

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MAINE

3
4 MERYL J. NASS, M.D.,

CIVIL ACTION

5 Plaintiff

Docket No: 1:23-00321-JDL

6
7 -versus-8
9 MAINE BOARD OF LICENSURE
10 IN MEDICINE, et al.,

11 Defendants

12 Transcript of Proceedings

13
14 Pursuant to notice, the above-entitled matter came on for **Oral**
15 **Argument** held before **THE HONORABLE JON D. LEVY**, United States
16 District Court Judge, in the United States District Court,
17 Edward T. Gignoux Courthouse, 156 Federal Street, Portland,
18 Maine, on the 17th day of January 2024 at 10:03 a.m. as
19 follows:20
21 Appearances:22 For the Plaintiff: Tyler J. Smith, Esquire
23 Gene R. Libby, Esquire24 For the Defendants: Michael Miller, Esquire
25 Paul E. Switter, EsquireLori D. Dunbar, RMR, CRR
Official Court Reporter(Prepared from manual stenography and
computer aided transcription)

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(Open court)

THE COURT: Good morning. We are now convening a hearing in the matter of Meryl J. Nass, M.D., versus Maine Board of Licensure in Medicine and others. This is Docket 23-CV-321. Counsel, let's have you note your appearances for the record, beginning with the plaintiff's side.

MR. SMITH: Good morning, Your Honor, Tyler Smith for Dr. Meryl Nass, and with me is Gene Libby.

THE COURT: Good morning.

MR. LIBBY: Good morning.

MS. MILLER: Good morning, Your Honor, Assistant Attorney General Michael Miller for the Board of Licensure in Medicine and the individual board defendants, and with me is Assistant Attorney General Paul Switter.

THE COURT: Good morning, thank you. Counsel, it's fine for you to remain at counsel table as you make your presentations this morning. I want to sort of lay out the framework for questions that I have for you so let's get right into it.

We're here on the motion to dismiss and the topic of a *Younger* abstention. As I think you all know, state courts are presumed to be as capable as federal courts in upholding the federal Constitution. Dr. Nass appears to concede that the ongoing state proceeding here is the sort of proceeding that may implicate *Younger* abstention. And so I have to consider

1 whether the ongoing board proceeding against her is, first,
2 judicial in nature as opposed to legislative in nature;
3 second, implicates important state interests; and third,
4 whether the state system provides an adequate opportunity for
5 her to raise her federal constitutional challenges. These are
6 the *Middlesex* factors, and if they are satisfied and no
7 exception applies, then *Younger* abstention may require me to
8 abstain.

9 Now, Dr. Nass appears to me to concede that the first
10 two *Middlesex* elements are satisfied but disputes the third
11 element, focusing on whether the state proceeding provides an
12 adequate opportunity to raise federal constitutional defenses.
13 It is sufficient under *Middlesex* that constitutional claims
14 may be raised in state court judicial review of administrative
15 proceedings. That's essentially the holding of the
16 *Bettencourt* decision from the First Circuit. But here
17 Dr. Nass argues that the board proceeding involves different
18 issues, parties, relief, and fact finders, and that her
19 opportunity for meaningful consideration of the facts is
20 sharply limited under the Maine Administrative Procedures Act.
21 The board essentially responds that the Maine APA expressly
22 permits judicial review of constitutional claims. I note,
23 however, that the Maine APA does not authorize an award of
24 damages for a constitutional violation.

25 Now, in *Bettencourt* the First Circuit concluded that

1 *Younger* abstention applied to a federal constitutional
2 challenge to the actions of this state's medical licensing
3 board, but the Court did not explicitly address whether the
4 fact that state judicial review of a state agency's
5 administrative adjudication would not allow for an award of
6 damages, including punitive damages or attorneys' fees, if a
7 constitutional violation was found, matters in deciding
8 whether *Younger* abstention applies, so let me start there.

9 Attorney Miller or Switter, whosever going to be
10 speaking today, does the fact that the Maine APA does not and
11 will not authorize an award of damages for constitutional
12 violations matter in determining whether *Younger* abstention
13 applies in this case?

14 MS. MILLER: So, Your Honor, the answer is no. The
15 APA would actually permit potentially the review of damages in
16 an 80C appeal because that's the process by which it would go,
17 and Dr. Nass would be able to -- would have the opportunity to
18 bring an independent claim under that rule and -- in order to
19 obtain damages under -- potentially under Section 1983.

20 THE COURT: So that would be -- would that be a
21 separate proceeding, or would that be a proceeding that is
22 within the confines of the 80B appeal?

