Case No. 23-40423

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Association of American Physicians and Surgeons Educational Foundation, AAPS,

Plaintiff - Appellant

v.

American Board of Internal Medicine, ABIM; American Board of Obstetrics & Gynecology, ABOG; American Board of Family Medicine, ABFM; Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security,

Defendants - Appellees

Appeal from the U.S. District Court for the
Southern District of Texas, Galveston Division (No. 3:22-CV-240)

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Statutes and Rules

Government Statements and Postings on Its Websites

Other Authorities

Plaintiff Association of American Physicians and Surgeons Educational Foundation ("AAPS"), as a co-sponsor of medical conferences and publisher of educational materials on the internet, submits its brief in reply to Defendants American Board of Internal Medicine ("ABIM"), American Board of Obstetrics & Gynecology ("ABOG"), and American Board of Family Medicine ("ABFM", collectively, the "Board Defendants") and Defendant Alejandro Mayorkas, as the Secretary of the U.S. Department of Homeland Security (the "government").

SUMMARY OF REPLY ARGUMENT

Censorship of speech on matters of public policy strikes at the core of self-governance, and denying judicial review of this censorship is contrary to precedents. Yet the closing of the courthouse doors below to this challenge to censorship is what Defendants argue for here on appeal. The Board Defendants, which certify competency based primarily on multiple choice exams, and the government abuse their power by censoring physicians. Judicial remedies against this must exist for those denied their constitutional right to hear, including AAPS.

This Court's recent ruling in *Missouri v. Biden*, and the long line of "right to hear" precedents by this and the Supreme Court, preclude the arguments asserted by the Board Defendants in their response brief. They admit that the lower court "observed" that this Circuit has not recognized a "right to hear" – when in fact this Circuit has recognized this fundamental right many times – and then the Board

Defendants applaud the district court for relying on a Third Circuit case instead. (Bd. Defs. Br. 16-17, citing *Pa. Fam. Inst., Inc. v. Black*, 489 F.3d 156, 165-69 (3d Cir. 2007)) But this and a few other extra-territorial authorities cited by the Board Defendants are not an obstacle to AAPS, which has a constitutional right to hear as this Court recently held the States have in *Missouri v. Biden*, cited *infra.*

The Board Defendants err further in arguing that there is no cause of action against their abuse of monopoly power. Under the reasoning by the Board Defendants, any monopoly could censor with impunity anyone dependent on it, for making statements about matters of public policy that those in control of or allied with the monopoly may dislike. Under their mistaken view of the law, any certifying monopoly is free to decertify anyone for advocating for pro-life laws or even publicly endorsing Donald Trump. Instead, both the First Amendment and Section 2 of the Sherman Act support accountability in court for the Board Defendants' wanton interference with freedom of speech.

As to the government, it is not entitled to dismissal of this lawsuit based on its unproven assertions of voluntarily ceasing its challenged conduct. The government asserts that it disbanded the Disinformation Governance Board (DGB) during this litigation, but its own documentation shows that it merely dispersed its censorship campaign rather than truly ending it. (Opening Br. 43-44) As to the Federal Advisory Committee Act (FACA), the government makes factual

assertions here that were never reached or adopted by the court below, such as claiming that Defendant Mayorkas adopted the discontinuation recommendation from the Homeland Security Advisory Council (HSAC) rather than directly from its Disinformation Best Practices and Safeguards Subcommittee. A remand is necessary to sort through the government's factual assertions unaddressed below.

Many of the issues raised by Defendants here could be resolved by a routine amendment by AAPS of the Complaint below, but Galveston Division Civil Local Rule 6 improperly precluded that despite the applicable Federal Rule of Civil Procedure allowing it. This improper Civil Local Rule should be invalidated by this Court because it is contrary to what Congress approved in the Federal Rules.

Finally, the government is correct that the dismissals for lack of subject matter jurisdiction below should have been "without prejudice," not "with prejudice," as based on a lack of subject matter jurisdiction.

REPLY ARGUMENT

I. Standard of Review.

AAPS concurs with Defendants' statement of the *de novo* standard of review, except that both the government and the Board Defendants fail to acknowledge that review on appeal of a local rule of a district court is also *de novo*, as AAPS stated in its opening brief. There should not be any deference here to the legality or illegality of a district court local rule, which is at issue here.

