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.	)	

PLAINTIFF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS EDUCATIONAL FOUNDATION'S OPPOSITION TO THE AMERICAN BOARD OF OBSTETRICS & GYNECOLOGY'S MOTION TO DISMISS

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Plaintiff Association of American Physicians and Surgeons Educational Foundation ("AAPS") hereby files its opposition to the Motion to Dismiss by the American Board of Obstetrics & Gynecology ("ABOG") (Dkt. 74).

NATURE AND STAGE OF PROCEEDINGS

Defendant ABOG's board certification is required for obstetricians to deliver babies in hospitals, and yet ABOG abuses its monopoly power by threating to decertify physicians who speak out in criticism of abortion and harm caused by it. ABOG threatens its retaliation against physicians who provide "false or misleading information" that is "used to advocate for legislation, regulations, criminal code, and health policy." (Dkt. 66, Am. Compl. ¶ 56) Punishing professionals for their testimony to legislatures is a public function, and not a legitimate private action. Likewise, broadly excluding a skilled obstetrician from delivering babies is a public function rather than a private one. State medical boards, not private entities, properly prevent certain physicians from practicing medicine. By engaging in a public function, ABOG's conduct is state action to which the First Amendment of the U.S. Constitution applies. ABOG's viewpoint-based discrimination infringes on it.

ABOG issued the following statement for the first anniversary of the Supreme Court decision in *Dobbs*:

> Spreading intentional misinformation and disinformation about family planning and ***abortion*** are a violation of professionalism, professional standing, and professional conduct standards for continuing certification in OB GYN. …
>
> ABOG joins that collective voice of our specialty, board-certified diplomates, and the people we serve to reiterate its commitment that comprehensive family planning ***including abortion are essential*** to the practice of OB GYN, the patients that place their trust in us, and public health of our country.

ABOG, "Dobbs vs. Jackson Women's Health Organization Anniversary Statement" (June 27, 2023) (emphasis added).[1] This statement by ABOG in 2023 expanded on its announcement quoted in the first paragraph above, which was in 2022.

As alleged and therefore taken to be true on ABOG's motion to dismiss:

> What ABOG considers to be "false or misleading" is almost any statement in opposition to abortion. ABOG denies harm caused by abortion, even harm reported in peer-reviewed published medical studies. ABOG is deliberating chilling free speech on this issue by physicians based on viewpoint, and ABOG's threats harm Plaintiffs by interfering with presentations and participation at conferences.

(Am. Compl. ¶ 56) When a speaker from an AAPS conference stated in her testimony in Congress that harm from abortion is underreported, abortion rights supporters responded by invoking ABOG's foregoing announcements threatening revocation of her board certification. (*Id.* ¶ 115)

As state action, ABOG's conduct violates the First Amendment by engaging in viewpoint discrimination. ABOG also violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, by misusing its monopoly power, while tortiously interfering with AAPS.

For the reasons set forth below, ABOG's motion to dismiss should be denied. If ABOG's arguments for dismissal were accepted, then ABOG could threaten to revoke its board certification and ruin the careers of all physicians who are registered Republicans, or all who attend religious services. AAPS states valid causes of action against this.

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[1] https://www.abog.org/about-abog/news-announcements/2023/06/27/dobbs-vs.-jackson-women-s-health-organization-anniversary-statement (viewed Mar. 29, 2025).

STATEMENT OF FACTS

ABOG has a board certification monopoly concerning delivering babies in hospitals, as it controls roughly 80% of the market for certification of physicians in the specialty of obstetrics and gynecology. (Dkt. 66, Am. Compl. ¶ 213) Certification by ABOG is required of physicians to practice at many hospitals and in many insurance networks. (*Id.* ¶ 214) Certification by ABOG is based primarily on the performance by physicians on written multiple-choice examinations, and the payments of fees by physicians. (*Id.* ¶ 215) Yet beginning on September 27, 2021, ABOG joined with the Federation of State Medical Boards ("FSMB") and co-Defendants ABIM and ABFM, to threaten unprecedented revocation of board certification based not on skill or patient care, but on public statements by physicians with which ABOG disagrees. (*Id.* ¶ 55)

Specifically, Defendant ABOG announced that it would take action against a physician's board certification for not "behaving professionally with patients, families, and colleagues across health professions." (*Id.*, quoting ABOG's website). Then ABOG's statement refers to "pregnant people" three times and "pregnant individuals" once, implying that professionalism requires referring to pregnant women with a gender neutral term and fully accepting transgender procedures in connection with pregnancy. (*Id.*)