23 MS. MILLER: Well, it would be a Rule 80C, Your
24 Honor.

25 THE COURT: 80C.

1 MS. MILLER: And it would be within the confines of
2 a Rule 80C appeal that she would still -- she would have the
3 opportunity. So under *Younger* abstention the key focus or the
4 analysis should be whether or not there's an opportunity to
5 bring her claims, and she would have the opportunity to bring
6 the claims as an independent claim in conjunction with the 80C
7 appeal.

8 THE COURT: Could she seek and recover punitive
9 damages?

10 MS. MILLER: I -- I believe so, Your Honor, because
11 I believe that she could bring a Section 1983, and if -- if in
12 fact she was entitled to receive damages she would be able to
13 receive damages.

14 THE COURT: All right. Attorney Smith or Libby,
15 what do you have to say?

16 MR. SMITH: Thank you, Your Honor. With respect to
17 the opportunity to bring the same claim in state court, it is
18 true that Dr. Nass could file an independent claim for relief,
19 but that's different than including it within the 80C. It
20 would be a Count 2 to the -- to the Rule 80C complaint. It
21 would be its own standalone claim. And that is not the type
22 of situation that *Younger* applies to. *Younger* applies to
23 ongoing judicial or quasi-judicial proceedings.

24 And with respect to relief, again, although she could
25 obtain that same relief in an independent claim, the point is

1 is that it's an independent claim so it wouldn't even -- so
2 *Younger* wouldn't even apply under *Sprint Communications*
3 because that independent claim would be a remedial claim by
4 Dr. Nass as opposed to part of a coercive proceeding initiated
5 by the state.

6 And then on the relief issue, one --

7 THE COURT: Well, let me stop you there for a
8 second. I'm not sure I follow. Because you're sort of trying
9 to separate the administrative review aspect of the 80C appeal
10 from the -- essentially the counterclaim for damages in the
11 80C appeal, but it's one proceeding, right? It's one judicial
12 authority that's making factual decisions and then based upon
13 that deciding what relief is available to her with respect to
14 the administrative adjudication and what relief is available
15 to her with respect to damages. So is it really two things?
16 It's really just one thing; isn't it?

17 MR. SMITH: I disagree; I believe it's two things.
18 The proceeding at issue -- and this is the proceeding that was
19 pending at the time of our filing, which is the critical
20 moment under *Younger* -- was one proceeding. It was the
21 board's proceeding, the coercive proceeding against Dr. Nass,
22 which culminated in the decision and order. There's no
23 opportunity within that proceeding for her to claim damages or
24 even to challenge the board's prehearing conduct, which is
25 what we've alleged in the complaint.

1 Now, once she gets to the point where she can file the
2 Rule 80C, she can file a separate claim which would be joined
3 with the Rule 80C appeal for relief under 1983 and other --
4 any other claims she may have. And to that end Dr. Nass has
5 the option of either bringing that claim in state court or
6 bringing it in federal court. And I would add, too, when you
7 look at the concerns of *Younger*, they really wouldn't -- those
8 concerns don't really apply if the plaintiff is still able to
9 bring the same type of claim albeit in a state court. Again,
10 they may be joined with one another, but they really are two
11 independent claims that can have independent relief,
12 independent outcomes of one another.

13 THE COURT: But are they separate? Again, coming
14 back to the factual decisions that will be made, within the
15 context of that one proceeding, there will be factual
16 decisions made which will adjudicate both the state licensing
17 board's imposition of sanctions, punishment, discipline, and
18 the same fact-finding would then also influence the
19 availability of damages; wouldn't it?

20 MR. SMITH: I disagree. I do believe they are
21 different because on -- let's call it Count 1, being the Rule
22 80C claim, that would be determined based on the existing
23 record under Rule 80C and it would be focusing on the narrow
24 question of whether the board's decision and order issued in
25 December of 2023 was arbitrary, capricious, or otherwise in

1 violation of law.

2 The Rule 80C -- or, excuse me, the 1983 claim and any
3 other claims, Count 2 and so on, would be determined by a fact
4 finder. And it would focus on whether the board's prehearing
5 conduct, in other words, the subpoenas, the 25 questions
6 letter, the order for the neuropsychological examination,
7 whether those were done with retaliatory animus under the
8 First Amendment because the board viewed Dr. Nass as a
9 disfavored speaker.

10 Those issues would be presented to a jury, and a jury
11 would review them and determine whether Dr. Nass made her
12 case. And the Maine Superior Court would have to look at
13 those two things individually, cabined by the applicable
14 standard of review under Rule 80C, and then for an independent
15 claim for relief.

16 So although those two claims can be joined under Rule
17 80C, they're entirely different because we have a coercive
18 proceeding in the board proceeding which culminates in the
19 Rule 80C, and then we have a request for relief on the
20 independent claim that could be brought in state court. And
21 again that's the type of distinction that *Sprint*
22 *Communications* is -- discusses in the Supreme Court's 2015
23 decision.