II. *Missouri v. Biden* and additional "Right to Hear" Precedents Preclude the Board Defendants' Argument Against Standing.

The primary argument here by the Board Defendants is that "AAPS cannot establish standing based on purported retaliation against speech that is not its own." (Bd. Defs. Br. 14) That is incorrect. The right to hear has been repeatedly recognized by this Court and the U.S. Supreme Court.

This Court held in a recent high-profile decision – on which the Board Defendants rely for a different purpose – that standing exists for a listener who is prevented by censorship from hearing something:

> The Government does not dispute that the State Plaintiffs have a crucial interest in listening to their citizens. Indeed, the CDC's own witness explained that if content were censored and removed from social-media platforms, government communicators would not "have the full picture" of what their citizens' true concerns are. So, when the federal government coerces or substantially encourages third parties to censor certain viewpoints, it hampers the states' right to hear their constituents and, in turn, reduces their ability to respond to the concerns of their constituents. ***This injury, too, means the states likely have standing***. *See Va. State Bd. of Pharm.*, 425 U.S. at 757.

Missouri v. Biden, 83 F.4th 350, 373 (5th Cir. 2023) (emphasis added), *stayed and cert. granted sub nom. Murthy v. Missouri*, 2023 U.S. LEXIS 4210 (Oct. 20, 2023). The above-cited Supreme Court authority held likewise:

> the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In Lamont v. Postmaster General, 381 U.S. 301 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972), we acknowledged that this Court has referred to a First

> Amendment right to "receive information and ideas," and that freedom of speech "'necessarily protects the right to receive.'" And in Procunier v. Martinez, 416 U.S. 396, 408-409 (1974), where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (omitting a half-dozen additional precedents).

The Board Defendants insist that "[b]ecause it did not identify a specific willing speaker, AAPS's general invocation of its right to hear or listen cannot support standing." (Bd. Defs. Br. 17) But there is not, and should not be, any requirement to identify, in the initial pleading, a specific speaker against whom the Board Defendants could then retaliate. Their campaign of censorship was in response to outspokenness by physicians. (Bd. Defs. Br. 6) Implicit in that is the existence of willing speakers whom the Board Defendants sought to punish.

The standing threshold for First Amendment cases like this is not set so high that an initial pleading must identify an individual willing speaker in order to challenge censorship. As a sponsor of medical conferences welcoming controversial presentations, AAPS is analogous to the position of the states in *Missouri v. Biden*, for which this Court found standing.

The Board Defendants rely heavily on a Third Circuit decision in 2007 which, unlike here, was rendered on appeal after a two-day bench trial. *Pa. Family Inst., Inc. v. Black*, 489 F.3d 156 (3d Cir. 2007) (cited by Bd. Defs. Br. 16, 17, 18) That decision upheld a dismissal of a challenge to election-related provisions in the Pennsylvania Code of Judicial Conduct, in a lawsuit brought by an organization not subject to the ethical rules. *See id.* at 162. That unusual case distinguished other decisions finding standing, because "[u]nlike the organizations in those cases, [plaintiff] PFI has not offered one affirmative, self-generated statement from any sitting judge or candidate that cites to or even mentions Pennsylvania's Canons and Rules." *Id.* at 168. That stands in sharp contrast with this case, where it is obvious that there are willing speakers whom the challenged censorship attempts to silence.

Indeed, the very same Third Circuit decision on which the Board Defendants rely cites multiple precedents in the Third Circuit and elsewhere establishing standing by a listener of speech affected by censorship. *See, e.g., United States v. Wecht*, 484 F.3d 194, 203 (3d Cir. 2007) ("To the extent that an occasion arises in the future where defense counsel desires to make public statements about the case, we believe the media and public have a legitimate interest in those comments not being inhibited by overly restrictive limitations.").

