND AND FOR PERMISSIVE JOINDER

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Plaintiff Association of American Physicians and Surgeons Educational Foundation ("AAPS") hereby replies in support of its motion for leave to amend its complaint and for permissive joinder to add as plaintiffs Pierre Kory, M.D. ("Kory"), Paul Marik, M.D. ("Marik"), and Karl N. Hanson, M.D. ("Hanson", collectively, the "Individual Plaintiffs").

The Defendants American Board of Internal Medicine ("ABIM"), American Board of Obstetrics & Gynecology ("ABOG"), and American Board of Family Medicine ("ABFM", collectively the "Board Defendants") do not oppose AAPS's motion. Only Defendant Alejandro Mayorkas ("Mayorkas" or the "government"), in his official capacity as the Secretary of the U.S. Department of Homeland Security ("DHS"), filed a short opposition totaling only about 5 pages in argument that does not challenge the joinder of new plaintiffs or contest the proposed amended complaint on any ground other than futility.

Accordingly, this reply by AAPS rebuts the government's assertion of futility.

Background

Defendant Mayorkas correctly states the procedural background for AAPS's initial claim against him that was previously dismissed by this court, but then inadequately describes the ruling by the Fifth Circuit. This Court of Appeals expressly held that "[t]he District Court should have given AAPS a chance to amend." *Ass'n of Am. Physicians & Surgeons Educ. Found. v. Am. Bd. of Internal Med.*, 103 F.4th 383, 395 (5th Cir. 2024). In light of this clear ruling by the Court of Appeals, this pending motion by AAPS for leave to amend should be granted.

Defendant Mayorkas correctly states the legal standard:

[L]eave to amend is to be granted liberally unless the movant has acted in bad faith

> or with a dilatory motive, granting the motion would cause prejudice, or amendment would be futile.

Jebaco Inc. v. Harrah's Operating Co. Inc., 587 F.3d 315, 322 (5th Cir. 2009) (quoted by Gov't Resp. 4) But then the government devotes barely one page to applying only the futility prong of that test, without ever quoting anything in the proposed Amended Complaint itself. (Gov't Resp. 5) "If leave to amend is granted, Defendant Mayorkas will likely file another motion to dismiss under Rule 12," government declares. (Gov't Resp. 5)

The burden of proof on showing futility is on the non-movant Defendant Mayorkas, which he fails to satisfy in his thin submission. *See, e.g.*, *Grant Twp. v. Bd. of Cty. Comm'rs of the Cty. of Douglas Cty.*, No. 24-2306-JAR-RES, 2024 U.S. Dist. LEXIS 150853, at *4 (D. Kan. Aug. 22, 2024) ("The party opposing a motion to amend on futility grounds bears the burden to establish the futility of the amendment."); *Coniglio v. Cucuzza*, 345 F.R.D. 372, 377 (E.D.N.Y. 2024) ("[I]t is well-established in the Second Circuit that the burden of proving futility rests on the party opposing the amendment.") (cleaned up, inner quotation marks omitted).

AAPS has significantly strengthened its two claims against Defendant Mayorkas in the proposed Amended Complaint, such that both assert valid causes of action against him: for infringement of the First Amendment (Count I) and for violation of the Federal Advisory Committee Act (FACA) (Count II).

FACA Claim (Count II)

The FACA claim is addressed first here because it is particularly clear-cut: Defendant Mayorkas violated FACA (i) during the tenure of the Disinformation

Governance Board (DGB), (ii) in how he disbanded it, and (iii) in the continuing lack of balance on the Homeland Security Advisory Council (HSAC). FACA requires transparency and balance in federal advisory committees, which HSAC and its subcommittee that recommended disbanding the DGB were because they directly advised the Secretary. The government expressly acknowledged that HSAC is subject to FACA (Am. Compl. ¶ 85), and its Subcommittee for Disinformation Best Practices and Safeguards ("HSAC Disinformation Subcommittee") was also subject to FACA due to its advising Secretary Mayorkas concerning disbanding the DGB. "'If a subcommittee makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee, then the subcommittee's meetings must be conducted in accordance with all openness requirements'" of FACA. *Elec. Privacy Info. Ctr. v. Drone Advisory Comm.*, 995 F.3d 993, 999 (2021) (quoting 41 C.F.R. § 102-3.145, bracketing removed). AAPS expressly alleges that the HSAC Disinformation Subcommittee provided such advice "to a Federal officer or agency," namely Secretary Mayorkas, and thus FACA fully applies to it. (Am. Comp. ¶¶ 170-71)

FACA requires transparency and balance by HSAC and its Disinformation Subcommittee, about which AAPS asserts a valid cause of action to attain compliance:

> the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. app. 2 § 10(b) (Am. Compl. ¶ 173).

