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

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS EDUCATIONAL FOUNDATION, PIERRE KORY, M.D., PAUL MARIK, M.D., and KARL N. HANSON, M.D.,	)	
Plaintiffs,	)	Case No. 3:22-cv-240
v.	)	
AMERICAN BOARD OF INTERNAL MEDICINE, AMERICAN BOARD OF OBSTETRICS & GYNECOLOGY, AMERICAN BOARD OF FAMILY MEDICINE, and KRISTI NOEM, in her official capacity as the Secretary of the U.S. Department of Homeland Security,	)	
Defendants.	)	

PLAINTIFFS ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS EDUCATIONAL FOUNDATION, PIERRE KORY AND PAUL MARIK'S OPPOSITION TO THE AMERICAN BOARD OF INTERNAL MEDICINE'S MOTION TO DISMISS

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Plaintiffs Association of American Physicians and Surgeons Educational Foundation ("AAPS"), Pierre Kory, M.D. ("Kory"), and Paul Marik, M.D. ("Marik") hereby file their Opposition to the Motion to Dismiss by the American Board of Internal Medicine ("ABIM") (Dkt. 71).

NATURE AND STAGE OF PROCEEDING

Defendant ABIM retaliated against distinguished physicians for speaking out on public policy, by revoking their board certifications essential to the practice of medicine. The ABIM board certifications are based primarily on the performance by a physician on a multiple choice examination as an indication of knowledge about internal medicine. This board certification is inserted into statutes, hospital admitting privileges, and insurance networks, and ABIM has extensively lobbied the Texas legislature for legal advantage. Without board certification by ABIM, a medical doctor specializing in internal medicine cannot typically pursue his professional career.

Defendant ABIM's revocation of these board certifications was not based on any lack of skill or knowledge by physicians. Instead, ABIM retaliated based on political views about how government should handle the COVID pandemic, and whether COVID patients should have access to certain treatments. Plaintiff Kory testified before the U.S. Senate Homeland Security Committee on December 8, 2020 – at the request of the Chairman of this Committee – and made statements disfavored by some government officials and others

who insisted on denying the benefits of ivermectin to treat COVID.[1] For that participation in the public debate by Kory and similar statements by Marik, ABIM revoked their board certifications. These unusual revocations were not based on qualifications but were disciplinary. ABIM then posted this revocation on its public website, having invited the world to see by announcing its intention to go after "misinformation doctors."

At issue on ABIM's motion to dismiss is whether Kory and co-Plaintiffs have a cause of action against ABIM for punishing their exercise of First Amendment rights, for ABIM's misuse of its monopoly over board certification and for its breach of contract and defamatory public statements. In addition to physicians who had their board certifications revoked, AAPS also has causes of action for the chilling effect on its conferences. ABIM's motion does not challenge Article III standing by any Plaintiff, or jurisdiction over ABIM.

Defendant ABIM's primary argument on its motion to dismiss is its assertion that it is not a state actor, and thus the First Amendment (Count I) and constitutional due process (Count VI) claims should not apply to it. (ABIM Mot. 7-12) But there are overwhelming facts demonstrating that ABIM has engaged in state action, and this complex issue is unsuitable for resolution on a motion to dismiss.

As to the Sherman Act claims, Plaintiffs plausibly allege an agreement, a relevant market, monopoly power by ABIM in a relevant market, exclusionary conduct, and antitrust injury. Plaintiffs Kory and Marik properly allege contractual violations by ABIM,

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[1] https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/Testimony-Kory-2020-12-08.pdf (viewed Mar. 20, 2025).

tortious interference, and defamation with malice in ABIM's public statements against them, which are not protected opinion, and none of which relies on the state actor determination. ABIM's motion to dismiss should be denied.

STATEMENT OF FACTS

This action is brought against ABIM by physicians, and a co-sponsor of medical conferences and publisher of educational materials on the internet, AAPS, concerning ABIM's unprecedented campaign to censor speech and retaliate against those who express disfavored views. (Dkt. 66, Am. Compl. ¶ 1) Using nearly identical terminology and timing, Defendants have acted in an apparently coordinated manner to attain their common objective of censorship based on viewpoint. (*Id.*) Plaintiffs Kory and Marik are eminent physicians whose board certifications have been revoked by ABIM. (*Id.*)

Defendants ABIM, ABOG and ABFM (the "Board Defendants") have certification monopolies in their respective specialties, certifications based primarily on written multiple-choice medical examinations. (*Id.* ¶ 2) Though ostensibly nonprofit and non-partisan, they were outspokenly allied with the Biden Administration on fundamental issues including opposition to ivermectin as early treatment for COVID, support of mandatory COVID masking, lockdowns, and vaccination. (*Id.*)

Beginning on or about May 26, 2022, ABIM sent threatening letters and ultimately revoked earned board certifications, including the certifications held by Plaintiffs Kory and Marik, based on their exercise of their First Amendment rights on matters of public policy. (*Id.* ¶¶ 3, 5) In at least one case, retaliation by ABIM was based on comments a physician made to a church congregation during a religious gathering. (*Id.* ¶ 4)

Although only official state medical boards have the proper authority to regulate the practice of medicine, certification by ABIM constitutes a *de facto* essential credential for practicing in most hospitals and participating in most networks. (*Id.* ¶ 6) By threatening to revoke board certification and publicly doing so, ABIM engaged in state action without political accountability and due process protections afforded by state medical boards. (*Id.*)

ABIM's actions have intentionally harmed Plaintiffs Kory and Marik by interfering with their ability to practice in hospitals and insurance networks. (*Id.* ¶ 10) In addition, ABIM has chilled their speech in violation of their constitutional rights. (*Id.*) ABIM sought to and did chill criticism of controversial government policies and acted in concert with state actors in retaliating against physicians for being opposed to certain policies (*Id.* ¶ 11), which also interferes with Plaintiff AAPS's ability to conduct conferences free from threat of disastrous consequences for its speakers. (*Id.* ¶¶ 24, 27)

State action. The Amended Complaint explains that the practice of medicine is a highly regulated field and governments have delegated state functions to ABIM, which is exclusively a governmental function. (Dkt. 66, Am. Compl. ¶¶ 58-59).