The Board Defendants misplace reliance on a Fifth Circuit decision that required evidence of a willing speaker ***at trial***, not in the pleadings. *See Basiardanes v. Galveston*, 682 F.2d 1203, 1211 n.5 (5th Cir. 1982) ("Only two witnesses in the theater business testified at trial. Neither expressed an intent to open a new theater."). And a decision by the Seventh Circuit, on which the Board Defendants rely here, does not help them at all. *See Ind. Right to Life, Inc. v. Shepard*, 507 F.3d 545, 549 (7th Cir. 2007) ("If there is no willing speaker, ***or if no speaker has been subjected to sanctions based on the Code***, Right to Life does not have standing.") (emphasis added). Board Defendants ABIM and ABFM have already sanctioned physicians based on their statements on matters of public policy, thereby comporting with the *Ind. Right to Life* precedent. Moreover, AAPS provided below the example of retaliation by Board Defendant ABIM against Dr. Peter McCullough, a renowned Texas physician, whom ABIM acknowledges in its response. "AAPS 'allege[d] only that Dr. McCullough spoke at an AAPS conference and ***has been targeted [by the Board Defendants]***.'" (Bd. Defs. Br. 17 n.2, quoting ROA.414, emphasis added). This suffices at this preliminary stage.

It would be unjust to early require identification, in the pleading, of a specific "willing speaker" in a lawsuit challenging retaliation against speakers, as that would expose them to more retaliation contrary to the very purpose of the lawsuit. Nothing in the Federal Rules requires that heightened particularity in

pleading an infringement on First Amendment rights, and nothing in the mostly extra-jurisdictional, post-trial rulings cited by the Board Defendants requires this to be in the pleading either.

III. The Board Defendants' Conduct Constitutes State Action.

Although not reached below and better-suited for resolution on a remand, the conduct by the Board Defendants constitutes state action and thus triggers application of the First Amendment. The Board Defendants cannot and do not dispute the central fact of "board certification being necessary for a physician to practice fully in his specialty" and that this fact "is widely recognized." (Opening Br. 34, citing ROA.11, ¶ 8; ROA.28, ¶ 81; ROA.31, ¶ 108) The practice of medicine is highly regulated and the control exercised by the Board Defendants over this activity qualifies as state action.

Yet the Board Defendants persist in pretending here to be purely private actors who can retaliate against physicians for speaking out on issues of public policy. To avoid any potential affirmance on this ground, AAPS rebuts the Board Defendants' extensive arguments on this point. (Bd. Defs. Br. 23-31)

Under both the public functions and state coercion tests, as summarized by the Board Defendants in their brief (Bd. Defs. Br. 24), their conduct qualifies as state action. News reporters recognize and refer to board certifying entities as "regulators", because they *de facto* are. (*Id.* 26) The Board Defendants do not

deny, nor could they, that physicians cannot typically practice in hospitals or enroll in insurance networks without the certification that the Board Defendants control, and which they revoke based on outspokenness about public policy. By deciding which physicians may practice medicine in hospitals or receive insurance reimbursements, the Board Defendants "perform[] a function which [was] exclusively reserved to the state." (*Id.* 24, quoting *Richard v. Hoechst Celanese Chem. Grp.*, 355 F.3d 345, 352 (5th Cir. 2003), cleaned up)).

Here the Board Defendants rely entirely on extra-jurisdictional decisions, and even several unpublished ones, for the outdated proposition that board certification is not tantamount to state action. (Bd. Defs. Br. 25-26) Those decisions are not controlling here, and do not purport to address how medicine is practiced today in most medical specialties. The Board Defendants unpersuasively attempt to distinguish the *Netchoice v. Paxton* decision by this Court, without addressing its reasoning, which is against Board Defendants' position here:

> Today we reject the idea that corporations have a freewheeling First Amendment right to censor what people say.

Netchoice, L.L.C. v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022), *stay vacated*, 142 S. Ct. 1715 (2022), *cert. granted*, 216 L. Ed. 2d 1313 (U.S. 2023).

The Board Defendants further engage in state action under the state coercion test, because there has been "significant encouragement" by the Federation of State Medical Boards (FSMB) and the Biden Administration to censor speech. In

response, the Board Defendants again rely on yet another non-precedential decision,[1] to argue that more than state encouragement is needed to become state action. (Bd. Defs. Br. 28-29) AAPS was never allowed to get to discovery below to uncover the full extent of the government involvement, but documents recently obtained by the U.S. House of Representatives Judiciary Committee reveals far more than minimal encouragement by the government to obtain censorship of speech on medical issues. *See* Point V, *infra.*

IV. The Board Defendants Abuse Their Monopoly Power and AAPS Properly Alleged an Antitrust Claim.

Notably absent from the response by the Board Defendants as to their abuse of monopoly power is any meaningful rebuttal of the point made by Judge James Ho, as cited in AAPS's opening brief, decrying the misuse of corporate power to impede our democratic process. *See Sambrano v. United Airlines, Inc*., 45 F.4th 877, 883 (5th Cir. 2022) (Ho, J., concurring in the denial of rehearing en banc) ("America was founded on the idea that we make our most important value judgments through our democratic process …. Debates about our social values belong in the civic sphere, not in the corner offices of corporate America.")