24 THE COURT: Thank you.

25 Attorney Miller, why don't you respond.

1 MS. MILLER: So the -- the board would disagree that
2 those are wholly separate that way. First of all, I also want
3 to point out that even though the independent claims brought
4 pursuant to 80C -- and actually I'm going to back up a bit and
5 talk about the damages first. Because the -- the fact that
6 there's not damages available for this Court's purposes, if
7 the Court's going to agree with them that for some reason
8 there's no opportunity to present that claim at the state
9 court at a minimum that this Court should still abstain
10 because the -- the cases indicate that damages still interfere
11 with an ongoing state proceeding. And those -- the Court
12 could stay this action with respect to those damages. And
13 what will knock the damages completely out is the fact that
14 quasi-judicial absolute immunity and qualified immunity would
15 prevent those claims from being brought in state court.

16 So going back to the independent claim possibility under
17 Rule 80C, they do have an opportunity to bring -- to seek
18 additional evidence and to develop a record with respect to
19 that to the extent that he's arguing that the administrative
20 record would be binding that. But in addition the 80C
21 decision itself would have an impact on the damage claims
22 because the same issues, the same constitutional concerns, are
23 going to be part of the 80C appeal. They're inextricably
24 intertwined.

25 THE COURT: Thank you.

1 Attorney Smith, the defendants characterize in their
2 memo in response your client's characterization of the board's
3 actions at its meeting in January of 2022, your
4 characterization of those actions as being investigative
5 conduct, unrelated to the adjudicatory hearing -- and I'm now
6 quoting -- as bordering on the absurd, end of quote. Is that
7 characterization bordering on the absurd?

8 MR. SMITH: No, Your Honor, because that's the
9 characterization that the board made in the executive session.
10 They referred to it as an investigate -- to further
11 investigate or investigate further. That term was used
12 multiple times.

13 And in addition to that, the Court does have the
14 subpoenas that were issued, which were attached to the
15 complaint, and those subpoenas cite the statute which refers
16 to investigative subpoenas, and the cover letter indicates
17 investigating further. So those are not our words. Those are
18 the board's words and the board's characterization.

19 And I think that characterization is a correct one,
20 because the conduct that they were engaged in at that point
21 was to investigate the complaint. That is different than the
22 actual adjudicatory hearing which began with the notice of
23 hearing which was issued on January 24th. And I think that's
24 a really critical distinction in this case, and the complaint
25 was drafted very specifically to try to thread that needle

1 where we -- where Dr. Nass is challenging the investigative
2 conduct by the board which occurred before the amended --
3 before the notice of complaint was issued. And again that
4 includes the order for the neuropsychological exam, which
5 doesn't require any kind of fact-finding or process beyond
6 simply there being an allegation or a complaint of certain
7 categories, the issuance of subpoenas, which on their face say
8 that they're investigative, the issuance of this 25 questions
9 letter to Dr. Nass requiring that she explain perceived
10 weaknesses with things she may have said in the public, and
11 then finally the order of immediate suspension that was issued
12 at that meeting.

13 THE COURT: How else, though, would a licensing body
14 such as this board enforce the requirements of licenses
15 without going through the actions that you just listed?
16 Aren't those actions part and parcel of oversight of
17 licensees, part and parcel of what may or may not result in
18 discipline, professional discipline? Can we really treat them
19 as a separate animal from the overall adjudicative
20 responsibilities of a board such as this?

21 MR. SMITH: We can because the board has dual -- has
22 multiple hats, and when you look at the statute it talks about
23 there being an investigative phase and an adjudicatory phase
24 that these licensing proceedings go through, and all the
25 conduct at issue here is investigative in nature. And I

1 understand the Court's getting to the immunity issue.

2 If you look at the First Circuit case law on this, and I
3 think this is an uncontroversial point of law, the focus isn't
4 on the identity of the official. It's based on the function
5 that they are performing. The function that they are
6 performing that Dr. Nass is challenging is an investigative
7 function. Now, from our position that removes any absolute
8 immunity. They still may have qualified immunity. That's
9 another issue in the case that I'm sure the Court may have
10 some questions on, and that is sufficient to protect police
11 officers, adjud -- or, pardon me, licensing bodies that may be
12 conducting any investigation, or generally any other public
13 official. And that's the presumption that the Supreme Court
14 has announced with absolute immunity is that in most cases
15 qualified immunity is sufficient.

16 So for those reasons I do think that the Court can and
17 under the First Circuit's precedent must look at the specific
18 functions at issue and divorce the investigative conduct from
19 the adjudicatory conduct.