Texas law permits a medical doctor to publicize that he is board certified only if he holds board certification from the ABIM, ABFM, ABOG, and other ABMS-affiliated boards. (*Id.* ¶ 71) In Texas medical liability cases, the legislature has expressly pointed to board certification as an essential consideration in weighing the qualifications to testify as an expert. Tex. Civ. Prac. & Rem. Code § 74.401(c)(1). This incorporates board certification into the Texas system of justice as a matter of law. (*Id.* ¶ 72) For at least the fiscal years 2013 and 2014, Medicare provided higher reimbursements to physicians who

held board certifications from ABIM and its affiliates. 77 Fed. Reg. 66670, 66673. (*Id.* ¶ 73) ABIM is intrinsically intertwined with State and federal regulatory systems, and the Texas Medical Board website lists, as part of each physician's professional profile, his board certification status. (*Id.* ¶ 65). ABIM affirmatively sought and lobbied for delegations to them by government. (*Id.* ¶ 75) The vast majority of hospitals require board certification as a condition of staff privileges, which is a requirement also affirmatively sought by ABIM to increase its revenue and power. (*Id.* ¶ 76) Likewise, many insurance networks require board certification as a condition of reimbursement. (*Id.*) Board certification is tantamount to state medical licensure for many physicians. (*Id.* ¶ 77)

ABIM was complicit with the Federation of State Medical Boards ("FSMB") in ABIM's actions at issue here. The FSMB has a structure similar to the association of high schools found to be a state actor by the Supreme Court in *Brentwood Academy*, discussed in Argument Point I, *infra.* The FSMB is comprised of, funded, and controlled by state medical boards. (*Id.* ¶ 66) The FSMB developed and issued a statement against so-called misinformation. (*Id.* ¶ 68) ABIM then agreed with the FSMB, the umbrella organization for ABIM (ABMS), and the other Board Defendants, about this by threatening adverse actions against physicians based on their public statements on matters of public policy. (*Id.* ¶ 69)[2]

[2] The FSMB, founded in 1912, was a co-founder of the umbrella group ABMS in 1933, which then three years later helped found Defendant ABIM and 36 years later helped establish Defendant ABFM. ABMS includes ABIM among its members. The FSMB is an associate member of the ABMS, the umbrella group for ABIM. (*Id.* ¶ 70)

Most states – 40 plus Washington D.C. and Guam – have enacted the Interstate Medical Licensure Compact (IMLC) to expedite medical licenses such that eligible physicians can pre-qualify to practice medicine in multiple states based on merely one application. (*Id.* ¶ 60, citing IMLC FAQs) State licensure via the IMLC is expressly limited to those who "[h]old a current specialty certification or time-unlimited certification by an ABMS [American Board of Medical Specialties] or AOABOS [American Osteopathic Association Bureau of Osteopathic Specialists] board." (*Id.* ¶ 61, quoting IMLC website)

Kory and Marik are highly experienced, widely published and internationally recognized physicians who were directly involved in treating COVID patients and immediately began investigating repurposed drugs that might be useful after the pandemic began. (*Id.* ¶ 13-15). Finding that safe, available and inexpensive drugs showing evidence of effectiveness were being dismissed, they founded a nonprofit physician organization, the Front Line COVID-19 Critical Care Alliance (FLCCC), to conduct research and provide information about COVID treatments. (*Id.* ¶ 138.) They provided extensive testimony in legislatures and courtrooms and their expertise was recognized by NIH who invited them to testify. (*Id.* ¶ 126.) None of the ABIM panel members who judged them specialized in infectious disease or had experience treating COVID. (*Id.* ¶ 137)

ABIM's retaliation against Kory and Marik came amid efforts by the Biden Administration, the FSMB, several other Boards and federal agencies intent on squelching any competing views against what they had quickly settled on as the science. (*Id.* ¶ 2, 5, 30, 202.) ABIM and others put doctors on notice, moved to revoke their certifications, cited the founding of FLCCC itself as a bases for revocation (*Id.* ¶ 138), and refused to even

consider how to properly assess the standards for legitimate debate in this novel exercise of suppressing speech. (*Id.* ¶¶ 122-23) Their revocation damaged the marketplace of scientific ideas and research and Kory and Marik's business and reputation, curtailing their ability to act as advocates and professionals precisely as intended. (*Id.* ¶¶ 190-92, 195)

PROCEDURAL BACKGROUND

Plaintiff AAPS filed its Complaint on July 12, 2022 (Dkt. 1), and Defendants subsequently filed their motions to dismiss on September 26 and 27, 2022 (Dkt. 20-23). On May 16, 2023, this Court issued its Opinion and Order granting the Board Defendants' motions to dismiss. (Dkt. 42) On May 23, 2023, this Court rendered a separate Opinion and Order granting the government's motion to dismiss. (Dkt. 43) This Court rendered a final judgment on that same day terminating the entire case. (Dkt. 44) Plaintiff timely filed its Notice of Appeal on July 13, 2023. (Dkt. 45)

On June 3, 2024, the U.S. Court of Appeals for the Fifth Circuit reversed as to the dismissal of the Board Defendants but affirmed as to the dismissal of Defendant Mayorkas. *Ass'n of Am. Physicians & Surgeons Educ. Found. v. Am. Bd. of Internal Med.* [hereinafter, *AAPS v. ABIM*], 103 F.4th 383 (5th Cir. 2024). Judge James Ho of the Fifth Circuit wrote a separate opinion dissenting in part.

The Fifth Circuit held that Plaintiff AAPS need not identify a willing speaker in its complaint in order to establish standing:

> AAPS sufficiently alleges an injury-in-fact: that the Board Defendants, through their censorship campaign, deprived AAPS of a "willing speaker" that would have voiced his/her opinions but for the threat of decertification, injuring AAPS's right to hear. And there is no requirement that AAPS allege or name a specific "willing speaker" at the pleading stage.

AAPS v. ABIM, 103 F.4th at 391. The Court of Appeals further held that "AAPS sufficiently alleges injury-in-fact, traceability, and redressability for its First Amendment claims against the Board Defendants, meaning it has standing to pursue those claims." *Id.* at 393.

