Big Case in the Big Easy: *AAPS v. ABIM, et al.*

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Two cities never sleep in the United States. One of them is, of course, the Big Apple, otherwise known as New York City. Frank Sinatra memorialized this in his famous song New York, New York: "I want to wake up in a city that doesn't sleep / And find I'm king of the hill, top of the heap."

The other city that never sleeps is New Orleans. In my latest trip to argue a federal appellate case in this city called the Big Easy, a local there proudly pointed out its top-tier ranking on this issue. He was right. Despite being on the 20th floor of a hotel in the French Quarter, to be within walking distance of the federal courthouse, I could hear the lively din and cheer of the street crowd below late into the evening. It was pleasant background noise as I prepared for the oral argument the next morning in the U.S. Court of Appeals for the Fifth Circuit.

The Court scheduled us in its En Banc Courtroom and cleared all the other cases from its docket there that morning. This enabled our oral argument to extend far longer than I had ever seen before.

There was spirited questioning by the three-judge panel on the Fifth Circuit, which is the finest appellate court in our country. It presides over Texas, Louisiana, and Mississippi, to which millions of Americans have been moving to attain the freedom that has been disappearing in the Northeast and on the West Coast.

The mix of Creole and Cajun cuisine in the Big Easy is another advantage. The night before oral argument, I enjoyed a dinner salad with more deep-fried shrimp than I could count. Entertainment by street musicians filled the air. Some say that the name "Big Easy" comes from how easy it is for a musician to obtain a job in this town. AAPS has quite a few musicians who could put on a show in the Big Easy, and perhaps AAPS will hold a future annual meeting there.

On the morning of April 27, 2026, the big case in the Big Easy was oral argument in our lawsuit, *Association of American Physicians and Surgeons Educational Foundation, et al., v. American Board of Internal Medicine, et al.*[1] This was on our appeal from the U.S. District Court in Galveston, Texas.

The Historic Location

Let us digress a bit to enjoy the history of the courthouse in which our case was argued. It is designated as a National Historic Landmark and included in the National Register of Historic Places. On the courthouse's roof, at its four corners, are "Ladies" representing Agriculture, Commerce, History, and Industry. Their sculptor was the 19th-century master Daniel Chester French, who also designed the famous statute of the seated Abraham Lincoln in the Lincoln Memorial in Washington, D.C.

The Fifth Circuit courthouse is majestic, so much so that it is a favorite backdrop for movie producers. Oliver Stone's movie *JFK* repeatedly featured its exterior, and its interior was the setting used for *Kingfish* in which John Goodman played the colorful Louisiana Governor Huey P. Long.

The designer of this renowned courthouse was James Gamble Rogers, a member of the eminent New York architectural firm of Hale and Rogers. He implemented a classical Italian Renaissance style, making plentiful use of marble. It is similar in design to the Shelby County Courthouse in Memphis, which was also a work by Rogers. This New Orleans federal courthouse took four years and $2 million to construct, and it opened in 1915. That price tag is equivalent to $65 million today, which is far less than what it costs to build far inferior government buildings today. We pay far more, even in inflation-adjusted dollars, for government projects today, and yet obtain much less.

The economical, yet magnificent, style of this courthouse is fitting for the Court that presides there. Its spacious hallways with high ceilings keep the building cool during the sultry New Orleans summers. A mixture of southern charm and European elegance is felt inside the courtrooms. The acoustics are superb, too.

Our oral argument was held before a three-judge panel in its En Banc courtroom, which is the grandest room of all. The En Banc courtroom has walls empaneled with Louisiana gum, which is a reddish-brown wood veneer having occasional random streaks, and a spacious interior with a very high ceiling. Located on the second floor and flanked by smaller alternatives, the En Banc courtroom is unique with its lengthy horseshoe bench that can accommodate all of the active judges in the Fifth Circuit whenever appropriate. A special effort was made to use local materials in the construction of this courtroom and throughout the entire courthouse, including marble from Tennessee and pine from Mississippi and Louisiana.

For some historical humor, during renovations of this courthouse a unique catwalk was uncovered by which supervisors could spy, without being seen, on postal workers toiling below to make sure they were doing their jobs. This harkened back to when a post office shared the building space with the judiciary. The catwalk featured small windows to obscure the supervisors' presence, and firm flooring to muffle the sound of their footsteps. Today such monitoring of an employee's performance might be grounds for a lawsuit, unless, of course, the employee being monitored is a physician!