Following up on its initial threat, on July 7, 2022, Defendant ABOG announced that it might revoke board certifications of physicians opposed to abortion if they provide misleading information that is used – not even necessarily by the physician – to "advocate for legislation, regulations, criminal code, and health policy." (*Id.* ¶ 56, quoting ABOG

website) This infringes on the constitutional rights of physicians to participate fully and candidly in the processes of legislation and public policy decision-making. (*Id.*) What ABOG considers to be misleading is almost any statement in opposition to abortion. (*Id.*) ABOG denies harm caused by abortion, even harm reported in peer-reviewed published medical studies. (*Id.*) ABOG is deliberating chilling free speech on this issue by physicians based on viewpoint, and ABOG's threats harm AAPS by interfering with presentations and participation at AAPS's conferences. (*Id.*)

ABOG's conduct appears to be coordinated, in a concerted attempt to advance a partisan political agenda. (*Id.* ¶ 57) ABOG is aware of the partisan positions taken by federal agency officials on the relevant issues, then in the Biden Administration but still in the federal government,[2] and ABOG has sought to appease, or respond to pressure or requests by, federal agency officials to censor the expression of independent viewpoints by physicians. (*Id.*)

A speaker at an AAPS conference in 2023, in Texas, was previously confronted during a congressional hearing in apparently a coordinated attempt by a congressman and

[2] During this lawsuit a presidential election has changed the leadership in the White House and the Cabinet, but there has not been any known replacement of state officials or federal workers relevant to this case. *Cf.* Andrea Hsu, "Nearly 6,000 USDA workers fired by Trump ordered back to work for now," NPR Morning Edition (Mar. 5, 2025) https://www.npr.org/2025/03/05/nx-s1-5318687/usda-fired-federal-employees-probationary-osc-mspb (viewed Mar. 30, 2025).

another witness to use ABOG's threat of retaliation against her. (*Id.* ¶ 115) The AAPS conference speaker stated at the congressional hearing that there was a lack of full reporting of harm from abortion. (*Id.*) Then Rep. Gerald Connolly (D-VA) and a subsequent witness, both in opposition to the views against abortion by the AAPS speaker, reportedly had the following exchange in their use of ABOG's threat against the AAPS speaker:

> "What do you know about complications and deaths from licensed clinics that provide medically supervised care with respect to abortions?" [Democratic Rep. Gerald Connolly (VA)] asked Dr. Ghazaleh Moayedi, a board-certified abortion provider who was also testifying at the hearing.
>
> Moayedi didn't mince words, replying, "I'd like to first remind all OBGYNs that the American Board of OBGYNs has recently warned that spreading medical misinformation can result in loss of board certification."

(*Id.*, footnote omitted) Next Rep. Connolly, a supporter of abortion rights, asked the witness to elaborate further on that "misinformation" and decertification assertion against the AAPS conference speaker. (*Id.*) This use of ABOG's threat of retaliation against a witness at a congressional hearing had an intimidating, chilling effect on candor about abortion by ABOG-certified physicians, including this physician as she subsequently made a presentation at an AAPS conference. (*Id.*)

ABOG has thereby invidiously abused its examination-based monopoly in order to interfere with physicians' freedom of speech, by threatening revocation of their certifications based on statements by physicians on matters of public concern. (*Id.* ¶ 217) ABOG has thereby wrongly interfered with the market for medical conferences and the posting of presentations from such conferences on the internet. (*Id.* ¶ 218) Plaintiff AAPS

is engaged in the business of co-sponsoring medical conferences and posting presentations from such conferences on the internet, based on which Plaintiff AAPS raises donations. (*Id.* ¶ 219) ABOG's foregoing conduct interferes with Plaintiff AAPS's business activities, and thereby impedes competition in the market of medical conferences and fundraising based on presentations posted on the internet. (*Id.* ¶ 220) The ABOG's foregoing conduct constitutes the willful maintenance of their monopoly power by chilling freedom of speech in order to advance a political agenda preferred by a major political party in Congress and officials in the Executive Branch of the federal government, and thereby gain favors from federal officials to perpetuate this monopoly power by ABOG. (*Id.* ¶ 221)

While "[t]ypically, parties with antitrust injury are either competitors, purchasers, or consumers in the relevant market," the Fifth Circuit's very next sentence stated that "[b]ut standing is not necessarily limited to this group." *Waggoner v. Denbury Onshore, LLC*, 612 F. App'x 734, 737 (5th Cir. 2015). (*Id.* ¶ 222) Appeasing federal agency officials and others to censor speech based on viewpoint, ABOG intends by its foregoing conduct to maintain its monopoly over board certification. (*Id.* ¶ 223)

PROCEDURAL BACKGROUND

The procedural background here is the same as with respect to all the Board Defendants: Plaintiff AAPS filed its Complaint on July 12, 2022 (Dkt. 1); Defendants subsequently filed their motions to dismiss on September 26 and 27, 2022 (Dkt. 20-23); and on May 16, 2023, this Court issued its Opinion and Order granting the Board Defendants' motions to dismiss. (Dkt. 42) Plaintiff timely appealed 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 ABOG and the other Board Defendants. *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).