SUMMARY OF ARGUMENT

ABIM's actions discourage what physicians say on the internet, at legislative hearings, in public and at conferences co-sponsored by Plaintiff AAPS. ABIM argues that it is not a state actor and thus should not be subject to the First Amendment, when in fact ABIM has broadly obtained inclusion of its board certifications into state law, hospital credentialing requirements for medical staff privileges, insurance networks, and public databases of purported competence and expertise such that their conduct qualifies as state action. Even were the Court to accept that ABIM is not a state actor generally, its activities complained of here were certainly state action. ABIM has also violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and has wrongfully injured Plaintiffs in additional ways.

ARGUMENT

Plaintiffs adopt ABIM's statement of the Legal Standard, with the addition that "it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007).

I. ABIM Has Engaged in State Action and Plaintiffs Properly State a First Amendment Claim.

Plaintiffs properly allege violations by Defendant ABIM of the First and Fourteenth Amendments of the U.S. Constitution. (Counts I and VI, Am. Compl. ¶¶ 147-68, 227-33)

Plaintiffs do not challenge here the ability of private organizations to grant or deny certification based on examinations, and Plaintiffs do not assert that such conduct ordinarily constitutes state action. Rather, it is the unusual revocation of ABIM board certifications to punish and banish a physician based on viewpoint discrimination in furtherance of a partisan agenda of government officials, which constitutes state action.

ABIM's denial that its relevant conduct is state action is belied by the facts pled in the Amended Complaint and is not a determination that can be made on the pleadings because it is so fact-specific. "[A]s *Flagg Brothers* states, the state action question remains fact specific even where the exclusivity of the public function is at issue." *Yeager v. City of McGregor*, 980 F.2d 337, 340 (5th Cir. 1993) (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978)). "The common foundation underlying these various and sometimes overlapping circumstances is that (1) there is no bright-line rule separating state action from private action, and that (2) the inquiry is ***highly fact-specific*** in nature." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 116 (4th Cir. 2022) (en banc, emphasis added) (addressing the issue on appeal from summary judgment). In assessing whether there has been state action, "[c]ategorizing [social media] posts that appear on an ambiguous page … is a fact-specific undertaking in which the post's content and function are the most important considerations." *Lindke v. Freed*, 601 U.S. 187, 203 (2024). "[T]he state action determination is a 'necessarily fact bound inquiry.'" *McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 523 (3d Cir. 1994) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982)).

Plaintiffs allege extensive collusion and intertwined relationships between ABIM, state medical boards and the FSMB, which is comprised of state medical boards as its members. (Am. Compl. ¶¶ 58-77) The intertwined relationship and collusion between ABIM and state medical boards, including the actions taken by ABIM alleged here, are far more than merely private actions. (*Id.* ¶¶ 65-77)

ABIM's brief overlooks that it is the totality of the factors that matter for determining the existence of state action, and the piecemeal divide-and-conquer approach taken by ABIM does not carry the day. Each factor alone may be insufficient to establish state action by a private entity, but these factors together certainly could. ABIM discusses these factors in isolation without ever addressing the overall entwinement and collusion by ABIM with the state that triggers state action doctrine here..

ABIM correctly states that private conduct is found to be state action by the Fifth Circuit under the "public functions" test, the "state compulsion or coercion" test, and the "joint action" test. *Richard v. Hoechst Celanese Chem. Grp., Inc.*, 355 F.3d 345, 352 (5th Cir. 2003) (quoted by ABIM at 8). ABIM's conduct here satisfies all three of these tests.

Public functions test. ABIM's revocation actions are disciplinary in nature and indistinguishable from the public function performed by state medical boards: "State medical boards discipline physicians who have engaged in inappropriate behavior," explains the FSMB in its "U.S. Medical Licensing And Disciplinary Data."[3] Disciplining

[3] https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/u.s.-medical-licensing-and-disciplinary-data/ (viewed Mar. 17, 2025).

physicians based on conduct rather than knowledge is a quintessential public function performed by state medical boards. ABIM does not and cannot deny this, and ABIM does not cite anyone other than state medical boards that typically perform this public function.

Defendant ABIM evidently feels it is serving some kind of public purpose by publicly disparaging physicians in this manner. In the medical profession the reputation of a physician is everything, as ABIM surely realizes, and ABIM cannot credibly deny that it is a public function to warn the public against a supposedly unqualified or irresponsible physician as ABIM does when it posts its revocations for the public to see.

Private entities that certify professionals based on examinations do not typically discipline them, let alone publicize their discipline as ABIM does. ABIM references other certifying entities, such as the United States Trotting Association, but does not cite to any discipline imposed by such entities and certainly not to publicizing such discipline. ABIM's imposition of discipline based on testimony in Congress and other public statements is unique, highly suspect, content-specific regulation of speech on behalf of the State, but without the constitutional protections that apply to medical board discipline.

ABIM's response fails to cite any decision involving concerted retaliation against physicians based on their public statements. Rather, the decisions cited by ABIM are limited to the issue of whether examination-based certification constitutes state action. That is not what this lawsuit is about and the claim here does not assert that the initial certification by ABIM is itself state action. Rather, it is the collusive retaliation by ABIM against physicians, not based on their examination results, that constituted state action.

For example, ABIM relies on the nearly half-century old *Bailey v. McCann*, 550 F.2d 1016, 1017-19 (5th Cir. 1977). That was a decision on appeal from summary judgment, thereby enabling a factual development in contrast with ABIM's motion on the pleadings here. Moreover, the *Bailey* case did not involve any discipline by a private entity in performing a public function ordinarily done by a state entity. Because *Bailey* long predated the landmark decision of *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), the public functions test was not even before the Fifth Circuit in *Bailey*. *See also Sanjuan v. American Board of Psychiatry & Neurology*, 40 F.3d 247 (7th Cir. 1994) (prior to *Brentwood Academy*, and not a board retaliation case).

ABIM focuses on the allegation that "Governments have delegated state functions to the Board Defendants in connection with medical licensure, which is exclusively a governmental function," suggesting that it alone is not sufficient. (Am. Compl. ¶ 59) But the Amended Complaint alleges far more than that, and ABIM's public discipline of physicians as sought by and entwined with the FSMB is a type of state action.