Background on this Lawsuit

The Association of American Physicians and Surgeons Educational Foundation (AAPS) sued the American Board of Internal Medicine (ABIM) and the American Board of Obstetrics and Gynecology (ABOG) based on their threatened and actual revocations of board certifications as retaliation for physicians' outspokenness on matters of public policy. This lawsuit alleged that their threats and actions have a chilling effect on physicians' outspokenness about matters of public policy. Board certifications

are generally necessary for physicians to practice on the medical staff at hospitals and to be in insurance networks.

ABIM has threatened to revoke and has actually revoked board certifications of physicians based on their opinions about matters of public concern, such as COVID, while ABOG has threatened to take action against obstetricians who speak out on the pro-life issue. No other entity is currently abusing monopoly power like this in the medical or legal professions.

The principles underlying state action doctrine and the Sherman Act, as well as its statutory text and precedents on conceptually analogous fact patterns, stand against an assault on freedom of speech by professionals. A viewpoint-based revocation of board certification bears no resemblance to the objective grading of multiple-choice exams on which initial board certification is based. Instead, the revocation of board certification is nearly indistinguishable from disciplinary action by a state medical board. Both are intentionally done with publicity, in contrast with private disciplinary decisions by schools or clubs. Both board certification revocation and licensure discipline terminate the ability of the physician to fully practice medicine. Both result in the exclusion of the physician from medical staffs of hospitals and insurance networks. Both are done with public statements that are devastating to the professional reputation of the physician. AAPS sued for violations of the First Amendment and federal antitrust law, the Sherman Act, for this retaliatory conduct by specialty boards.

ABIM and ABOG responded to this lawsuit by arguing that they cannot be accountable under the First Amendment because they are private entities, not state actors. But being a private entity has never completely immunized anyone from application of state-action doctrine, particularly when the entity has authority over professionals as specialty boards do. For example, obstetricians need ABOG certification to deliver babies in hospitals. By threatening to revoke these board certifications in a partisan manner, ABOG is silencing physicians on one side of the abortion debate.

Freedom of speech is chilled; public discourse by physicians is undermined; and the democratic process suffers due to misuse by specialty boards of their board certification monopolies to censor physicians. If specialty boards have unlimited rights to revoke board certification, then they could retaliate with impunity based on any political views by a physician, including even his religious objections to vaccination.

Fortunately, several legal doctrines exist that should protect against viewpoint-based retaliation by specialty boards. They engage in a public function when they sharply restrict the ability of a physician to practice medicine, which is what happens when board certification is revoked. While specialty boards need not be considered state actors for their traditional role in granting certification based on multiple-choice exams, their new program of decertifying physicians based on their outspokenness should be deemed to be state action because the public restriction of a physician's ability to practice medicine is a public function. This conduct by specialty boards further violates the Sherman Act by interfering with the free market and reducing patient choice.

In a Mar 31 decision by the U.S. Supreme Court in favor of a right to provide conversion therapy, against a Colorado law that had banned it, the High Court emphatically reversed lower courts that had sided with the ban. This ruling by the Supreme Court was a spectacular victory for the First Amendment, as a large majority of the Justices on the Supreme Court held that:

> the First Amendment stands as a shield against ***any*** effort to enforce orthodoxy in thought or speech in this country. It reflects instead a judgment that every American possesses ***an inalienable right to think and speak freely***, and a faith in the free marketplace of ideas as the best means for discovering truth [emphasis added].[2]

I emphasized this strong affirmance of First Amendment rights during my oral argument in New Orleans, including reciting the first sentence in the above block quote verbatim. This is the sort of clear, emphatic statement in favor of a fundamental right, which one might expect to find in the Declaration of Independence or another document written by our Founding Fathers. They would surely be dismayed by the many intrusions and infringements on our First Amendment right of freedom of speech today.

State or Private Action?

Defendants ABIM and ABOG, however, have insisted in Court that their conduct did not constitute "state action," and thus the First Amendment should not apply. Purely private conduct, such as a country club expelling a member based on his political views, does not ordinarily implicate the First Amendment because it is not governmental or otherwise state action. Rather, the Bill of Rights typically safeguards against actions only by the government, and only by private parties if certain conditions exist such that their action is tantamount to state action.

AAPS is not asking that initial board certification be designated as state action. The initial board certification of physicians who have completed residency training is very different from the unprecedented retaliatory campaign to revoke board certification today. Initial board certification is based on a computerized grading of an objective multiple-choice exam concerning knowledge, as typically administered to medical residents. There is no identifiable viewpoint-based discrimination in initial board certification, in contrast with the heavily viewpoint-based discrimination that occurs when a specialty board revokes an experienced physician's board certification or threatens to do so.