LEGAL STANDARD

Plaintiff AAPS adopts the legal standard stated by ABOG, with the addition that this Court may take judicial notice of ABOG's relevant statements as it has posted on its website. *See, e.g.*, *Norris v. Hearst Tr.*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.").

ARGUMENT

Defendant ABOG has repeatedly threatened retaliation in the form of board certification revocation based on physicians' outspokenness about harm caused by abortion, and there has even been reuse of ABOG's threats during a congressional hearing. ABOG, from its position of authority over who is allowed as a practical matter to deliver babies in hospitals and as part of insurance networks, is thereby interfering with the democratic process which relies heavily on freedom of speech. Physicians, some of whom campaign for public office themselves, need to be able to speak candidly in public, at medical conferences including those hosted by Plaintiff AAPS, and in legislative

committee hearings on highly contentious issues such as abortion, without a threat of losing their professional career in retaliation.

ABOG argues that it is not a state actor, and thus should not be subject to the First Amendment, when in fact it has obtained inclusion of their board certification broadly 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 under state action doctrine. (Dkt. 66, Am. Compl. ¶¶ 30-32, 58-78) From its position of power ABOG seeks to silence physicians who speak out against abortion, but its arguments for dismissal do not withstand scrutiny.

This statement by the Fifth Circuit Judge Ho is apt here:

> I began by imagining a hypothetical employer who doesn't care how productive an employee you might be—he insists that you abandon certain religious beliefs he finds offensive, whether it's abortion, marriage, sexuality, gender, or something else.
>
> But here's the thing: What was once hypothetical is now rapidly becoming reality. Examples of this abound. [citations of many examples omitted]
>
> So this case may be the first, but I suspect it will not be the last.

Sambrano v. United Airlines, 45 F.4th 877, 882-83 (5th Cir. 2022) (Ho, J., concurring).

I. AAPS Has Standing.

ABOG reargues the issue of standing that was fully resolved by the Fifth Circuit in favor of AAPS here in this same case. (ABOG Mot. 6-9) The Court of Appeals 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." *AAPS v. ABIM*, 103 F.4th at 393.

This constitutes the "law of the case," which binds not only this court but also any future appeals. *See Mackey v. Am. Multi-Cinema, Inc.*, No. 24-30562, 2025 U.S. App. LEXIS 6552, at *5 (5th Cir. Mar. 20, 2025) ("'[A]n issue of law ... decided on appeal may not be reexamined ... by the appellate court on a subsequent appeal.'") (quoting *Fuhrman v. Dretke*, 442 F.3d 893, 896 (5th Cir. 2006), further inner quotations omitted).

Moreover, ABOG's threats are plainly designed to chill advocacy by physicians against abortion, in the wake of *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). AAPS's conferences feature physicians who present about harm caused by abortion, and who speak out against it. There is a constitutional right to hear and ABOG is intentionally interfering with it. None of ABOG's cited standing decisions even addresses this fundamental First Amendment right, other than a unanimous Fifth Circuit decision that fully supports AAPS here. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 339 (5th Cir. 2020) ("courts must be especially vigilant against assaults on speech in the Constitution's care") (Jones, J.)

Here ABOG argues that its threats of revocation of board certification, such as the example threat made to an AAPS conference speaker when she testified in Congress (Am. Compl. ¶ 115), are not "about any position on the acceptability of abortion" but instead merely based on "false statements about data tracking." (ABOG Mot. 8) But interpretations and criticisms of data concerning abortion are what ABOG threatens retaliation for, as in threatening punishment of those who testify about harm caused by abortion as Dr. Ingrid

Skop was in her testimony to Congress as cited above. ABOG is plainly chilling freedom of speech about harm from abortion when its threatened board revocation is used against a congressional witness in this manner. This is not mere speculation about whether "ABOG *would* threaten or decertify a physician" (ABOG Mot. 8, emphasis added), as ABOG's threats are posted by it on its own website and they have been expressly used against an AAPS conference speaker.

ABOG's cited precedents are easily distinguishable. ABOG relies on *Clapper v. Amnesty Int'l USA*, but the only chilling effect there was that a federal "agency might in the future take some *other* and additional action detrimental to that individual." *Clapper*, 568 U.S. 398, 418 (2013) (emphasis in original). ABOG's threats themselves cause the chilling effect, without another action necessary, as demonstrated by the congressional hearing. Moreover, here there is not a "speculative chain of possibilities" as in *Clapper*, but rather threats posted by ABOG on its own website and emphasized against an AAPS conference speaker at a congressional hearing. *Id.* at 414.