ABIM relies on a *pro se* case concerning a challenge to a retesting requirement it imposed on a physician, which was not a case (as here) where ABIM outright revoked board certification based on viewpoint discrimination. *See Afzal v. Am. Bd. of Internal Med.*, No. 22-1234, 2022 U.S. App. LEXIS 18505, at *2 (3d Cir. July 6, 2022).[4]

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[4] ABIM's additional citations are likewise inapposite. ABIM relies on another *pro se* challenge to its certification – not to a revocation of an earned certification – and the unpublished decision found no allegations of state action. *Munsif v. Cassel*, 331 F. App'x 954, 959 (3d Cir. 2009) ("[H]ere is no allegation from which we can infer that the defendants, individually or as agents of ABIM, acted under color of state law."). In *ABIM*

Likewise, in *ABIM v. Von Muller*, there were no allegations to support state action in connection with ABIM's administration of an examination, and thus no state action was found. The physician there did not expressly assert a claim based on a violation of the Constitution. *Am. Bd. of Internal Med. v. Muller*, No. 10-CV-2680, 2011 U.S. Dist. LEXIS 25169, at *5-6 (E.D. Pa. Mar. 10, 2011) ("[H]er counterclaim does not specifically reference … the Due Process Clause of the Fourteenth Amendment," and the court merely inferred it). That was an initial certification case, unlike the concerted retaliation against physicians for outspokenness during COVID at issue here, and it is unsurprising that state action would not be found in *Muller* as it was not alleged. In another case cited ABIM, *Goussis v. Kimball*, the lawsuit was by "a foreign born and trained physician" based on his "failure to pass on four separate occasions" ABIM's certification examination. 813 F. Supp. 352, 353 (E.D. Pa. 1993) (granting summary judgment to ABIM). The finding of no state action in *Goussis* was on summary judgment, and was because there was no delegation by the state and ABIM's "role only involves the preparation, administration, and grading of a test. *Id.* at 358. The issue here is the concerted retaliation against physicians, not "the preparation, administration, and grading of a test" by ABIM. *Id.* Unlike

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v. Salas-Rushford, there was no claim based on state action, and instead it was based in part on a claim of contractual due process under Puerto Rico law. *Am. Bd. of Internal Med. v. Rushford*, No. 19-1943 (SCC), 2021 U.S. Dist. LEXIS 128708, at *29-30 (D.P.R. July 9, 2021) (quoting the cause of action), *aff'd on other grounds*, 114 F.4th 42 (1st Cir. 2024).

the factual allegations in *Goussis*, ABIM has sought and obtained the incorporation of its role into multiple state requirements. (Am. Compl. ¶¶ 326, 31-32, 59-65).

"Board certification is tantamount to state medical licensure for many physicians." (*Id.* ¶ 77) ABIM does not contest this, nor could it. Indeed, FSMB confirms it. (*Id.* ¶ 34 n.5) ABIM's very public revocation of board certification is a "public function" ordinarily reserved for state medical boards, and ABIM's conduct at issue here is state action.

"State Compulsion or Coercion" or "Joint Action" Tests: ABIM combines these two tests in its motion and baldly denies that "ABIM policies at issue were undertaken at the behest of government officials." (ABIM Mot. 10) But that is an argument for summary judgment, not to dismiss on the pleadings. The standard on a motion to dismiss is to accept factual assertions by the movant at face value and draw all inferences in favor of the non-moving Plaintiffs. *Morgan v. Swanson*, 659 F.3d 359, 370 n.17 (5th Cir. 2011) (en banc).

The *Bailey* decision, on which ABIM relies, indicates that state action would be found to exist when there is a:

> conspiracy between public officials and a private person, *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), or of *de facto* State partnership with a discriminating private institution, *Burton v. Wilmington Parking Authority*, [365 U.S. 715 (1961)].

Bailey, 550 F.2d at 1018-19 (citation trimmed and another added). These are adequately alleged here with respect to viewpoint discrimination by ABIM in violation of the First Amendment. If ABIM were to revoke board certifications based on racial or religious discrimination, then it would surely be held accountable for that under Section 1983. The standard for viewpoint-discrimination under the First Amendment is not more permissive.

ABIM's primary argument on this test is its assertions that FSMB is not a government entity. But it is the joint action by these state medical boards with ABIM, through the FSMB, that triggers the joint action test and provides sufficient interrelationship with ABIM to qualify as state action. This is the teaching by the U.S. Supreme Court in *Brentwood Academy*, *supra*, which held that a non-profit incorporated association of public schools is itself a state actor. Given that the Tennessee Secondary School Athletic Association is a state actor, despite being a nonprofit corporation, so is the FSMB. ABIM's motion fails to cite *Brentwood Academy*, let alone distinguish it.

"Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it." *Brentwood*, 531 U.S. at 302. "When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test." *Id.* at 303. The entwinement by state medical boards, FSMB and ABIM, is set forth in detail in the Amended Complaint. (Am. Compl. ¶¶ 66-70)

An additional part of the reasoning by the Supreme Court in *Brentwood Academy* also applies here: there is no substantial unfairness to ABIM in treating this as a state action and requiring ABIM to respect fundamental constitutional rights. If ABIM has a valid reason to revoke a physician's board certification, then ABIM should be able to prove its case while complying with constitutional protections. ABIM provides no reason, and there is none, for ABIM to be able to destroy the careers of distinguished physicians without

respecting the constitutional rights of those physicians.[5]

ABIM argues that "a private entity merely agreeing with the policy goals of government and acting accordingly does not constitute state action." (ABIM Mot. 11, citing *La. Div. Sons of Confederate Veterans v. City of Natchitoches*, 821 F. App'x 317, 320 (5th Cir. 2020) (per curiam)). But *Sons of Confederate Veterans* was a decision on summary judgment, not on the pleadings as sought by ABIM. Moreover, the panel majority did not "reach the predicate issue: whether the [association seeking the exclusion] is a state actor for purposes of this case. *Id.* at 324 n.3 (Elrod, J., concurring). As Judge Elrod explained in her separate opinion, compliance with a request "is certainly more than 'mere acquiescence,'" and ABIM's retaliation against physicians is likewise more than mere acquiescence. *Id.* at 322 (Elrod, J., concurring). FSMB, on behalf of state medical boards, demanded discipline of physicians who spoke out against certain policies, and then ABIM aggressively took that action, with FSMB taking credit for it. (Am. Comp. ¶ 69)