[1] Throughout their brief, the Board Defendants rely on an astounding quantity of unpublished decisions. The Local Rule of this Court states, "Unpublished opinions issued on or after January 1, 1996, are not precedent, except under" limited circumstances not present here. 5th Cir. R. 47.5.4. The heavy reliance by the district court on an unpublished post-1996 decision and by the Board Defendants on appeal here on unpublished post-1996 decisions undermines their reasoning. The precedential decisions of this Court are what should matter.

(quoting Vivek Ramaswamy, "Woke, Inc.: Inside Corporate America's Social Justice Scam" 18-19 (2021)).

While the censorship challenged in this case is not identical to the injustice presented in *Sambrano*, the problem of devious misuse of corporate power is, and legal remedies should not be denied for addressing it.[2] Unprecedented abuse of monopoly power, in ways that interfere with our democratic process, requires new precedent to review its harmful effect in court. The Sherman Act should apply to a novel misuse of monopoly power. A precisely controlling precedent should not be expected for a devious type of censorship that is unprecedented.

Analogous authority does exist, as held in the judicial breakup of AT&T:

> A number of persons have argued that because of potential dangers to competition and to First Amendment values, AT&T should be prohibited from engaging in [electronic publishing]. For the reasons stated below, the Court agrees.

United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 181 (1982). As that court explained further:

> The goal of the First Amendment is to achieve "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945). See also *FCC v. National Citizens Committee for*

[2] As alleged by AAPS, "The Board Defendants' foregoing conduct constitutes the willful maintenance of their monopoly power by chilling freedom of speech in order to advance a political agenda preferred by the political party in control of Congress and the Executive Branch of the federal government, and thereby gain favors from federal officials to perpetuate this monopoly power by the Board Defendants." (Complaint ¶ 114, ROA.32)

> *Broadcasting*, 436 U.S. 775, 795, 56 L. Ed. 2d 697, 98 S. Ct. 2096 (1978). This interest in diversity has been recognized time and again by various courts. In *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969), for example, the Supreme Court observed that
>
> > it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market.

United States v. Am. Tel. & Tel. Co., 552 F. Supp. at 183.

Other courts have likewise applied antitrust law against censorship. Relying on appellate authority, a federal court in Illinois held that "the allegation that the public has been and will continue to be deprived of seeing the motion picture 'Salt of the Earth' by the arbitrary censorship of the defendants, is sufficient to show an injury to the public." *I. P. C. Distribs., Inc. v. Chi. Moving Picture Mach. Operators Union, etc.*, 132 F. Supp. 294, 298 (N.D. Ill. 1955) (citing *William Goldman Theaters v. Loews, Inc.*, 150 F.2d 738 (3d Cir. 1945)). The Seventh Circuit has cautioned that the "doctrine of standing is a complex web, and all the parts of it must be satisfied; but attention to the details of the doctrine does not require us to give up our common sense. 'The constitutional standing requirement [cannot be made] a mechanical exercise.'" *Palmer v. City of Chicago*, 755 F.2d 560, 580 (7th Cir. 1985) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). *See also* Gregory Day, "Monopolizing Free Speech," 88 Fordham L. Rev. 1315, 1248 n.232 (2020) ("The Third, Fifth, Ninth, Tenth, and Eleventh Circuits state that

antitrust law may remedy diminished innovation, quality of goods, and perhaps similar nonprice injuries.").

Despite their long-winded argument on this issue (Bd. Defs. Br. 31-43), the Board Defendants never address the big picture of misusing monopoly power to impede the democratic process. A handful of people today control powerful private monopolies, from the Board Defendants to the NFL. Defendants ABIM and ABOG are apparently run by a small group of people who advocate for one side of the abortion issue. When they or any other monopoly threatens retaliation against people for speaking out on issues of public policy, that becomes a pernicious form of censorship for which accountability in court must be available. And judicial review must be available not only for competitors and consumers, but also for those who want to hear unfettered speech by physicians on fundamental issues.