Legal precedents are well-established that a mere threat to retaliate against someone who speaks out constitutes a First Amendment violation if the threat is part of state action. In *NAACP v. Button*, the Supreme Court stated that the mere threat of sanctions for speech may deter the exercise of First Amendment rights nearly as much as the actual application of sanctions. Thus, it is well-established that chilling someone's right to free speech is itself a constitutional harm that is sufficient for legal standing purposes to challenge it.

Patients suffer when their long-time physician has his board certification revoked, more so than when a medical resident is unable to obtain it in the first instance. When the board certification of a renowned physician occurs, hundreds or thousands of patients are adversely affected by that decision. This is akin to a traditional public function of a state medical board revoking a physician's medical license in the middle of their career, while many patients are relying on him.

Indeed, board certification of an accomplished physician is virtually indistinguishable from state medical board discipline, which plainly is state action. Both processes limit a physician's abil-

ity to practice medicine, and both are publicly devastating to the reputation of the physician. In contrast with academic discipline, which is typically kept confidential, both ABIM's revocation of board certification and state medical board discipline are done in a highly publicized manner, as ABIM posts its revocations on its public website, just as a state medical board does. Both forms of discipline are undertaken supposedly to protect the public in some way. Both are based on subjective criteria rather than the more objective process of grading multiple-choice exams.

In its appellate brief to the Fifth Circuit, ABIM relied on a series of decisions concerning disputes about initial board certification, without any court decisions about a mid-career revocation of board certification. ABIM's first cited precedent in its brief was to a 5-4 U.S. Supreme Court decision in favor of an entity controlling public access channels on a private television cable system in Manhattan, which had suspended two film producers.[3] While historically interesting, this and other authorities cited by ABIM do not support its campaign today of revoking board certification, which has an effect nearly indistinguishable from the traditional, exclusive public function of state medical board discipline.

ABIM relied on a case concerning the initial board certification (as opposed to revocation) of a psychiatrist, who practiced in a field that does not typically require hospital medical staff privileges dependent on board certification: *Sanjuan v. Am. Bd. of Psychiatry & Neurology*.[4] Initial board certification is based on objectively grading multiple-choice exams and thus has no bearing on viewpoint-based revocation of board certification at issue now.

ABIM asserted in its appellate brief that its revocation of board certification is based on professionalism, but that is a traditional state function performed by state medical boards. Professionalism is precisely the basis on which state medical boards have traditionally and exclusively disciplined physicians. "The most common reason for physician disciplinary action for professionalism in 2019 was the catch-all term 'unprofessional conduct' …." By revoking board certification based on "professionalism," ABIM is encroaching on what state medical boards have traditionally done, but ABIM is doing this based on its disagreement with a viewpoint expressed by the physician.

ABIM objected to this distinction between the new board certification revocation campaign and the process of initial board certification. But the sharp contrast between initial certification and mid-career revocation based on viewpoint seems obvious. The former is an objective process based on assessing knowledge, while the latter is entirely subjective and susceptible to bias and viewpoint discrimination. ABIM argued in its appellate brief to the Fifth Circuit that "Plaintiffs cite no case indicating that whether an activity constitutes a public function for purposes of the state action analysis depends on how it is performed." But AAPS also quoted clear Fifth Circuit holdings that a private entity can be engaged in state action without becoming a state actor overall: "Defendant may be a state actor for some purposes but not for others."[6, 7]

"'That which looks like a duck, walks like a duck, and quacks like a duck will be treated as a duck even though some would insist upon calling it a chicken.'"[8] When specialty boards revoke board certification of a physician for speaking out, they act like state medical boards in publicly disciplining physicians.

Ironically, one legal precedent on this issue was written by the same judge after whom the courthouse in which we argued this appeal is named: Judge John G. Wisdom. He wrote the decision for the same Court in a case argued in the very same courthouse in New Orleans, because this famous building has been operating since 1915. Judge Wisdom addressed the exclusion by a private racetrack of an outspoken horse trainer. In that case of 30 years ago, the Fifth Circuit held that the horse trainer had a valid First Amendment claim. Judge Wisdom found that the racetrack, though private, had a sufficient nexus with public officials to justify a continuation of that lawsuit, captioned *Sims v. Jefferson Downs*. The Court held that an allegation very similar to that made by AAPS now was sufficient to overcome a motion to dismiss on the pleadings:

> [B]ecause of the plaintiff's involvement with the organization and planning of the Louisiana Thoroughbred Trainers Association, and because of plaintiff's exercise of his constitutional rights of freedom of speech and freedom of association ... the defendants herein, Jefferson Downs Racing Association, Marie Krantz, and the Louisiana State Racing Commission and its Stewards in co-operation, conjunction, and participation with one another, did willfully and intentionally deny the plaintiff the right of access to Jefferson Downs Racing Association facilities." R. at I, 193. ***The district court must proceed to consider the merits of this allegation*** [emphasis added].[9]

Mere "co-operation, conjunction, and participation" by a state-controlled entity with a private one in excluding a licensee from something essential to his profession is sufficient under Judge Wisdom's ruling to allege state action by a private entity.