ABIM's own quoted precedent held that "significant encouragement" by government of a private entity's action is enough to be state action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoted by ABIM Mot. 11, brackets omitted). Even if ABIM is not

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[5] Prior to *Brentwood Academy*, the Seventh Circuit observed that "state action doctrine is complex and fluid," and did not explain if or why it felt that FSMB was not subject to it. *Brown v. FSMB*, 830 F.2d 1429, 1436 (7th Cir. 1987). There is no analysis of the history, structure, or membership of FSMB in that decision. ABIM further relies on a magistrate's recommendation after a *pro se* plaintiff, in challenging an exam result, failed to make a "showing of any connection to a state actor." *Zhang v. FSMB*, No. 1:11CV129, 2011 U.S. Dist. LEXIS 152911, at *9 (M.D.N.C. Dec. 29, 2011) (cited by ABIM at 10). These cases were not challenges to retaliation as presented here.

generally a state actor, its action in this instance is state action. The public, forceful statements by FSMB and the Biden Administration to discipline physicians or censor those who spoke out against government policy, was significant encouragement and ABIM's retaliation based on physicians' statements qualifies as state action under the *Blum* standard. (Am. Compl. ¶¶ 7-8, 202) ABIM argues that it is merely applying its own credentialing standards, but ABIM has never applied its credentialing standards like this before nor has any of the other 23 board-certifying affiliates under the ABMS umbrella.[6]

II. Plaintiffs Have Sufficiently Pled Sherman Act Claims.

Plaintiffs' Amended Complaint asserts a new Sherman Act Section 1 claim, a more detailed Section 2 claim, and more detail on antitrust injury. (Am. Compl. ¶¶ 38-46)

Plaintiffs' new Sherman Act Section 1 claim is as suggested by Judge James Ho's separate opinion in the appellate decision in this case. (Am. Compl. ¶¶ 197-211). It is also based on an appellate admission at oral argument by ABIM's counsel, which is now law of this case: "Collusion always creates antitrust problems." *AAPS v. ABIM*, 103 F.4th at 399 (Ho, J., dissenting in part, quoting appellate Oral Argument at 32:27-33:01). (*Id.* ¶ 204)

A. Plaintiffs State a Sherman Act Section 1 Claim, by Plausibly Alleging an Agreement and a Relevant Market.

In arguing against Plaintiffs' Sherman Act Section 1 claim, ABIM asserts that

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[6] Meanwhile, Plaintiffs have served a document production request on Defendant Department of Homeland Security that may uncover additional collusion by the Biden Administration with ABIM; it would be premature to dismiss based on the pleadings alone.

Plaintiffs fail to plausibly allege an agreement. (ABIM Mot. 14-16) But Plaintiffs plead concerted action in detail among ABIM and others in revoking board certification, using identical language of "misinformation" and "disinformation". Before 2020 neither ABIM nor any of the Board Defendants revoked a physician's board certification based on disapproval of statements made by him in public. (Am. Compl. ¶ 199). So the tradition was not to retaliate against physicians based, for example, on their testimony to a Senate Committee. But "[a]t roughly the same time and while using identical terminology of 'misinformation' and 'disinformation', the Board Defendants issued very similar threatening statements about revoking the board certifications of physicians based merely on what they said publicly, and not on how they treated patients." (*Id.* ¶ 200). ABIM then "took actions that were nearly identical in substance, scope and timing." (*Id.* ¶ 201).

The proof that the Board Defendants and FSMB were colluding is in a joint statement that ABIM and others issued together on September 9, 2021, which stated that:

> The Federation of State Medical Boards (FSMB), which supports its member state medical licensing boards, has recently issued a statement saying that providing misinformation about the COVID-19 vaccine contradicts physicians' ethical and professional responsibilities, and therefore may subject a physician to disciplinary actions, including suspension or revocation of their medical license. ***We at the American Board of Family Medicine (ABFM), the American Board of Internal Medicine (ABIM)***, and the American Board of Pediatrics (ABP) support FSMB's position. We also want all physicians certified by our boards to know that such unethical or unprofessional conduct ***may prompt their respective board to take action that could put their certification at risk***.[7] (*Id.* ¶ 202, emphasis added)

The above joint statement is the "plus" that is sufficient to convert innocent parallel

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[7] https://www.abim.org/media-center/press-releases/joint-statement-on-dissemination-of-misinformation/ (viewed Apr. 1, 2025).

action into collusive action that triggers a Sherman Act Section 1 violation. Imagine if the above statement concerned setting prices by different companies. Of course that would be an antitrust violation for collusive pricing.

Yet ABIM insists, after acknowledging its joint statement above, that "Plaintiffs make no attempt to plead any such additional factors here." (ABIM Mot. 16) But Plaintiffs have asserted an adequate "plus factor" for a jury to decide, under ABIM's precedent:

> [O]nce he has established a setting that bespeaks accord – then consciously parallel action is probative of the existence of a conspiracy whether or not it is potentially explicable in terms of the actor's self-interest. It is up to the jury to determine which explanation of the parallel action to accept: the explanation in terms of conspiracy or in terms of independent business judgment.

Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1060 n.11 (5th Cir. 1985) (cited by ABIM Mot. 16).

Universities, businesses, and certifying entities do not ordinarily post on their public websites a disparagement of their students or customers, yet ABIM posts "Not Certified, Revoked" about Plaintiffs Kory and Marik. What legitimate academic or business purpose is served by adding "Revoked" to "Not Certified"? None. Economically, Kory and Marik were customers of ABIM, and businesses do not ordinarily publicly disparage their own customers, which dissuades other customers and thus this is a "plus factor" that "tends to indicate" ABIM was not acting in independently in good faith. *Paul Kadair, Inc. v. Sony Corp. of Am.*, 694 F.2d 1017, 1027 n.27 (5th Cir. 1983) (quoted by ABIM Mot. 16).