20 THE COURT: Attorney Miller, you know, if those --
21 if that initial January 2022 meeting and the investigative
22 conduct surrounding it had resulted in a decision not to
23 proceed against your -- against the licensee, just pretend --
24 hypothetical, hypothetically, but the licensee had reason to
25 believe that her rights had been violated by the manner in

1 which she had been investigated, you wouldn't be arguing
2 *Younger* abstention here; would you? I mean, they could
3 certainly bring a case here in federal court challenging that
4 exercise of prosecutorial type authority without any *Younger*
5 problems, right?

6 MS. MILLER: That is correct, Your Honor. In fact,
7 they did actually challenge the subpoenas in state court on
8 constitutional grounds, and they did challenge the order
9 directing evaluation in state court on constitutional grounds.
10 The problem with what Dr. Nass's counsel's contending is that
11 at the time that this board met on January -- in January of
12 2022 it was at that board meeting that they made the
13 determination that they were proceeding to an adjudicatory
14 hearing by virtue of issuing the summary suspension order and
15 also issuing the other orders. They were gathering the
16 information that they felt that they need in order to proceed
17 to the -- the adjudicatory hearing so that all of the facts
18 that would be relevant to them in making their determination
19 as to whether or not Dr. Nass had engaged in unprofessional
20 conduct or incompetence or fraud, deceit, misrepresentation,
21 or violated their rules, all of those things, that was the
22 information that the board determined at that meeting they
23 needed in addition to what they already possessed, which was
24 the first time they actually had reviewed any material with
25 respect to this, but they had made the determination at that

1 meeting to proceed to an adjudicatory hearing.

2 It's clearly stated in the order of immediate suspension
3 that one would be issued shortly, that the statute -- the
4 Maine statute that permits them to issue that order will only
5 permit that suspension to last for 30 days, and -- which is
6 why the board always proceeds immediately to a hearing.

7 So it's all part and parcel. The investigation can't be
8 separated. They can't carve out what actually created the
9 need to -- they issued a complaint with respect to the three
10 pending investigations, and that's what assessment and
11 directions are, sort of pending investigations, and they
12 initiated a complaint. And that's at least prosecutorially
13 conduct that would be also subject to absolute immunity.

14 THE COURT: All right. Attorney Miller, under your
15 view of the law, if -- as I understand your position, you
16 could have brought this lawsuit -- I'm sorry, Attorney Smith,
17 my apologies. Attorney Smith, under your view of the law you
18 could have filed this case back in January of 2022, right?

19 MR. SMITH: Yes.

20 THE COURT: And so we would have had a situation
21 where we would have federal litigation pending challenging the
22 investigation here in federal court, challenging the
23 constitutionality of some of the events that occurred, and we
24 would have a parallel proceeding in the state, before the
25 board and then ultimately in the superior court, looking at

1 the exact same issues. Isn't that exactly what *Younger* is
2 supposed to prevent?

3 MR. SMITH: Well, I think it -- it's designed to
4 prevent federal interference with ongoing state proceedings.
5 I mean, as the Court of course knows, the context of *Younger*
6 was avoiding interference with ongoing state proceedings, and
7 then the case law evolved into quasi-criminal cases and
8 discussed further in *Sprint*.

9 I agree that it's to avoid the issue of parallel
10 litigation on the same issues where the federal matter would
11 interfere with the ongoing state matter. But the issue here
12 is that the federal matter is looking at different issues than
13 the state matter. The state matter is not considering the
14 issuance of the prehearing -- the prehearing actions of the
15 board. They're completely separated.

16 As a good example of that, the state did file the
17 decision and order that was ultimately issued by the board.
18 Now, again, that happened after this proceeding was filed, so
19 it's not the relevant time period. But I do think it's
20 persuasive when you look at that and, you know, misinformation
21 or whether the board engaged in its prehearing conduct with
22 retaliatory animus, none of those issues are even raised.

23 So even if we had done it the way that Your Honor
24 suggested that perhaps we could have, I still think you would
25 have parallel litigation. But, again, they would have been

1 looking at different issues.

2 And then I finally might just note that the board
3 proceeding in this case took an -- what I at least would
4 presume is an unprecedented amount of time. I mean, we have a
5 licensing proceeding that usually is something that's
6 determined in, you know, a day hearing that took seven days
7 over the course from, you know, October of 2022 lasting until
8 September of 2023 for the final hearing date and then several
9 months later for the actual decision. So this is already a
10 very unusual case in terms of the timing of it.

11 THE COURT: Thank you.

12 Attorney Miller, if I were to conclude that *Younger*
13 abstention applies here, do I need to also address the
14 immunity issues?