In *Glass v. Paxton*, 900 F.3d 233 (5th Cir. 2018) (also cited by ABOG Mot. 8), there was no threat against a university professor who challenged a statutory right of students to carry concealed guns in a college classroom, and thus the professor lacked standing under the First Amendment. Here, ABOG has repeatedly told physicians that ABOG will revoke their board certification if the physicians make public statements about abortion of which ABOG disapproves. The "chain of contingencies" that was too far afield in *Glass v. Paxton* is not an obstacle to standing here. *Id.* at 239. ABOG's threats are real and unmistakable,

have an intended chilling effect on speech, and do not depend on speculation that someone might break the law. "Glass lacked standing because she alleged a 'subjective' First Amendment chill that was contrary to the presumption her students 'will conduct their activities within the law and so avoid prosecution and conviction.'" *Id.* at 238 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)).

As the Fifth Circuit held and ABOG acknowledges, "people will likely react in 'predictable ways' when confronted with a threat of 'stop saying things about Covid-19, Dr. Fauci, and abortion that we don't like, or we will neuter your ability to practice medicine through decertification.'" (ABOG Mot. 8, quoting *AAPS v. ABIM*, 103 F.4th at 392) But then ABOG argues that AAPS has not pled facts "showing ABOG made threats." (ABOG Mot. 9) Plaintiff AAPS has done precisely that as explained in the Statement of Facts and earlier above, which quotes both the Amended Complaint and ABOG's current website.

Finally, ABOG cites an unpublished Fifth Circuit decision for its proposition that a plaintiff lacks standing to bring a First Amendment retaliation claim on behalf of a third party. *See Duran v. City of Corpus Christi*, 240 F.App'x 639 (5th Cir. 2007). But AAPS fits comfortably into the exception to the limitation on third-party standing because "there [does] exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 643. The hindrance is that ABOG could retaliate by revoking the board certification of any physician who challenged its threats to do that. If ABOG is engaging in purely private conduct as it asserts (and AAPS disputes below), then it could moot any lawsuit by

a physician against it by immediately revoking that physician's board certification. So ABOG cannot credibly object to third-party standing here. The prudential limitations on third-party standing as explained in ABOG's own authority have no application here.

II. ABOG Engages in State Action and AAPS Properly States a Constitutional Claim.

Plaintiff AAPS presents in greater detail on the state action issue in Plaintiffs' Opposition to the American Board of Internal Medicine's (ABIM's) Motion to Dismiss, as filed contemporaneously with this response to ABOG. For example, numerous appellate decisions emphasize that the issue of state action is fact-intensive, and thus unsuitable for resolution on ABOG's motion to dismiss. *Yeager v. City of McGregor*, 980 F.2d 337, 340 (5th Cir. 1993) (applying a "fact-specific view" to the assertion of state action, on appeal from a grant of summary judgment). To avoid repetition, AAPS focuses here on rebutting ABOG's specific arguments and distinguishing its cited decisions. (ABOG Mot. 9-14)

For starters, ABOG never cites or addresses the landmark Supreme Court decision that found state action by a private corporation based on conduct analogous to that of ABOG here. *See Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 302 (2001) (finding state action by a private corporation in the context of school sports).

"An entity may be a state actor for some purposes but not for others." *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 550 (5th Cir. 2005) (quoting *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996)). ABOG fails to recognize or address this central point. Instead, ABOG argues that if it is not a state actor when it administers its examinations and grants board certification, then it cannot be a state actor when it publicly

disciplines physicians based on their testimony to legislative committees. ABOG's argument is a non-sequitur. In fact, ABOG is engaging in state action when it publicly disciplines a physician based on his statements – an action traditionally within the exclusive authority of state medical boards – and the issue of whether ABOG is state actor when it administers certification examinations is irrelevant.

ABOG repeatedly cites a paragraph in AAPS's Amended Complaint – which must be taken as true with all inferences drawn in AAPS's favor – which fully states:

> Although only official state medical boards have the proper authority to regulate the practice of medicine, certifications by the Board Defendants constitute a *de facto* essential credential for practicing in most hospitals and participating in most networks. By threatening to revoke board certification of physicians, and actually doing so, the Board Defendants engage in state action, and intentionally and improperly chill speech by physicians without the political accountability of official state medical boards.

(Dkt. 66, Am. Compl. ¶ 6) This allegation puts ABOG in the same boat as a private company that provides juvenile correctional services to Dallas County, which is traditionally or exclusively a public function and thus the provision of those services concededly constituted state action. *Cornish*, 402 F.3d at 550 (the private company's internal firing of an employee, however, is not).