As to pleading a relevant market, it would be premature on ABIM's motion to dismiss, prior to factual development, for this Court to choose irrevocably between the *per se* and rule of reason standards. This case is not about a threshold requirement for

certification as ABIM insists in order to come under the rule of reason rubric. (ABIM Mot. 16 n.7, relying on a decision from Georgia) Instead, this case is about retaliation by an entity against eminent professionals who have long been certified without any doubts as to their skills and competence. If ABIM were to engage in price-fixing for the cost of board certification, no one would assert that should be analyzed under rule of reason. Collusive conduct to exclude qualified professionals from their trade is unsuitable for rule of reason as well. ABIM appears to concede that it cannot prevail on its motion to dismiss if the *per se* standard is applied (*id.*), and thus instead prematurely urges that this court adopt a rule of reason standard in order to analyze the relevant market.

But if the Court were to adopt the rule of reason at this early stage, Plaintiffs have properly alleged a relevant market. As ABIM concedes, Plaintiffs allege that Board Defendants control an estimated 80% of the certification of physicians in their specialties, as stated by ABIM's longtime president, Richard Baron. (*Id.* ¶ 38 n.7)[8]

B. Plaintiffs State a Sherman Act Section 2 Violation.

Plaintiffs plausibly plead that ABIM possesses monopoly power in a relevant

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[8] ABIM relies on cases that are not about the antitrust violation presented here. In *Kenney v. ABIM*, for example, the lawsuit challenged ABIM's insistence on "maintenance of certification" (MOC) as leveraging its monopoly over certification. 847 F. App'x 137 (3rd Cir. 2021) (cited by ABIM Mot. 17) The flaw, as ABIM quotes in its motion, was that the plaintiffs there failed to allege "the existence of a [MOC] market." (ABIM Mot. 18, quoting *Kenney*. Neither *Kenney*, which was really a challenge to ABIM "tying" its MOC product to its certification monopoly, nor *AAPS v. ABMS*, No. 14-cv-02705, 2020 U.S. Dist. LEXIS 173853 (N.D. Ill. Sep. 22, 2020), *aff'd*, 15 F.4th 831 (7th Cir. 2021), which likewise concerned the MOC requirement for which ABIM holds a powerful monopoly, apply here.

market, and that it has engaged in exclusionary conduct. (ABIM Mot. 18-19) As to the relevant market issue, ABIM relies on *New Orleans Ass'n of Cemetery Tour Guides & Co. v. New Orleans Archdiocesan*, *Cemeteries*, 56 F.4th 1026, 1039 (5th Cir. 2023). But the defect there was a definition of "the product market as solely consisting of the products that the alleged monopolist controls would control," namely specific tours of cemeteries in New Orleans when a broader market including other tours was readily apparent. *See id.* Here, ABIM controls 80% of the board certification that medical doctors need to practice in hospitals and insurance networks. ABIM's exclusion of physicians from this market by revoking their certifications triggers the Sherman Act Section 2.

C. Plaintiffs Plead Facts Establishing Antitrust Injury.

ABIM devotes more ink to arguing against antitrust injury (ABIM Mot. 19-22), asserting that AAPS cannot be a plaintiff as it is not a direct competitor or customer of ABIM. But ABIM can find only an unpublished district court decision in New York for its novel argument that one plaintiff can be dismissed on antitrust injury grounds even though other plaintiffs (Kory and Marik) have antitrust injury. (ABIM Mot. 20) The antitrust standing by Kory and Marik give this court Article III jurisdiction – which ABIM does not dispute – and nothing would be gained by dismissing a co-plaintiff at this early stage. Moreover, ABIM's cited unpublished Fifth Circuit decision (ABIM Mot. 20) does allow antitrust standing by injured parties other than competitors and consumers. *See Waggoner v. Denbury Onshore, L.L.C.*, 612 F. App'x 734, 737 (5th Cir. 2015) ("Typically, parties with antitrust injury are either competitors, purchasers, or consumers in the relevant market. But ***standing is not necessarily limited to this group***.") (emphasis added). ABIM's

reliance on the unpublished *DataCell ehf v. Visa*, No. 1:14–CV–1658, 2015 WL 4624714 (E.D. Va. July 30, 2015), which held in favor of credit card companies that refused to process donations for Wikileaks while it posted classified documents, is unpersuasive as that court did not recognize Wikileaks as a legitimate part of the media.

ABIM concedes that antitrust injury exists when "the claimed harm does … flow from the price, quantity, or quality of products or services in the allegedly monopolized certification markets." (ABIM Mot. 21) Eminent physicians are excluded from the market by ABIM's retaliatory revocations, and that does reduce the quantity and quality of medical services. The conference host AAPS, and Kory and Marik, all have antitrust standing.

III. Kory and Marik Have Sufficiently Pled a Breach of Contract Claim.

As ABIM is well aware, *see Am. Bd. of Internal Med. v. Rushford*, 114 F.4th 42 (1st Cir. 2024) (cited by ABIM Mot. 12-13), ABIM's Policies and Procedures constitute a contract with its diplomates. One of the terms of this agreement expressly states that ABIM will recognize the importance of legitimate scientific debate, a necessary corollary of which is that engaging in legitimate scientific debate cannot be a basis for sanctions:

> ***While ABIM recognizes the importance of legitimate scientific debate***, physicians have an ethical and professional responsibility to provide information that is factual, scientifically grounded, and ***consensus driven***.

(Am. Compl. ¶ 120, quoting ABIM Policies and Procedures at 19, emphasis added, also quoted by ABIM Mot. 4).

ABIM's policy is internally inconsistent; if a physician is required to provide only "consensus-driven" information, this effectively prohibits participation in scientific debate, which would render ABIM's recognition of such debate meaningless. ABIM's policy is

vague and arbitrary as it does not define when scientific debate is "legitimate." If disciplinary action is based on deviation from consensus, it allows selective enforcement against dissenters, making it inherently unfair. ABIM noted that Kory and Marik strenuously – and in vain – argued that a threshold issue is what standard distinguishes legitimate differences of professional opinion and misinformation. (Am. Compl. ¶ 121)

While central to its claims, assertively raised before the ABIM and in the Am. Compl. ¶¶ 121-123, 131, 136, 138, 153, 158 and 231, ABIM's motion spares not one word defending its failure to articulate a standard that weighs the determination of legitimate debate. ABIM thus asks this Court to dismiss Kory and Marik's claims without even attempting to come to grips with their central basis.