As to the FACA requirement of balance, new allegations in the proposed Amended Complaint, which are unaddressed by the government's opposition, include the following:

> 86. In what is known as its "fair balance provision," FACA requires that "the membership of [any] advisory committee … be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." 5 U.S.C. app. 2 § 5(b)(2). See *Cargill, Inc. v. United States*, 173 F.3d 323, 334 (5th Cir. 1999) (holding that this FACA requirement of fair balance is justiciable).
>
> 87. There are currently 32 members of the HSAC, none of whom represents a pro-First Amendment point-of-view that stands against government-induced censorship. For example, there no members of HSAC who represent the media, alternative media, religious organizations, social media influencers, bloggers, vocal supporters of Elon Musk or Robert F. Kennedy, Jr., or other advocates of freedom of speech without government censorship.
>
> 88. Similarly, among HSAC's current 32-person membership there is not a single member who is an identifiable political conservative, critic of overreach by the federal government, vocal supporter of Donald Trump, or advocate for less government.
>
> 89. Geographically, the Southern and Midwestern regions of the United States are severely underrepresented on the 32-person membership of HSAC, while instead most of the current members have ongoing, substantial connections with Washington, D.C.
>
> 90. The HSAC is predominantly comprised of former government officials, corporate executives, current or former partners of large law firms, political liberals, and others who have no meaningful background in the First Amendment right of freedom of speech, or advocacy of this right.

(Am. Comp. ¶¶ 86-90) These compelling allegations of a violation of the balance requirement by FACA are not futile, and thus should be allowed by granting AAPS's motion for leave to amend.

The HSAC is active and ongoing today and into the future, yet its membership violates FACA's balance requirement. A notion advanced by Judge Silberman of the D.C. Circuit that courts should not adjudicate balance on FACA committees has been soundly rejected by a majority of the D.C. Circuit, by the Fifth Circuit, and by many other federal

courts. As the Fifth Circuit held:

> We conclude that FACA's requirements that advisory committees be fairly balanced and adequately staffed are justiciable. Relying primarily on Judge Silberman's concurring opinion, NIOSH fails to note that the other two judges *disagreed* with Judge Silberman and found the statutory provisions to be justiciable.
>
> Another panel of that circuit has concluded that the words chosen by Congress in § 5 of FACA were intended to be enforced by the courts. In *National Anti-Hunger Coalition v. Executive Committee,* 229 U.S. App. D.C. 143, 711 F.2d 1071 (D.C. Cir. 1983), the court explained that courts may enforce FACA's "point-of-view balance" requirement ….

Cargill, Inc. v. United States, 173 F.3d 323, 334-35 (5th Cir. 1999) (emphasis in original, cited at Am. Compl. ¶ 86). No one expects a reviewing court to micromanage the precise membership of a FACA committee, but FACA committees that completely lack representation of significant points-of-view – such as First Amendment rights – should be declared in violation of FACA and ordered to come into compliance with FACA's balance requirement. Such is the case here with respect to Defendant Mayorkas's HSAC.

Defendant Mayorkas does not deny – nor could he plausibly deny – that his department continues to engage in efforts against disinformation. Indeed, earlier in this same case this Court described such efforts by the federal government as a "long-standing practice of countering disinformation." (Dkt. 43 at 10-11) HSAC is required by FACA to have balance as it continues to oversee these efforts. No court has held that HSAC is in compliance with FACA, and Defendant Mayorkas does not cite to any changes made to HSAC in response to this lawsuit. Yet Defendant Mayorkas argues that, while citing sweepingly to 30 paragraphs of the proposed Amended Complaint (¶¶ 79–107), that there are "no new forward-looking allegations or description of ongoing harm that would suggest

a different outcome under the voluntary-cessation exception to mootness. The Court already considered and rejected Plaintiff's FACA claim, which has not changed substantively." (Gov't Resp. 5) To the contrary, the above-quoted paragraphs of the Amended Complaint are new, and they provide details of the ongoing, undeniable violation of FACA balance by Defendant Mayorkas.

As to the HSAC Disinformation Subcommittee, it has violated the FACA requirements of both transparency and balance. Defendant Mayorkas may argue that this Subcommittee is not subject to FACA, but this Subcommittee did make recommendations directly to Secretary Mayorkas thereby triggering FACA as expressly set forth in the Amended Complaint. (Am. Compl. ¶ 105 – "***the Subcommittee directly advised the Secretary of DHS, Mayorkas***") (emphasis in original) Even if the HSAC Disinformation Subcommittee has disbanded – and AAPS has no confirmation of that – the Subcommittee's prior violations of FACA should still be remedied by this Court by ordering release of its drafts and other records. 5 U.S.C. app. 2 § 10(b) (Am. Compl. ¶ 173).

First Amendment Claim (Count I)

Defendant Mayorkas's opposition to AAPS's amended First Amendment claim is grounded in the termination of the Disinformation Governance Board. (Gov't Resp. 4-5) AAPS's amended First Amendment claim (Count I) is no longer based on the DGB, but on the ongoing efforts by the government against the exercise of First Amendment rights, which the government has not denied doing with its public statements or its briefing here. AAPS quotes the government in its proposed Amended Complaint:

104. In disbanding the DGB, Defendant Mayorkas adopted the position "that there

> is no need for a ***separate*** Disinformation Governance Board. But it is our assessment that the underlying work of Department components on this issue is critical." *Subcommittee Final Report* at 12 (emphasis added).