ABOG begins its legal argument by citing a *pro se* case brought by a plaintiff who alleged that "a spacecraft launch service provider" had surveilled her for more than a decade, which the court found implausible. *Hondros v. Hewlett Packard Enter.*, No. H-21-1982, 2021 U.S. Dist. LEXIS 211360, at *4, *6 (S.D. Tex. Nov. 2, 2021) (cited by ABOG Mot. 10). There were no allegations of state action there, unlike the many allegations

establishing state action by ABOG here in threatening to end professional careers of physicians in its specialty.

Stated another way, ABOG cannot show that there are no set of facts which can be proven – ABOG has not yet provided any discovery in this action – which would show that ABOG's conduct constitutes state action. *Am. Precision Ammunition, L.L.C. v. City of Mineral Wells*, 90 F.4th 820, 824 (5th Cir. 2024) (dismissal appropriate only if "the pleadings must 'reveal beyond doubt that the plaintiffs can prove no set of facts' that would overcome the defense or otherwise entitle them to relief.") (quoting *Garrett v. Commonwealth Mortg. Corp.*, 938 F.2d 591, 594 (5th Cir. 1991)).

Public functions test. ABOG mischaracterizes the allegations and distorts AAPS's claim, in seeking to avoid recognition that ABOG's complained-of public conduct is traditionally exercised only by state medical boards, as ABOG's conduct has the same effect as discipline imposed by state medical boards. ABOG repeatedly misstates what is in "Dkt. 66, ¶ 6." (ABOG Mot. 10) That paragraph in the Amended Complaint, fully quoted above, explains that certifications by ABOG "constitute a *de facto* essential credential for practicing in most hospitals and participating in most networks" and thus it is the revocation of these certifications by ABOG that amounts to an improper exercise of state action. ABOG seems to be arguing that because this paragraph 6 states that "only" state medical boards have the "proper authority" to regulate the practice of medicine, then ABOG cannot be engaging in state action when it does so. But ABOG's reading omits the use of the word "proper", and fails to recognize many precedents establishing state action

by private entities that invade domains of exclusive state authority, such as prison management. "Though CCA is a private corporation, state action exists because CCA has contracted with the State of Texas to operate and manage state prison facilities." *Gallien v. Corr. Corp. of Am.*, No. 95-40858, 1996 U.S. App. LEXIS 43836, at *1 n.1 (5th Cir. June 18, 1996). *See also West v. Atkins*, 487 U.S. 42, 55-56 (1988) (finding state action by a private physician who contracted with a state prison to provide medical care to prisoners).

While several of these cases observe that the private party had a contract with the state, that is not what makes their conduct state action under the public functions test. Regardless of the existence of a contract, the operation of prisons (and the public restriction of a physician's ability to practice medicine based on his public conduct) is traditionally a function of government, not private businesses. ABOG's board certification "is tantamount to state medical licensure," and thus revocation is a public function. (Am. Compl. ¶ 77)

Yet ABOG relies on several decisions that merely declined to apply state action doctrine to the private administration of certification exams (ABOG Mot. 11-12), which is not the issue here. Indeed, Plaintiff AAPS would prefer that ABOG stay in its lane of administering certification exams. The issue here is ABOG's threatened revocation of board certification based on a physician's legislative testimony or other public statements on a matter of public policy, in an obvious attempt by ABOG to chill debate. These targeted physicians passed ABOG's examinations and earned their board certifications long ago, and no one doubts their medical skills at delivering babies today.

Compulsion/coercion and joint action test. The *Brentwood Academy* decision by the Supreme Court found state action by a private corporation affiliated with public schools, much as the Federation of State Medical Boards (FSMB) is affiliated with state medical boards. (Am. Compl. ¶ 66) Both the FSMB and ABOG are headquartered in the Dallas area (*id.* ¶ 30), and ABOG "agreed with FSMB on this by threatening adverse actions against physicians based on their public statements about matters of public policy" (*id.* ¶ 68-69). Plaintiffs explain this in greater detail in their contemporaneous opposition to ABIM's motion to dismiss.

ABOG fails to cite or distinguish *Brentwood Academy* and thus fails to address how ABOG's entwinement under that precedent with the FSMB triggers state action doctrine for ABOG's threatened revocation of certifications, while using similar terminology nearly simultaneously. ABOG complains that AAPS alleges "unspecified requests by state actors" (ABOG Mot. 13) for ABOG's threats of nearly identical retaliation, using the same wording at around the same time as co-Defendants and the FSMB, but reasonable inferences are to be drawn in favor of AAPS on ABOG's motion to dismiss and discovery has not yet occurred here. (Am. Compl. ¶¶ 56, 151) Moreover, entwinement is shown by how a congressman teamed with an allied witness at a legislative hearing to use ABOG's threatened revocation against one of AAPS's conference speakers, as quoted in the Statement of Facts above. (Am. Compl. ¶ 115)