V. At This Pleading Stage, There Is Sufficient Traceability and Redressability.

There is nothing merely "conjectural or hypothetical" about AAPS's alleged injuries from the censorship of speech by the Board Defendants. (Bd. Defs. Br. 22, quoting *Little v. KPMG LLP*, 575 F.3d 533, 540-41 (5th Cir. 2009)). AAPS sponsors medical conferences and posts information on the internet that is contrary to the positions held by those who control the Board Defendants. A sponsor of medical conferences featuring controversial presentations by physicians is plainly a victim of censorship of those same physicians, with real injury to AAPS.

This decision in *Little v. KPMG*, on which the Board Defendants rely, did not involve any censorship and was an unusual class action claim by accountants against a large accounting firm that allegedly "misrepresented the nature of its public-accountancy services and overcharged for them unlawfully." 575 F.3d at 535. The Board Defendants' response brief should have addressed this Court's leading precedents on the relaxed test for standing when the issue is censorship, as it is here. "[S]tanding rules are relaxed for First Amendment cases so that citizens whose speech might otherwise be chilled by fear of sanction can prospectively seek relief." *Nat'l Press Photographers Ass'n v. McCraw*, 84 F.4th 632, 644 (5th Cir. 2023) (inner quotations omitted); *Justice v. Hosemann*, 771 F.3d 285, 294 (5th Cir. 2014) ("Recall that standing rules are relaxed for First Amendment cases …."); *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) ("we relax the requirements of standing and ripeness to avoid the chilling of protected speech"). "It is not hard to sustain standing for a pre-enforcement challenge in the highly sensitive area of public regulations governing bedrock political speech." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 331 (5th Cir. 2020).

The Board Defendants fail to mention, let alone distinguish, the oft-cited precedents establishing standing in First Amendment cases as cited by AAPS in its opening brief. *See Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 660 (5th Cir. 2010); *Vitagliano v. Cty. of Westchester*, 71 F.4th 130, 140 & n.5 (2d Cir.

2023) (adhering to this Court's *Speech First* precedent); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (finding standing for a plaintiff compelled to alter political behavior); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (Posner, J.) (whenever something "deter[s] constitutionally protected expression ..., there is standing"). (cited by the Opening Br. 27)

Instead, the Board Defendants rely heavily on *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance*, 123 F.3d 301 (5th Cir. 1997), for their argument that plaintiffs have not properly defined a relevant product market. But that was not a misuse of monopoly power to impose censorship against political speech, as presented here. Moreover, that case was on appeal from a grant of summary judgment, after plaintiffs had been afforded the full opportunity develop a factual record to support their allegations. In that case the Fifth Circuit reversed the holding by the district court that there was a lack of standing by plaintiffs, which is the issue here on appeal.

Though relied on by the Board Defendants, the *Doctor's Hospital* precedent by this Court supports AAPS on this appeal:

> [S]tanding should not become the tail wagging the dog in "classical" antitrust cases such as this one by an allegedly excluded competitor. …
>
> The district court erred in holding that injury to competition in the market was a prerequisite of [plaintiff's] antitrust injury and in denying standing rather than addressing the claims' merits for summary judgment purposes.

Doctor's Hospital, 123 F.3d at 306-07.

The other decisions relied upon by the Board Defendants, none of which relates to censorship by a monopolist that is at issue here, are likewise unhelpful to them. *See Norris v. Hearst Tr.*, 500 F.3d 454, 466 (5th Cir. 2007) (unlike here, "Plaintiffs contend that they have sustained antitrust injury because they were terminated due to their refusal to participate in the antitrust violations. We have rejected that approach."). In *Walker Process Equip. v. Food Mach. & Chem. Corp.*, the U.S. Supreme Court reversed the dismissal of a Sherman Act Section 2 claim against a firm that allegedly procured a patent by fraud. 382 U.S. 172, 177 (1965). While a patent case is far afield from the abuse of monopoly power to censor, which is at issue here, the reversal by the Supreme Court of the dismissal of the claim against abuse of monopoly power in *Walker Process* tends to support AAPS here. In *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, the issue was "monopolistic leveraging" and an alleged "attempt and conspiracy to monopolize," not the censorship at issue here. 309 F.3d 836, 839 (5th Cir. 2002) (inner quotations omitted). The Board Defendants also misplace reliance on *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, which was not even a Sherman Act Section 2 case. 615 F.3d 412, 417 (5th Cir. 2010).