In its Amended Complaint against the specialty boards, AAPS did allege involvement by the Federation of State Medical Boards, which is a nexus for state action. AAPS's Amended Complaint stated the following:

> The Board Defendants then agreed with the FSMB, which took credit that other health organizations including the umbrella organization for the Board Defendants, ABMS, then agreed with FSMB on this by threatening adverse actions against physicians based on their public statements about matters of public policy. (Citation omitted.)

AAPS does not seek in a legal ruling a vast expansion in the scope of what qualifies as state action, but merely a narrow recognition that when specialty boards behave like state medical boards in publicly disciplining physicians by revoking their board certification, to limit their practice of medicine, then this is traditionally a state function to which state action doctrine should apply.

Slippery Slope

Left unaddressed by the specialty boards' arguments in Court is the frightening slippery slope that would result if their arguments were accepted. If First Amendment values can be undermined by revoking board certification based on statements relating to public policy, then physicians lack genuine freedom of speech to the detriment of our form of government. Career-ending board certification revocation based on religious beliefs or even race could be next. ABOG represented to the Court that its board certification does not require a physician to perform abortions, if he has a religious,

moral or ethical objection, but ABOG is chilling advocacy against abortion by threatening to revoke certification based on what a physician says. Testifying against abortion is a basis for ABOG's revocation of certification, yet ABOG argued in Court against legal accountability for its partisan misuse of its monopoly power.

A vocal meeting attendee who speaks out at AAPS's videoed conferences is being retaliated against by ABIM based primarily on a presentation she made during a religious gathering at her own church. That was apparently video-recorded and posted by someone else on the internet, and ABIM is threatening the revocation of her board certification due to her comments as part of that religious ceremony. The ongoing action by ABIM against her, which has persisted for more than a year, has had a chilling effect on her statements at AAPS meetings, to the detriment of the candor at AAPS's conferences and AAPS's constitutional right to hear.

Two highly acclaimed speakers at AAPS conferences—both having impeccable academic credentials and a lifetime of achievement in medicine—have been subjected to retaliation by ABIM such that it has had a chilling effect on their candor and outspokenness in their presentations at AAPS conferences.

A speaker at an AAPS conference in Texas in 2023 was previously confronted during a congressional hearing in apparently a coordinated attempt by a congressman and another witness to use ABOG's threat of retaliation against her. The AAPS conference speaker stated at the hearing that there was a lack of full reporting of harm from abortion. Then Democratic Rep. Gerald Connolly (VA) and a subsequent witness, both in opposition to the views against abortion by the AAPS speaker, reportedly had the following exchange in misuse 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.[10]
>
> Moayedi did not 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."[10]
>
> Then Rep. Connolly, a supporter of abortion rights, asked the witness to elaborate further on that "misinformation" and decertification assertion against the AAPS conference speaker.[10]

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.

The speakers and attendees at AAPS conferences are nearly entirely physicians and other medical practitioners, who seek candid discussion without any distortions caused by censorship, or any chilling effects from censorship.

The full success of AAPS's conferences depends on candor of the presentations by physicians there, and by the candor of attendees when the floor is frequently opened to questions and comments by attendees.

Antitrust Issue

As to the antitrust issue, AAPS alleges that it is a violation for specialty boards to misuse their monopoly power to impose viewpoint discrimination as a condition of having a professional certification. This conclusion can be reached under Section 1 or 2 of the Sherman Act, and AAPS alleged violations by the specialty boards of both sections. In their responses, the specialty boards did not deny that they have vast monopoly power, which they are exploiting to influence what physicians say about matters of public policy. The specialty boards' conduct impedes competition by eliminating renowned physicians, but they argued in their legal filings that there is a lack of an antitrust injury or a specifically defined relevant market. Monopolists do not have a blank check to abuse their power by censoring others, and the Sherman Act exists to curb this and other wrongdoing by monopolists.