ABOG relies on unpublished decisions, and decisions predating the sea change in *Brentwood Academy*, none of which involves facts even remotely similar to those alleged

here. In *Pikaluk v. Horseshoe Entm't L.P.* (cited by ABOG Mot. 13), the unremarkable holding was that "[a] meeting of the minds does not occur merely by calling upon law enforcement, even when the information furnished is used to effect an arrest." *Pikaluk v. Horseshoe Entm't, L.P.*, 810 F. App'x 243, 247 (5th Cir. 2020). In *Priester v. Lowndes County*, the court affirmed a grant of summary judgment, after discovery which has not yet occurred here, because "[s]tate action will not accrue merely because of government acquiescence or approval of the private entity's actions." *Priester v. Lowndes Cty.*, 354 F.3d 414, 423 (5th Cir. 2004). AAPS alleges here that the FSMB and Biden Administration took the lead and did more than merely acquiesce in ABOG's threatened retaliation.

There is a "symbiotic relationship" between ABOG and the FSMB that fits comfortably within the Supreme Court reasoning for state action in another precedent quoted by ABOG. *See Rendall-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982) (state action can be based on a "symbiotic relationship" between state and private actors). Finally, ABOG relies on a magistrate's recommendation in *Doe v. Steward Health Care Sys. LLC,* concerning the discharge by a hospital of a patient for her admission to a jail "pursuant to a court order that had been obtained by the Harris County District Attorney's Office." *Doe*, No. 4:18-CV-00394, 2018 U.S. Dist. LEXIS 152247, at *3 (S.D. Tex. July 31, 2018) (cited by ABOG Mot. 13). The lack of a finding of state action there is unhelpful to assessing state action here.

III. AAPS States a Valid Claim for Tortious Interference.

Plaintiff AAPS states a valid claim for ABOG's tortious interference with past and prospective business relationships, namely future conferences held by AAPS, because ABOG is threatening revocation of certification by those who make presentations about harm from abortion. ABOG cites the elements required to prove this (ABOG Mot. 15), and AAPS adequately pleads each of those elements. (Dkt. 66, Am. Compl. ¶ 187-93). ABOG causes injury to AAPS by chilling this speech. (*Id.* ¶¶ 194-95)

A plausible inference from ABOG's repeated threats to revoke board certification is that its very purpose is to chill speech on one of the most politically controversial issues of our time: abortion. ABOG argues to this court that it is not a political organization (ABOG Mot. 3), and yet it declares that it will revoke board certification if a physician's statement about (against) abortion is a basis for enacting legislation, which is quintessential political action. ABOG's conduct satisfies all of the elements of tortiously interfering with AAPS conferences by chilling speech at them.

The harm is not too remote, as ABOG argues in reliance on a case decided on summary judgment. In *IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason*, summary judgment was granted in a lawsuit about a discharge by a hospital, for injuries suffered later by a victim of a car accident involving those who had been previously discharged. 143 S.W.3d 794, 798 (Tex. 2004) (cited by ABOG Mot. 5, 16) Here, ABOG intends to and is chilling speech, and AAPS suffers from this as a sponsor of medical conferences

featuring adversaries of ABOG's position on abortion. Factual development would show details about the financial injury, which need not be included in a pleading.

IV. AAPS States Valid Sherman Act Claims.

ABOG undeniably holds a monopoly over board certification, so much so that Texas law prohibits a medical doctor in obstetrics or gynecology from referring to himself as "board certified" unless his certification is with ABOG. (Am. Compl. ¶ 71) In addition, ABOG's collusion with other entities to revoke board certification triggers antitrust scrutiny:

> As conceded by counsel for the Board Defendants [including ABOG] on appeal in this action and held by the U.S. Court of Appeals for the Fifth Circuit in what becomes the law of this case, "Collusion always creates antitrust problems." *Ass'n of Am. Physicians & Surgeons Educ. Found. v. Am. Bd. of Internal Med.*, 103 F.4th 383, 399 (5th Cir. 2024) (Ho, J., dissenting in part, quoting the appellate Oral Argument at 32:27-33:01).

(Am. Compl. ¶ 204)

Yet despite the above, ABOG argues at length for dismissal of AAPS's antitrust claims against it. (ABOG Mot. 16-29) Plaintiffs address and rebut many of these same arguments in their extensive response to ABIM's similar motion to dismiss, and AAPS avoids repetition here.

A. AAPS Has Antitrust Standing.

ABOG repeats a familiar – but incorrect – argument that antitrust laws should be for the benefit of consumer welfare alone: "This does not relate to consumer welfare and therefore is not an antitrust injury. Without an antitrust injury, these claims should be dismissed." (ABOG Mot. 19, misplacing reliance on *Reiter v. Sonotone Corp.*, 442 U.S.