(Am. Compl. ¶ 104, emphasis in original) Thus by the government's own admission, its disbanding of a separate Disinformation Governance Board did not end the government's efforts against what it calls disinformation, which is a type of viewpoint discrimination against the exercise of First Amendment rights.

Further allegations in the Amended Complaint reinforce the ongoing efforts by DHS against the exercise of First Amendment rights:

> 107. The censorship work planned for the DGB did not cease but has simply continued in a dispersed manner among employees of DHS and other federal agencies. …
>
> 148. Defendants have been misusing their power and authority to discriminate based on viewpoint, and thereby cause a chilling effect on freedom of speech. …
>
> 153. Defendants have never carved out clearly protected speech, such as criticism of public figures or legitimate debate in the public interest, and have not refrained from retaliating against or censoring that speech.
>
> 154. By their foregoing actions, Defendants cause injury to Plaintiff AAPS in the form of a decrease in attendance at its conferences and in donations to it.

(Am. Compl. ¶¶ 107, 148, 153-54)

One of the most often quoted verses of Shakespeare by the Fifth Circuit and many other federal courts is particularly apt here:

> What's in a name? That which we call a rose
> By any other name would smell as sweet.

William Shakespeare, Romeo and Juliet, act II, sc. 2, lines 890-91 (quoted by, *inter alia*, *E.E.O.C. v. Boeing Servs. Int'l*, 968 F.2d 549, 556 n.7 (5th Cir. 1992) ("We pause briefly

to note that if the issue was before us, we would not hold that a cat was a dog simply because a defendant called the cat a dog.") and by *SR Constr., Inc. v. Hall Palm Springs, L.L.C. (In re Palm Springs II, L.L.C.)*, 65 F.4th 752, 763 n.36 (5th Cir. 2023).

It was only after AAPS sued here that the government disbanded its Disinformation Governance Board. It is thus procedurally proper for AAPS to propose an Amended Complaint in which AAPS does not challenge that DGB itself (because it no longer exists), but does challenge the government's work against disinformation that continues by its own admission. There is a valid cause of action for challenging viewpoint-discrimination by government of speech on the internet and elsewhere. This Court previously rejected similar allegations because they were "not properly before the court – AAPS did not bring them in its compliant, instead raising them for the first time in response to Mayorkas's motion to dismiss. Accordingly, the court will not consider these new allegations now." (Dkt. 43 at 11, citations and inner quotations omitted) These allegations are properly before the Court now, and should be allowed by granting the motion for leave to amend.

The Amended Complaint further includes additional facts that the original Complaint did not, and could not, contain. Meta Platforms (formerly Facebook) CEO Mark Zuckerberg remarkably admitted in his letter to Congress dated August 26, 2024, that the government "repeatedly pressured our teams for months to censor certain COVID-19 content, including humor and satire. … I believe the government pressure was wrong, and I regret that we were not more outspoken about it." (Am. Compl. ¶ 7)

Defendant Mayorkas's "DHS is the federal agency taking the greatest responsibility in government over combating so-called misinformation and disinformation on the internet

and elsewhere," and its Homeland Security Advisory Council (HSAC) is "the primary advisory committee to the federal government on censorship issues." (Am. Compl. ¶¶ 79-80; *see also id.* ¶ 80 n.24 – White House press secretary responded to a question about government censorship with: "This is a Department of Homeland Security [matter] that I would refer you to.").

Defendant Mayorkas is free to argue against these allegations in his planned motion to dismiss the Amended Complaint, if the pending motion for leave to file it is granted. Defendant Mayorkas suggests in a footnote that he will rely on the recent U.S. Supreme Court decision in *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), for the proposition that there is "no standing in suit against government over social media restrictions." (Gov't Resp. 5 n.2) But that is an overreading of the standing defects in *Murthy* where, for example, one plaintiff was unfortunately suing over a social media posting not by himself, but by his brother. *See id.* at 1990 ("It is unclear why Jim Hoft would have standing to sue for his brother's injury."). No such standing defects present here, where in addition to the censorship of Plaintiff AAPS on the internet, "Defendants' conduct as alleged herein has infringed on the First Amendment's protection of freedom of speech by the Individual Plaintiffs such that they have been professionally harmed and lost opportunities, for which they seek monetary compensation." (Am. Comp. ¶ 165) The government does not object to adding the Individual Plaintiffs, who plainly have standing.

CONCLUSION

For the foregoing reasons and those set forth in its initial Motion, Plaintiff AAPS requests that the Court grant its motion, and order the filing of its Amended Complaint.

Dated: November 19, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document uses size 13 Times New Roman font, and that its length, other than its cover page, is 10 pages long.

Dated: November 19, 2024

/s/ Andrew L Schlafly
Andrew L. Schlafly

CERTIFICATE OF SERVICE

I hereby certify that on this day of November 19, 2024, I caused service of all the parties, though their counsel of record, of the foregoing document through operation of the Court's CM/ECF system.

/s/ Andrew L. Schlafly
Andrew L. Schlafly