The Board Defendants have a monopoly over certifying the competency of physicians based primarily on a multiple-choice exam. When the Board Defendants misuse and increase their monopoly power by censoring physicians for

speaking out on matters of public policy, then there is a valid cause of action against this censorship based on Section 2 of the Sherman Act.

VI. The Claim Against the Government Is Not Moot, the Improper Government Censorship Continues, and the FACA Claim Remains Viable.

AAPS has not obtained full relief on its claims against the government, whose own brief here admits that mootness occurs only if there is receipt of "the ***precise relief*** that [plaintiff] requested in the prayer for relief in [plaintiff's] complaint." (Gov't Br. 10, quoting *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (per curiam, emphasis added). The government also relies on *Amawi v. Paxton*, where this Court found that a case had become moot because a legislative amendment "provided the plaintiffs the ***very relief*** their lawsuit sought." 956 F.3d 816, 821 (5th Cir. 2020) (emphasis added, quoted by Gov't Br. 10).

AAPS's Complaint below sought, *inter alia*, "an injunction requiring Defendant Mayorkas to disband and ***permanently discontinue*** the Disinformation Governance Board." (Complaint p. 28, ROA.35, emphasis added) A few lines down AAPS further requests "an injunction requiring Defendant Mayorkas to comply fully with FACA in connection with all activities by HSAC and/or its members relating to the DGB, or abolishing DGB altogether by virtue of this violation of FACA." (*Id.*) This "precise relief" or "very relief" has not been

granted, and AAPS's claims against the government are not moot. The government has not permanently discontinued its DGB-type censorship efforts, and has not complied with FACA.

The government relies on its purported voluntary cessation of the challenged practice, but "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). "A defendant, without court compulsion, could legally return to its former ways." *K.P. v. LeBlanc*, 627 F.3d 115, 121 (5th Cir. 2010).

The government's assertions, found nowhere in any pleading, are that it has disbanded its DGB, but the reason it provided was that similar activities are ongoing in other ways through other government employees. Indeed, the government has recently gone to the U.S. Supreme Court to obtain an emergency stay of an order by this Court commanding it to stop censoring information on the internet. *See Murthy v. Biden*, cited *supra*. The government's conduct is ample evidence that it does not intend to voluntarily give up on its agenda of censorship.

The government itself quotes a Supreme Court authority that the burden is fully on a defendant to prove "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (quoted by Gov't Br.

11). Despite this general principle and the Biden Administration's pattern of censoring internet postings, the government seeks a presumption of good faith in order to establish mootness. (Gov't Br. 7, 12)

The U.S. Supreme Court has rejected a similar attempt by government officials to evade judicial review. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (rejecting a defense by government "officials with a track record of 'moving the goalposts' [who] retain authority to reinstate [the challenged] restrictions at any time"). Moreover, the disbanding of the DGB was based on its statement that the government continues to perform the same work in an ongoing basis in other ways. That is not a "voluntary cessation" of an unlawful activity that requires dismissal of litigation. It is akin to a wrongdoer voluntarily ceasing to commit a crime in one way because he found another, more efficient but unlawful way to pursue his same goals. Such a shift does not qualify for any presumption of good faith for the voluntary-cessation exception. This Court can take judicial notice of a report by FOX Business just two weeks ago:

> The documents, acquired through a source close to the House Judiciary Committee, reveal … [that a disinformation] campaign was led by former White House Director of Digital Strategy Rob Flaherty, who has since left the administration to help run Biden's 2024 re-election campaign as a Deputy Campaign Manager. …
>
> Google, in an internal email, noted that after a subsequent meeting with Flaherty, the White House staffer "particularly dug in on our decision making for borderline content" — which is content that doesn't cross

> Community Guidelines but rather brushes up against it, according to YouTube. ...
>
> "Really [Flaherty's] interested in what we're seeing that is NOT coming down," read an internal Google email between employees, seemingly referring to videos that had not yet been removed.

Chase Williams, "White House worked with YouTube to censor COVID-19 & vaccine 'misinformation': House Judiciary Committee" *FOX Business* (Nov. 30, 2023).