ABIM concluded it need not consider the standard merely because it was able to critique Kory and Marik's arguments. That critiques can be offered is a given in a matter of controversy. ABIM thus sidestepped an obligation that is a prerequisite to a fair hearing. That ABIM is in breach of its own Policies and Procedures is made express by the fact that in each instance of finding fault, it rested its conclusion that Kory and Marik conveyed misinformation upon a finding that they departed from the ***consensus*** viewpoint, which ABIM expressly used as its yardstick.[9]

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[9] As set forth in Plaintiffs' Amended Complaint – and thus taken as true with all reasonable inferences in favor of Plaintiffs at this state – ABIM violated its own Policy and Procedures in revoking the board certifications of Kory and Mark:

> In each of the findings against Plaintiffs Kory and Marik, ABIM expressly faulted them for not following 'consensus-driven scientific evidence.' This is directly contrary to the *ABIM Policies* statement that recognizes a role for 'legitimate

ABIM's failure to address its own language is a breach of ABIM's contract with Kory and Marik. It was intended to chill physicians' speech with professional censure. Whether ABIM is a state or private actor, its failure to address these contractual obligations raise important public policy considerations as well as causes of action against ABIM.

IV. Kory and Marik Have Sufficiently Pled a Due Process Claim on the Independent Bases of State Action and the Contractual Promise of a Hearing.

Whether based on state action or the independent ground of its contractual obligation, Kory and Marik have provided sufficient basis to go forward on the deprivation of their due process rights. ABIM makes much of the fact that a hearing was held and Kory and Marik had an opportunity to respond. (ABIM Mot. 2, 5-6, 12-13) However, a hearing must be fair and impartial. *See Finch v. Fort Bend Indep. Sch. Dist.* 333 F.3d 555, 562 (5th Cir. 2003); *Thomas v. Graham Mortg. Corp*., 408 S.W.3d 581, 595 (Tex. App. 2013).

ABIM argues (ABIM Mot. 12 n.5) that Kory and Marik's breach of contractual due process claim fails because its Policies and Procedures reserve absolute discretion to make disciplinary decisions as long as an opportunity to respond was provided. ABIM relies on its right to take action against any diplomate who "fail[ed] to maintain moral, ethical or professional behavior *satisfactory to ABIM*." *Rushford*, 114 F.4th at 54 (emphasis added).

> scientific debate.' Opinions within the ambit of legitimate debate are, by definition, not consensus-driven. To require consensus where there is evidence of legitimate debate is a violation of the ABIM's own Policies & Procedures.

(Am. Compl. ¶ 123)

ABIM seeks on this basis the right to make entirely arbitrary determinations. While the *Rushford* court upheld that discretion in that case, its holding is carefully narrow and based on a very different set of facts and after the benefit of discovery. *See id.* at 52.

Rushford argued, as we do here, that the ABIM appeals process was a sham. The Court rejected that argument because the record repeatedly demonstrated Rushford had "refused to address the allegations against him head-on." *Id.* This was hardly the case here. The Court also found that while "the revocation provision clearly vests ABIM with the discretion there was "no language defining those standards of behavior or otherwise constraining ABIM's exercise of its revocation authority," an absence which allowed ABIM to exercise that discretion. *Id.* at 55. That is also different here, as the policy allowing "legitimate debate" provides a standard that was ignored. The court in *Rushford* was clear that ABIM's discretion does not alleviate it from following its own standards where stated.

The Court further recognized that ABIM:

> was nonetheless obligated to exercise that discretion in good faith, meaning in a reasonable manner, without bad motive or ill intention. ... *[S]ee also Silvestri* [*v. Optus Software, Inc.*, 175 N.J. 113, 814 A.2d 602 (2003)] at 607 (explaining that even when a satisfaction clause relates to a party's subjective satisfaction, the party is "oblige[d] ... to act 'honestly in accordance with his duty of good faith and fair dealing.'"

Rushford, 114 F.4th at 56 (cleaned up, inner quotation and citation omitted). The Court in *Rushford* found the argument unconvincing given that Rushford had refused to address the charges. Here, Kory and Marik addressed the charges head-on and challenged ABIM for

its bad faith and breach of its agreement.[10]

V. Kory and Marik Have Sufficiently Pled a Tortious Interference Claim.

Contrary to ABIM's representation (ABIM Mot. 23), Kory directly pled an effect regarding his business interests. "He is currently listed as an expert witness in a case before the Texas Medical Board that is affected by the ABIM revocation of his certification." (Am. Compl. ¶ 13) Kory was removed as an expert witness as a result of the loss of his ABIM certification. There can be little doubt that this was an intended result of ABIM's action. For Marik, the pleading noted that "[he] has delivered conference presentations, expert testimony and undertaken other professional activities in Texas that will be affected by the ABIM's revocation of his board certification. (*Id.* ¶ 15)

Kory and Marik had been extremely active in providing expert testimony. Given that board certification is generally required to provide testimony, *see supra* at 6, this continuing impact is not merely speculative. Kory and Marik were professionally very active, having co-founded an organization to address the management of COVID and testifying frequently in various legal and legislative forums. Clearly this would have continued and numerous third-party contracts or advocacy activities would have occurred. Derailing that activity was the point of ABIM's action.[11]

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[10] *See, e.g., Doe v. Rider Univ*., No. 16-cv-4882, 2018 U.S. Dist. LEXIS 7592, 2018 WL 466225, at 14 (D.N.J. Jan. 17, 2018) (sustaining a breach of good faith claim where a student alleged that the university official overseeing his disciplinary proceeding had told him he was "going against" him); *Rushford*, 114 F.4th at 61. As ABIM did here.

[11] Texas law protects prospective as well as existing contracts from third party interference. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 712-13 (Tex. 2001). Kory's and Marik's

In an effort to minimize the clear effect of its actions, ABIM disingenuously calls this "incidental interference." (ABIM Mot. 24). It is reasonably probable that the disastrous effects of decertification for physicians with significant careers would include substantial lost opportunities for income and advocacy, which was ABIM's intention.