15 MS. MILLER: Yes, Your Honor. I would -- I would
16 say that you do need to address the immunity issues in order
17 to eliminate the damages claims. So under -- under *Younger*
18 abstention this Court should dismiss all of the claims that
19 Dr. Nass has with the exception of the damages claims. And
20 then the damages claims should be dismissed under sovereign
21 immunity against the board and the individual members acting
22 in their official capacities and against the individual
23 defendants under both the quasi-judicial absolute immunity and
24 qualified immunity bases.

25 THE COURT: All right. One can sort of imagine a

1 situation in which, if I only decided the abstention question
2 and I abstain and stay this case and then the state proceeding
3 moves forward, that it -- a consequence of the state
4 adjudication would be that there would -- that there would be
5 no damages claims. It would become essentially for purposes
6 of the federal proceeding moot. Is that -- is that a
7 possibility? Is that a possible outcome here?

8 MS. MILLER: So, Your Honor, I'm sorry, I'm not sure
9 I actually understood what --

10 THE COURT: I'm not actually sure I understand what
11 I'm saying. Let me try again.

12 If this case -- if I abstain and stay this proceeding,
13 one scenario is that the state proceeding goes forward and at
14 the end of it there's no damages to be determined based upon
15 the state adjudication.

16 MS. MILLER: That's assuming that Dr. Nass has not
17 availed herself of the opportunity to bring the independent
18 claims in conjunction with the state action.

19 THE COURT: Right.

20 MS. MILLER: Okay.

21 THE COURT: All right. And so -- I see, all right.
22 Thank you.

23 Attorney Miller [sic], do you want to weigh in on that
24 or not?

25 MR. SMITH: Yes, Your Honor. As I -- as I view the

1 state case, if the Court were to abstain and issue a stay,
2 once the state case goes through I don't envision any way that
3 the result of that stay would be to moot the federal
4 proceeding because the -- the state proceeding is only looking
5 at the decision and order issued in December of 2023. It's
6 not going to pass judgment on any of the prehearing conduct.
7 So I don't understand how the -- how the outcome of the state
8 case would in any way control the federal case, even though
9 they may involve some of the same concepts and general subject
10 matter.

11 THE COURT: Under your -- it's your view that under
12 Rule 80C you cannot get judicial review of the prehearing
13 conduct?

14 MR. SMITH: Well, there would be no -- no incentive
15 to do that because what would we be asking the Court to do? I
16 mean, those -- those actions are done. And really the harm in
17 them is not the actual requirement of going through a
18 neuropsychological examination or having to produce documents
19 in response to the subpoena. It's harassment for exercising
20 one's First Amendment rights, a professional, and once they
21 say something that the board dislikes they have to face things
22 like having subpoenas issued to them, a letter demanding that
23 they explain their position on various topics. They get
24 basically blacklisted because they get this order of
25 neuropsychological examination, which really implies to the

1 world that the board has some reason to think that Dr. Nass is
2 mentally ill. So that's really what the harm is that we're
3 seeking relief for.

4 I did want to touch on one issue from one of the prior
5 questions that you had posed to AAG Miller about this issue of
6 a stay. One important issue I don't want to have lost is that
7 Count 1 and Count 2 are simply declaratory judgment actions
8 which seek -- which request that the Court determine that the
9 board's position statement from fall 2021 violates the First
10 Amendment.

11 And very few of the issues raised in this case, perhaps
12 none of them in the motion to dismiss, really directly address
13 those particular counts, because it's not a claim for damages.
14 It really has nothing to do with Dr. Nass individually beyond
15 just concepts of standing. It's a board -- it's a board
16 announcement that it is going to construe one of its statutes
17 in a way to retaliate against disfavored speech. And that's
18 something that Dr. Nass or any doctor in Maine, really, who
19 has standing can bring to the Court to say that this position
20 statement violates the First Amendment.

21 And then finally on the relief issue of the stay, there
22 was some discussion in the briefing about whether a stay verse
23 dismissal is appropriate. As I was preparing for today and
24 rereading *Bettencourt*, *Bettencourt* does talk about that. And
25 in fact on page 781 of *Bettencourt* the First Circuit notes

1 that ordinarily the remedy would be a stay in the
2 circumstances of that case, and that's why the Court went on
3 to consider whether immunity applied, which kind of goes to
4 the question that Your Honor just posed.

5 THE COURT: Thank you. All right.

6 Let's turn to the bad faith exception. Under that
7 exception abstention's appropriate -- I'm quoting from *Sirva*
8 *Relocation*, a First Circuit decision. It's inappropriate when
9 a state proceeding is brought in bad faith, that is, for the
10 purpose of harassment. The Court has described the bad faith
11 exception as being a narrow one, and it's to be granted
12 parsimoniously.