Finally, as to FACA, the government relies here on factual assertions never established below, and which are disputed by AAPS as implausible: "Because the [Homeland Security Advisory Council Disinformation Best Practices and Safeguards] Subcommittee advised the [Homeland Security Advisory] Council, which in turn advised the Secretary [Mayorkas], the FACA does not apply to the Subcommittee." (Gov't Br. 17) The citation by the government is to a vote by the HSAC that did not happen until 3:30pm on Aug. 24, 2022, at a meeting which Defendant Mayorkas did not attend, and the HSAC meeting minutes say that its recommendation would be sent to Defendant Mayorkas "in the coming days."[3] The press office for Defendant Mayorkas issued a public statement that same day declaring that he has disbanded the DGB, while thanking the Subcommittee and

[3] U.S. Dep't of Homeland Sec., *Homeland Security Advisory Council Meeting Minutes* 8 (Aug. 24, 2022), https://perma.cc/W7EM-NTZQ (cited by Gov't Br. 5).

the "prior recommendation" of HSAC,[4] which strongly implies that this decision was not based on a vote at an HSAC meeting late that same afternoon. FACA applies to the Subcommittee, requiring it to release its documents, if Defendant Mayorkas relied on its recommendation to disband DGB, as the timeline and the press release on behalf of Defendant Mayorkas strongly suggest. But rather than engage in appellate fact-finding, this Court should order a remand to allow discovery on this issue to determine if FACA applies to the Homeland Security Advisory Council Disinformation Best Practices and Safeguards Subcommittee, whereupon AAPS would have a successful claim for the government to comply with its FACA disclosure obligations. (Complaint ¶ 127, ROA.33-34)

VII. Galveston Civil Local Rule 6 Is Invalid.

None of the Defendants denies, nor could any of them, that the unusual Civil Local Rule 6 imposed by the district court in Galveston does, in fact, deprive parties of rights guaranteed to them by the Federal Rules of Civil Procedure to freely amend their pleadings. That deprivation alone is improper, as local rules should never take away any rights granted by the Federal Rules. *See* FED. R. CIV. P. 83(a) ("A local rule must be consistent with … federal statutes and rules ….");

Johnson v. United States, 460 F.3d 616, 620 & n.5 (5th Cir. 2006) ("[N]ot even

[4] Press Release, U.S. Dep't of Homeland Sec., *Following HSAC Recommendation, DHS Terminates Disinformation Governance Board* (Aug. 24, 2022), https://perma.cc/JM42-9PN7 (cited by Gov't Br. 5).

local court rules can diminish rights afforded to parties by the rules ….") (collecting multiple precedents stating likewise).

Defendants do not dispute any of this. The government argues that AAPS did not seek to amend its Complaint "as a matter of course within the time prescribed by Civil Rule 15(a)(1)." (Gov't Br. 18) That is true, but not controlling here. AAPS sought to amend its Complaint not as a matter of right, but as freely allowed by FED. R. CIV. P. 15(a)(2), based on if and how the district court might find the Complaint to be deficient. The drafters of the Federal Rules of Civil Procedure, and of Congress in mandating them, require that leave to amend be freely granted, yet the Galveston local rule improperly deprives litigants that right. *See Ashland Chem. v. Barco Inc.*, 123 F.3d 261, 267 (5th Cir. 1997) ("Regardless of whether the CJRA allows deviation from the Federal Rules of Civil Procedure, there is no evidence that Congress intended it to authorize the creation of a substantive fee shifting provision such as the Local Rule.") While the Galveston rule has the effect of rapidly clearing the docket of the district court, it unnecessarily burdens the docket of this appellate court by preventing further development of civil cases below prior to an appeal to this Court.

The improper deprivation of rights by the Galveston local rule is starkly illustrated by this case, where AAPS had no way of knowing that the district court would require identification of a willing speaker in the pleading, before

recognizing a constitutional right to hear. Nothing in the notice pleading standard of the Federal Rules or the decisions by the Fifth Circuit requires so much particularity in a pleading that objects to censorship. It would be a trivial exercise for AAPS to amend its Complaint to provide the name of an invited speaker to one of its medical conferences who feels he cannot speak as freely as he or she would like because of the threat of retaliation by a Board Defendant.