VI. The Claim of Defamation Has Been Sufficiently Pled.

Because ABIM conducted a sham hearing that did not fairly adjudicate matters of legitimate professional disagreement, its revocation of Kory and Marik's certificates were an improper action intended to send a *per se* defamatory message. ABIM misconstrue the Amended Complaint by stating that Kory and Marik admit this is simply a professional disagreement and that there is no deliberate falsification on ABIM's part. (ABIM Mot. 30, citing Am. Comp. ¶¶ 5, 122) These paragraphs say no such thing. This concept is instead properly pled as follows:

> While reasonable people can disagree with the aggregate meaning of available research, ABIM's conclusion that there is no evidence whatsoever in support of Drs. Kory's and Marik's views is arbitrary, capricious, and not credible; reflects ABIM's prejudgment on the issue; and illustrates that fair and due consideration of the matter was not provided.

(Am. Compl. ¶ 124) That is an altogether different statement from ABIM's interpretation.

ABIM asserts its publicly available action and media reports of the action in the *Washington Post* and *Medscape* (Am. Compl. ¶ 235) are not sufficiently pled to make out

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pleading addresses both. *See I Love Omni, LLC v. Omnitrition Int'l, Inc.*, No. 3:16-CV-2410-G, 2017 U.S. Dist. LEXIS 112818, *8-9 (N.D. Tex. July 20, 2017).

a case for defamation.[12] To withstand a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint "does not need detailed factual allegations" if it contains something "more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Citing specific publications upon the reasonable belief that ABIM was involved in these publications is sufficient. Further, the very act of decertifying Kory and Marik with the knowledge and intention that it would be published with defamatory effect is sufficient to sustain this claim. "A facially plausible claim is one that permits a reasonable inference that the defendant is liable for the misconduct alleged." *Doe v. Univ. of the Scis.*, 961 F.3d 203, 208 (3d Cir. 2020) (citing *Iqbal*, 556 U.S. at 678). *See also Am. Osteopathic Ass'n v. ABIM*, 555 F. Supp. 3d 142, 148-49 (E.D. Pa. 2021). Given the public interest around this case, the clear intent of ABIM to publicly enforce its concern for misinformation and its rapid reporting in the news, it is likely that ABIM was involved in these publications.

ABIM attempts to represent its speech was limited to posting that Kory's and Marik's board certifications had been revoked. Yet somehow, in articles such as those cited in Am. Compl. ¶ 235, the immediate reporting stated this was done because Kory and Marik are "disinformation doctors." ABIM had made public statements about its intentions to decertify physicians for alleged misinformation and the basis was promptly publicly

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[12] Note that direct defamation was also pled: "[o]n behalf of ABIM, and posting as its then-President and CEO, Dr. Baron wrongly defamed those who disagree with his approach to COVID as being 'friends of the virus.'" (Am. Compl. ¶ 50)

known. At this stage of the proceeding discovery is needed to determine the actual role of ABIM in these publications, and dismissal would be inappropriate. The revocation of Kory's and Marik's certifications were intended to be an indictment of their professional opinions. The entire context and purpose for its actions was to fire a shot in the information war and the position that ABIM did not want this publicized is disingenuous. The very purpose of its action was to send a message and if its underlying revocations are shown to be improper, its attempt to distance itself from publication is unconvincing.[13]

A. The Doctrine of Protected Opinion Provides No Basis for Dismissal.

ABIM also argues that it is entitled to protection as its revocations are "protected opinion." It makes this argument by citing cases about news reporting, cases all referring to fair comment privilege by *CNN*, *New York Times*, *Gannett Co*., *The Baltimore Examiner* and the *Washington Post*. To take and report an adverse official action as a certifying body is not mere "opinion." None of the authorities cited in ABIM's motion supports the proposition that taking and publishing a defamatory action is protected. ABIM did not merely assert another position in public debate but took and reported a dispositive action.[14]

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[13] While discovery may show a direct path to publication, courts have recognized that a sequence of publications can be taken together in the aggregate to constitute defamation. The Texas Supreme Court noted that an allegedly defamatory publication should be construed in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it. *Turner v. KTRK TV, Inc*., 38 S.W.3d 103, 114 (Tex. 2000). *See also Wood v. Dawkins*, 85 S.W.3d 312 (Tex. App. 2002). Taken together, widely publicizing it would seek to defrock "misinformation doctors" and posting that Kory and Marik had been decertified was certainly taken accurately by reporters.

[14] ABIM also mischaracterizes Kory and Marik's request as asking the Court to pick sides in this medical debate. (ABIM Mot. 27-28) Adjudicating ABIM's defamatory actions does

Critically, ABIM cannot be heard, on the one hand, to hold in sanctioning Kory and Marik that there is no legitimate debate on the issues and then attempt to hide behind protected opinion because these matters are "subject to vigorous scientific debate." (ABIM Mot. 28) ABIM admits here what it would not concede when sanctioning Kory and Marik.

B. Malice Has Been Sufficiently Pled.

To avoid dismissal in a defamation case involving a limited public figure, the plaintiff simply needs to plausibly allege that the defamatory statements were made with actual malice. *See Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002), holding that in a national debate that forms the backdrop for this dispute, malice can best be understood as a "calculated falsehood." *Id.* at 590. Here, Kory and Marik allege that the action taken was not a good faith assessment of whether their views about COVID were so unfounded as to violate the actual published ABIM standards.

Given the unique national circumstances that gave rise to the conflicts in this matter, the allegations that ABIM reached a foregone conclusion with the intent to discredit them, and that the hearing results were indeed a calculated falsehood, properly plead malice. ABIM recognizes in its motion that the effect of these communications would be that Kory and Marik were "unsuited to practice medicine." (ABIM Mot. 27)

CONCLUSION

Plaintiffs request that Defendant ABIM's motion to dismiss be denied.

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not require it do so. ABIM's refusal to provide a fair and impartial hearing, follow its own Policies and Procedures, and its reliance on objectively false information are all exercises this Court is perfectly competent and within its jurisdiction to address.

Dated: April 4, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document uses size 13 Times New Roman font, and that its substantive body is 30 pages.

CERTIFICATE OF SERVICE

I hereby certify that on this day of April 4, 2025, I caused service of all the parties of the foregoing document through operation of the Court's CM/ECF system, which I understand to cause service on all counsel of record for the parties.

/s/ Andrew L. Schlafly
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