330, 343 (1979)) ABOG's "consumer welfare" argument for limiting the scope of the Sherman Act has no historical basis and is not an accurate statement of antitrust law, which broadly prohibits misuse of monopoly power including ABOG's conduct at issue here.

The Fifth Circuit has expressly stated that antitrust standing is not limited as ABOG argues, including in the very same precedent relied on by ABOG here. *See Waggoner v. Denbury Onshore, L.L.C.*, 612 F. App'x 734, 737 (5th Cir. 2015) (quoted above, included again here for convenience: "[t]ypically, parties with antitrust injury are either competitors, purchasers, or consumers in the relevant market. ***But standing is not necessarily limited to this group***.") (collecting multiple authorities, omitting the citation to a treatise within the quote, emphasis added). ABOG quotes the first sentence, but then misleadingly omits the second sentence. (ABOG Mot. 18) In the *Reiter* case cited by ABOG above, the Supreme Court was merely saying that antitrust laws ***extend to*** protect consumers and thus consumers have a cause of action, not that antitrust laws are ***limited*** for the benefit of only consumers.

As to ABOG's reliance on Robert Bork's treatise, his views on antitrust have long been the subject of academic debate but have not been broadly embraced by courts. *See, e.g.*, *Greene v. Gen. Foods Corp.*, 517 F.2d 635, 650 n.9 (5th Cir. 1975) (Wisdom, J.) ("This is not the place to attempt to refute [Bork's] argument, except to note that, in addition to Professors Gould & Yamey, a number of other commentators have taken a contrary view."). If antitrust standing were limited to consumer welfare, then many

antitrust precedents would no longer be good law today. The Sherman Act has never been so narrowly construed.

AAPS has financial injuries from ABOG's censorship of presentations by physicians about abortion. This is not a lawsuit alleging vague harm to the "marketplace of ideas," but one properly grounded in economic loss, and thus antitrust standing exists. ABOG's cited decisions on this point are inapplicable here. *See Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 983 (D.C. Cir. 2017) (rejecting a claim by third-party candidates to participate in certain presidential debates because a "political economy" is "merely a term of art"); *Adams v. Am. Bar Assoc.*, 400 F. Supp. 219, 223 (E.D. Pa. 1975) ("[T]he court doubts, in a world which has not yet reached the ominous year of 1984, whether monopolization of ideas is even possible.").

Finally, ABOG's argument overlooks an additional reason why AAPS has antitrust standing here: the physicians threatened by ABOG with revocation of the board certification are unable themselves to sue, as a practical matter, lest ABOG then retaliate by immediately destroying their careers with revocation of their board certification. That would be irreparable harm for which there is no remedy available in court, and no physician can take that risk. *See, e.g.*, *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) (Plaintiff Burgess would be "left unable to find employment in the banking industry so long as the FDIC's order remains in place. Burgess ***has therefore established an irreparable injury***.") (emphasis added). AAPS is the only plaintiff who can plausibly sue ABOG over its misuse of its monopoly to impose censorship.

B. AAPS Adequately Pleads a Sherman Act Section 1 Violation by ABOG.

As to Section 1 of the Sherman Act, ABOG sets forth the legal elements but then is unpersuasive in arguing that it has acted independently. ABOG's terminology and timing were virtually identical to that of the other Board Defendants, the FSMB, and the Biden Administration. Moreover, ABOG's conduct is unprecedented in its prior history, as never before has it never threatened revocation of certification like this. This is as though several gas stations in a town suddenly and sharply increased their prices to the very same higher price on the same day, but then insisted there was no collusion. They would be unable to dismiss a lawsuit at the pleading stage with that argument, and ABOG's motion to dismiss should likewise fail here.

ABOG tries to downplay its intimidation of the AAPS conference speaker, identified above as Dr. Ingrid Skop (and disclosed in the link's URL name provided in the Amended Complaint, ¶ 115 n.30, a link that ABOG copied into its own motion at ABOG Mot. 4 n.4), by saying she did speak at AAPS's conference so there must not have been any harm. But of course there is harm in the chilling effect that ABOG intends and is inflicting: this speaker and others need to become less candid and controversial in what they say, out of fear of losing their professional career at the hands of ABOG retaliation. This dilutes AAPS's conferences, reduces attendance and donations for it, and makes it more difficult to attract other speakers on the same topic.

ABOG's focus on possible relevant markets is premature on a motion to dismiss, and overlooks how there is no substitute product for ABOG's board certification, as AAPS

has alleged that board certification with ABOG "is tantamount to state medical licensure." (Dkt. 66, Am. Compl. ¶ 77) By failing to come to grips with this reality, ABOG's extensive antitrust arguments are simply off-target.