Section 1 of the Sherman Act prohibits collusion that has an anti-competitive effect, and Section 2 of the Sherman Act prohibits the misuse of monopoly to exclude others. AAPS argued in its lawsuit that specialty boards are violating both sections with their campaign to threaten to and actually to revoke board certifications. The effect of these revocations is to exclude physicians from hospitals and insurance networks and thereby deny access to them.

Prominent, world-renowned physicians have been excluded from treating patients at hospitals due to revocation of their board certifications based on their outspokenness during COVID. The effect of this is plainly anticompetitive, by removing these and other physicians from the marketplace of medical care. These victims have "antitrust injury" as excluded physicians, and AAPS has antitrust injury due to the harm it suffers from the chilling effect caused by the Board Defendants' retaliation.

Despite this, the Board Defendants asserted in Court that the antitrust claims should be denied at the pleading stage due to a lack of clarity about the relevant market. But this lawsuit is not that kind of a run-of-the-mill antitrust case, AAPS argued. Instead, this is a case whereby monopolists have denied access by physicians to the equivalent of an essential facility—board certification—in violation of the Sherman Act. Supreme Court precedents are in AAPS's favor.[11]

AAPS does not seek to apply anything that is not supported by the text of Sherman Act, or to depart from any existing relevant antitrust precedents. Under well-established antitrust principles, "Collusion always creates antitrust problems," as was conceded by an attorney for the specialty boards during oral argument in a prior appeal in this action.[12] Moreover, a textualist interpretation of the Sherman Act fully supports Plaintiffs' causes of action here, as its Section 1 states that: "Every … conspiracy, in restraint of trade or commerce among the several States … is hereby declared to be illegal."[13] Collusion to revoke board certifications is a conspiracy in restraint of trade and is therefore a violation.

A relevant market need not be clearly defined in all antitrust cases, and this unusual misuse of monopoly power by the Board Defendants does not require defining a relevant market at this early stage. "[A] showing of manifest anticompetitive effects *a fortiori* renders unnecessary the definition of a relevant market."[14] Definition of a relevant market is needed for analyzing mergers under Section 7 of the Clayton Act, which is not at issue here, or if there is doubt about the market power of defendants, but that is

not the case here. The specialty boards relied in their filings in Court on a famous bowling alley case, *Brunswick Corp. v. Pueblo Bowl-O-Mat*.[15] But *Brunswick* concerned an objection by a competitor to allowing his rivals to remain in business due to a merger, and the Supreme Court rejected the notion that antitrust laws are for the protection of competitors rather than for protection of competition. As the Supreme Court later explained in elaborating on the *Brunswick* holding:

> The plaintiffs were 3 of the 10 bowling centers owned by a relatively small bowling chain. The defendant, one of the two largest bowling chains in the country, acquired several bowling centers located in the plaintiffs' market that would have gone out of business but for the acquisition. The plaintiffs sought treble damages under § 4, alleging as injury the loss of income that would have accrued had the acquired centers gone bankrupt and had competition in their markets consequently been reduced. We held that this injury, although causally related to a merger alleged to violate § 7, was not an antitrust injury, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition. This reasoning in *Brunswick* was consistent with the principle that "the antitrust laws ... were enacted for 'the protection of *competition*, not *competitors*." [16]

The restraint on trade by specialty boards is injurious to AAPS and individual physicians who lose their board certifications, ***and*** is harmful to competition too. When specialty boards revoke the board certification of a physician, the effect is to remove that physician from hospital medical staffs and insurance networks. This is a reduction in output and in competition which the Sherman Act safeguards against. The famous bowling alley case does not justify the retaliation by specialty boards against board certification.

Next Steps

The Apr 27 oral argument in New Orleans concluded at the command of the Chief Judge, and the courtroom adjourned for the morning. Typically, three judges on an appellate panel meet at a conference the same afternoon to discuss and decide privately what the outcome of the appeal will be, and who will write the opinion for the Court. Then they spend weeks or months writing the majority opinion. If there is a dissent, a separate opinion is published by any judge who may disagree.

For nearly all cases, the decision by the three-judge appellate panel is the end of the road on appeal. The only options thereafter for a losing party are to seek rehearing en banc (by the full Court), or petition for a writ of certiorari by the Supreme Court for its review. Both of these avenues can be tried sequentially. But the odds are low, often less than 1 percent, for either approach to be successful, and both are discouraged by court rules except under extraordinary circumstances.

If successful on appeal, a plaintiff typically returns to the district court on a remand and seeks a trial there. AAPS hopes to have a trial so that First Amendment rights of physicians can be restored.

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