Under the Federal Rules of Civil Procedure, AAPS, like any plaintiff who has not previously amended its complaint, would be freely granted leave to amend its pleading in response to a surprise requirement for the pleading imposed by the district court. This is what notice pleading allows in order to facilitate litigation in an efficient manner, without causing premature closure of a case followed by time-consuming appeals on an inadequate record. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

What the Board Defendants left out of their argument here (Bd. Defs. Br. 44) is that the Galveston rule precludes AAPS and every litigant in that court from correcting perceived deficiencies, such as a lack of particularity, based upon how the district court rules. When a district court surprisingly demands more

particularity in a pleading – despite the notice pleading standard established by the Federal Rules – then FED. R. CIV. P. 15 ensures that a party be freely granted the right to amend the pleading in order to address the deficiency. *See* FED. R. CIV. P. 15(a)(2) ("The court should freely give leave when justice so requires."). It is improper for the Galveston local rule to repeal this provision of the Federal Rules.

The Board Defendants argue further that any amendment would be futile (Bd. Defs. Br. 44), but AAPS remains ready and willing to identify in its pleading a willing speaker whose presentation would have been chilled by the Board Defendants' censorship.

The Board Defendants misplace reliance on three decisions by this court, one unpublished, which did not address the unique Galveston local rule. In *Scott v. United States Bank Nat'l Ass'n*, the court reversed a Rule 12(b)(6) dismissal by the district court, so its statement about leave to amend was at most dicta. 16 F.4th 1204, 1209, 1213 (5th Cir. 2021). Moreover, there was not a local rule in that case which precluded obtaining leave to amend under FED. R. CIV. P. 15(a)(2). In the unpublished decision of *Garrett v. Celanese Corp.*, this Court affirmed a denial of leave to amend because the plaintiff "never apprised the district court or this court of any facts that she would have added to her complaint that would have sufficiently stated a claim upon which relief could be granted." 102 F. App'x 387, 388 (5th Cir. 2004). Here, AAPS has always been able to identify willing speakers

who, in the absence of the censorship by the Board Defendants, would speak more candidly at AAPS conferences. AAPS did not expect a requirement of particularity as to inserting that in its pleading, which could subject those speakers to retaliation, and should not have been denied leave to amend to include them.

In *McKinney v. Irving Indep. Sch. Dist.*, the plaintiffs failed on appeal, "even at oral argument," to identify what their amendment to their complaint would be. 309 F.3d 308, 315 (5th Cir. 2002). Moreover, this Court found that those plaintiffs would not be able to allege a central element of their claim. In contrast, AAPS can identify willing speakers to comply with the requirement imposed by the district court that this be in the pleading. It was improper for the Galveston local rule to preclude that.

VIII. This Court Should Reverse the Dismissal "With Prejudice" Below, and Replace It as "Without Prejudice."

The dismissals below were based on a lack of Article III standing, and mootness. These are jurisdictional grounds. Accordingly, the dismissals below should have been "without prejudice," not "with prejudice." "Ordinarily, when a complaint is dismissed for lack of jurisdiction, including lack of standing, it should be without prejudice." *Denning v. Bond Pharmacy, Inc.*, 50 F.4th 445, 452 (5th Cir. 2022) (quoting *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 468 (5th Cir. 2020)). The government agrees in its brief here to correcting the dismissal below to be "without prejudice." (Gov't Br. 20 n.5)

Challenges to jurisdictional defects, of course, can be raised at any time, and federal courts should correct jurisdictional errors *sua sponte.* "It goes without saying courts are also obliged to raise jurisdictional defects 'sua sponte, if necessary.'" *Hinkley v. Envoy Air, Inc.*, 968 F.3d 544, 549 (5th Cir. 2020) (quoting *Smith v. Tex. Children's Hosp.*, 172 F.3d 923, 925 (5th Cir. 1999)). The dismissals below "with prejudice" should be corrected by this Court, or an order should issue here for the district court to replace them to be "without prejudice." *See Denning*, 50 F.4th at 452-53 ("We thus modify the district court's judgment dismissing [plaintiff's] claims with prejudice to make it ***without prejudice*** and affirm the judgment as modified.") (emphasis added).

CONCLUSION

This Court should reverse the dismissals below with respect to all the Defendants, and invalidate Galveston Civil Local Rule 6. In the event a full reversal is not ordered, all of the dismissals below should be reversed with respect to their entry "with prejudice," replacing it as "without prejudice."

Dated: December 14, 2023

Respectfully submitted,

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Dated: December 14, 2023

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