13 Now, Nass argues here that she's alleged sufficient
14 facts to establish institutional bias by the board, noting, as
15 Attorney Miller has pointed out, that she was ordered to
16 undergo a neuropsychological exam, that the board imposed an
17 immediate suspension, issued unnecessary subpoenas, and
18 proposed 50 questions requiring her to explain the basis for
19 her public statements.

20 The standard to allege and show bad faith is demanding.
21 The First Circuit -- I'm sorry, the Supreme Court in *Brooks*
22 said, to implicate due process, claims of general
23 institutional bias must be harnessed to a further showing,
24 such as a potential conflict of interest or pecuniary stake in
25 the outcome of the litigation.

1 Attorney Miller, are the allegations of institutional
2 bias in the complaint, including the allegations of a conflict
3 of interest, sufficient at the motion to dismiss phase to
4 plausibly plead that the bad faith *Younger* exception applies
5 here?

6 MS. MILLER: So the answer is no, Your Honor, I
7 don't believe that Dr. Nass has sufficiently plausibly claimed
8 that there's institutional bias that has -- that infects the
9 board's proceedings. She simply points to the membership of
10 one of the board members on the federation of state medical
11 boards, which is an entity that actually serves the purpose of
12 serving medical regulatory boards. It's not a professional
13 association, as has been indicated by Dr. Nass in her briefs.

14 The -- the passing of an e-mail with information to be
15 included in a complaint filed without any allegations that the
16 board even was aware of that, that the -- simply put, the
17 allegations that Dr. Nass has in her complaint are
18 insufficient to establish the sort of institutional bias that
19 the cases require. To establish institutional bias, you know,
20 as the cases that, *Brooks* in particular, sort of piecemeal
21 potentially -- not even may be relevant information that they
22 have alleged as far as establishing that there's a bias that
23 infects the entire proceeding.

24 THE COURT: Attorney Miller, why do you disagree --
25 I'm sorry -- yeah, Attorney Miller [sic], why do you disagree?

1 What is it in the complaint that plausibly leads to a finding
2 of bias?

3 MR. SMITH: Well, Your Honor, I would suggest the
4 complaint goes much further than simply alleging institutional
5 bias as a general matter. Plausibility, of course, is a
6 familiar standard of whether the allegations in the complaint
7 would allow a reasonable inference. It isn't a particularly
8 demanding standard, but it does require an allegation of some
9 facts so we get beyond pure speculation. And really when the
10 Court looks at the timeline the facts alleged here do at least
11 meet that plausibility standard.

12 So we begin with the Federation of State Medical Boards'
13 statements that physicians may face disciplinary action if
14 they generate or spread COVID-19 vaccine misinformation. We
15 have the chair of the Maine State Medical Board, who is a
16 director on the FSMB, who takes that position statement and
17 implements it as a position statement of the board.

18 Now, as far as the FSMB, that is a private entity. We
19 can quibble about whether it's a professional organization or
20 a group that's membership is based on different medical
21 boards, but the bottom line is it's a private entity, it
22 engages in advocacy like other private entities do -- does.
23 The board chair in her election to the FSMB touts her
24 commitment to their strategic goals.

25 Then we have a misinformation complaint against Dr.

1 Nass. She's engaged in advocacy before -- advocacy, so the
2 highest level of First Amendment protection, political
3 advocacy, to the Maine Board of Pharmacy. And that
4 information is added to what is termed as the, quote unquote,
5 complaint file about Dr. Nass. They have an executive session
6 in which the discussion centers around, again quotes, harmful
7 opinions that Dr. Nass is sharing, harmful opinions.

8 And then we have a neuropsychological exam that's
9 ordered which, looking at what the board had, I do not see how
10 there is any basis in the statute for allowing that because
11 there was no allegation of mental illness, alcohol abuse, drug
12 abuse, anything like that. Then we have the 25 questions
13 letter and then the other -- the other actions of the board.

14 I certainly do agree that it's a demanding standard to
15 show bias. The complaint alleges the facts as best we have
16 them at this phase. Of course we don't have the benefit of
17 any discovery. We only have the benefit of what we've
18 observed by the board to this point. But considering that
19 this is a plausibility standard, the complaint here does
20 sufficiently allege that the board's actions were motivated by
21 retaliatory animus against Dr. Nass. And if the Court agrees
22 that we've sufficiently alleged that then that would qualify
23 as an exception to the *Younger* doctrine.

24 THE COURT: Does the fact that the board's chair
25 belonged to an organization which took a policy position which

1 she then advocates and has the board adopt in her capacity as
2 chairperson of the board on a matter of public health policy,
3 can that constitute a form of bias that the courts have in
4 mind when they speak of bias in this setting?