C. AAPS Adequately Pleads a Sherman Act Section 2 Violation by ABOG.

AAPS benefits from having practicing obstetricians speak candidly at its conferences, but ABOG misuses its monopoly power to impede that. A valid cause of action in Section 2 of the Sherman Act by AAPS exists here, because ABOG is acting "in an unreasonably exclusionary manner." *Mid-Texas Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1387 (5th Cir. 1980) (inner quotations omitted). *See also United States v. S. Motor Carriers Rate Conference, Inc.*, 672 F.2d 469, 484 (5th Cir. 1982) ("Both the possession of monopoly power and its willful misuse are necessary to sustain a charge of illegal monopolization under Section 2 of the Sherman Act."). A violation of Sherman Act Section 2 occurs when there is misuse of a monopoly by one company without any conspiracy or unlawful agreement.

AAPS's claim against ABOG is very similar to a claim found to be valid by the Fifth Circuit in reversing a grant of summary judgment in favor of a television station that refused to accept advertisements from a particular advertising agency. *Six Twenty-Nine Prods., Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 482 (5th Cir. 1966). As that decision illustrates, it is not necessary that the plaintiff be a direct competitor of the defendant. "[T]he Supreme Court has firmly established the principle that Section 2 of the Sherman Act prohibits an enterprise from refusing to deal with another business entity when this

course of action is undertaken in furtherance of monopolization of the relevant market." *Id.* at 482. When one monopoly acting alone excludes others as ABOG threatens to do, then Section 2 is implicated.

ABOG argues that its conduct is justified, but that is an issue of fact for summary judgment, not for a motion to dismiss as presented here. *See Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958) (it is an issue of fact whether a monopolist television station's refusal to accept plaintiff's programs was justified).

In *Lorain Journal Co. v. United States*, the only newspaper in a town refused to accept advertising from local merchants who also advertised on a new radio station, and the Supreme Court held that the newspaper's refusal was an illegal attempt, under Sherman Act Section 2, to monopolize the dissemination of news and advertising. 342 U.S. 143, 154 (1951). Likewise, ABOG's announcement that it will revoke its board certification from physicians who testify in ways disfavored by ABOG is a Section 2 violation as ABOG attempts to control the dissemination of information about abortion.

In the landmark Supreme Court decision on Section 2, known as the *Terminal Railroad* case, an association of railroad operators monopolized the cheapest route across the Mississippi River, which was the Eads Bridge at St. Louis. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). "The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company." *Id.* at 397. Board

certification is not a railroad bridge across a wide river, but "it is, as a practical matter," necessary for patients to have full access to the physicians of their choice. The Supreme Court found a violation of Section 2 of the Sherman Act, in addition to Section 1, for the defendant to act with partiality with respect to this monopoly. *See id.* at 409-10. Likewise here.

ABOG's cited authorities are unhelpful to its motion, and instead reinforce the validity of AAPS's cause of action. For example, ABOG relies on the unpublished *Clean Water Opportunities, Inc. v. Willamette Valley Co*. decision, but that ruling emphasized that if there is no rational business justification for the exclusionary conduct, then an inference of a Section 2 violation exists. 759 F. App'x 244, 248 (5th Cir. 2019). We have that here: there is no business justification for ABOG to revoke board certifications based on legislative testimony. ABOG has an immediate loss in maintenance of certification fees from the physicians whose certifications are revoked, and ABOG deters future customers from being subjected to this abuse by ABOG. Based on ABOG's own precedents, this Court should infer a Section 2 violation by ABOG.

In an unsuccessful lawsuit alleging predatory hiring, a Northern District of Texas court held that conduct "inconsistent with competition on the merits" would be a violation of Section 2 of the Sherman Act, which AAPS alleges here against the monopolist ABOG. *Oxford Glob. Res., Inc. v. Weekley-Cessnun*, Civil Action No. 3:04-CV-0330-N, 2004 U.S. Dist. LEXIS 32186, at *5 (N.D. Tex. Nov. 12, 2004). In a Louisiana federal district court decision that "denies the motion to dismiss plaintiffs' Sherman Act Section 2 attempted

monopolization claim and plaintiffs' Sherman Act Section 1 claims under the rule of reason," that court found "plaintiffs have alleged facts that allow the Court to draw the reasonable inference that Pool's conduct was anticompetitive." *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, 940 F. Supp. 2d 367, 391, 402 (E.D. La. 2013). ABOG's conduct as alleged here is also anticompetitive, and as a monopolist ABOG is subject to a Sherman Act Section 2 claim here.

CONCLUSION

Plaintiff AAPS respectfully requests that ABOG's motion to dismiss be denied in its entirety.

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 26 pages long.

CERTIFICATE OF SERVICE

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

/s/ Andrew L. Schlafly
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