5 MR. SMITH: On these facts, yes, because this
6 position went far beyond, for example, the board stating that
7 we believe hydroxychloroquine and ivermectin are not effective
8 treatments or we stand behind the COVID-19 vaccine. The
9 policy statement was a threat that if doctors make statements
10 that are negative about the COVID-19 vaccine they face
11 discipline. And in fact the board in its position statement
12 went beyond the FSMB statement and they said that any
13 misinformation about COVID-19 may be a ground for discipline,
14 and then they gave examples through hyperlinks to the AMA and
15 other organizations about things doctors can and are
16 encouraged to say.

17 So the whole point is -- the whole message to the Maine
18 medical community is, if you're a doctor, please say things
19 that are good about the COVID-19 vaccine. But if you have
20 things that are bad to say about the COVID-19 vaccine, you are
21 going to be in front of the board facing disciplinary action.

22 THE COURT: Attorney Miller?

23 MS. MILLER: Your Honor, I'd like to address what
24 was just argued with respect to the -- first of all, the
25 position statement. What is the position statement. The

1 position statement was simply a statement to the board's
2 licensees indicating that COVID-19 is going to be treated just
3 like any other disease, and if you are treating that disease
4 you need to follow the standard of care and you need to be
5 honest and truthful in your communications to your patients
6 and prospective patients. That's it.

7 There's nowhere in that statement -- and they quote the
8 statement in their complaint -- that says you have to take a
9 position -- a particular position on the vaccine or not on the
10 vaccine. It simply says you are going to be required to be
11 truthful in your communications to your patients, just like
12 you would be if you were telling them about their cancer
13 diagnosis or something else. That's all it is.

14 It was a statement that was published in the board's
15 newsletter and it was by the chair, as indicated in their
16 complaint. And that's what it was. It was basically
17 reminding their licensees that they were going to be held to
18 the same standards that the licensees are held in any
19 specialty and with respect to any disease. And that is all
20 that that is.

21 THE COURT: Attorney Smith, do you want to respond?

22 MS. MILLER: Oh, and -- the second point, too, is
23 that with respect to the misinformation in all of these, these
24 are issues that she has in fact raised in her appeal.

25 THE COURT: Thank you. Yes.

1 MR. SMITH: Well, this is from the position
2 statement as quoted on paragraph 17 of the complaint.
3 Physicians who generate and spread COVID-19 vaccine
4 misinformation or disinformation are risking disciplinary
5 action by state medical boards, including the suspension or
6 revocation of their medical license.

7 The statement continues a couple of paragraphs down.
8 The board also applies the standard to all misinformation
9 regarding COVID-19, including non-verbal treatments and
10 preventative measures. Then the statement goes on and has
11 hyperlinks to different resources which are presented as
12 resources to be used to fight misinformation.

13 So the whole point here is speech. The point here is
14 that if you're a physician and you speak about COVID-19, you
15 need to speak with the government's preferred view or you will
16 be in front of the Maine Board of Licensure facing potential
17 suspension and revocation of your license. And that is a
18 sufficient showing of bias to overcome *Younger*.

19 THE COURT: So, Attorney Miller, why isn't Attorney
20 Smith right that what the board did was take a step beyond
21 establishing the standard of care and really was trying to
22 dictate what physicians might say outside of the context of
23 their -- of treating an individual patient?

24 MS. MILLER: So -- so with respect to, for example,
25 COVID-19 vaccine misinformation, again, it's whether or not

1 you are -- you are providing information that is accurate and
2 not misleading.

3 So, for example, if you take a look at the -- the
4 questions that Dr. Nass has claimed in the communication from
5 the board when they were seeking additional information with
6 respect to certain positions, if you look at that -- and it's
7 an exhibit to their complaint -- it includes questions about
8 her practice. It includes questions about what information
9 she does provide to her patients with respect to vaccines.
10 Because what the board is only concerned about is providing
11 inaccurate or misleading information to your patients, not
12 whether or not you're going to advocate for the vaccine or not
13 advocate for the vaccine, but whether or not what you're
14 providing to your patients is accurate information. That's
15 all that they're looking at, and that's all that statement
16 says.

17 THE COURT: I want to ask you about another subject,
18 and that is the neuropsychological exam. What is the board's
19 explanation for requiring Dr. Nass to submit herself to a
20 neuropsychological exam?

21 MS. MILLER: Okay. So, first of all, under Section
22 3286, which is the statute that authorizes the board to direct
23 a licensee to undergo an evaluation, there's actually three
24 paragraphs. The second paragraph actually provides that every
25 licensee in this state has, by virtue of accepting the

1 license, consented to a neuropsychological or any mental or
2 physical examination when directed in writing by the board.
3 But in this case it was subject to an order directing an
4 evaluation based on public safety. And the rationale behind
5 what the board did was because they had in front of them
6 information from the three investigations calling into
7 question Dr. Nass's competence as a physician based on the way
8 that the -- that her medical records associated with those
9 patients were, which were -- comprised a few handwritten notes
10 and text messages.

11 So the board was concerned about the care that Dr. Nass
12 was providing to her patients, first and foremost. And then
13 some of the -- some of the information or the misinformation
14 or the objectively false information that she had made to the
15 public, which -- with prospective patients, included things
16 that gave rise to a question of whether or not there might be
17 some kind of a mental health condition that Dr. Nass had that
18 might be impacting her ability to practice medicine.

19 So the board directed Dr. Nass to undergo an evaluation
20 in order to determine whether or not her conduct -- and
21 that's -- we're talking about her conduct both in how she was
22 treating those patients, as well as what she was claiming what
23 occurring, which were objectionably false statements in many
24 cases. The board was concerned that there might be a mental
25 health condition that was impacting her ability.

1 THE COURT: Thank you.

2 Attorney Smith, I know that you don't agree that your
3 client's public statements were -- provided adequate support
4 for the requirement of a neuropsychological exam, but how
5 about the inadequate medical records? Is that factually
6 disputed in this case, that those records were as threadbare
7 as the licensing board claims them to have been?

8 MR. SMITH: Well, I just -- I don't see that as an
9 issue in the case, Your Honor. That is an issue for the board
10 proceeding, and we haven't raised it in this case because, you
11 know, I think that --

12 THE COURT: You're arguing that the -- requiring the
13 neuropsychological exam was vindictive or was motivated by
14 illegitimate -- for illegitimate reasons, but here the board
15 has said, listen, we have a doctor who, among other things,
16 isn't keeping records. Here they are. Is that in dispute
17 here?

18 MR. SMITH: Well, that is -- that is in dispute, and
19 that would be -- I see that as a defense that they may raise
20 on the merits. Ultimately, you know, if this case proceeds
21 beyond this initial proceeding, there's going to be -- there
22 will be disputed facts, and they're entitled to raise whatever
23 rationale they want to offer for their actions to say, no,
24 these weren't retaliatory, these were for -- you know, because
25 we were concerned about patient care or we were concerned

1 about recordkeeping. They're entitled to raise those issues
2 and we'll respond, and you'll ultimately decide whether we've
3 created an issue of fact and perhaps a jury will decide. So
4 that is an -- that's a factual issue that I anticipate we
5 would be fighting against on our side. But ultimately that's
6 a question of fact.

7 If I may, Your Honor, I'd like to respond to one of the
8 earlier questions that you had posed to --

9 THE COURT: Let me just -- before you do that, it is
10 a question of fact, of course I agree. The question is, is it
11 disputed?

12 MR. SMITH: It is disputed. It is disputed.

13 THE COURT: Okay.

14 MR. SMITH: We disputed that in the board proceeding
15 as well.

16 With regard to the issue of the position statement and
17 the characterization that the concern is about what is being
18 told to patients, again, Your Honor can certainly read for
19 himself, but paragraph 17 of the complaint quotes the position
20 statement. And it's talking about things like the duty of
21 physicians given their powerful platform in society. So I
22 would suggest that the suggestion from the state that the
23 purpose of the position statement was to raise issues of
24 patient care is not consistent with the board's position
25 statement that they've offered.

1 THE COURT: Very good. Let's turn to immunity
2 questions. I want to first discuss sovereign immunity. And,
3 Attorney Smith, I'll turn to you first. Here's my question.
4 Do you agree that sovereign immunity bars any damages claims
5 against the board, against the board's members in their
6 official capacities, and also any injunctive relief against
7 the board because the board is an arm of the sovereign, that
8 being the state of Maine? Do you agree?

9 MR. SMITH: Yes on the damages questions. No on the
10 injunctive questions under *Ex parte Young*, which has the
11 exception for ongoing constitutional violations. And the way
12 that I view that, Your Honor, is that we do have the position
13 statement in place which basically puts Dr. Nass and all
14 physicians in Maine under a cloud of potential discipline from
15 the board should they speak in a way that the board disfavors.
16 And that would be an ongoing constitutional violation that
17 is -- within the *Ex parte Young* exception would allow the
18 Court to order some injunctive relief on that narrow issue.

19 THE COURT: Okay. Dr. -- Dr. Miller -- Attorney
20 Miller, do you agree?

21 MS. MILLER: No, Your Honor, I don't agree with
22 Attorney Smith on that. The -- sovereign immunity bars all
23 the claims against the board because the board is an arm of
24 the state. Where the *Ex parte Young* would come into play
25 would simply be potentially injunctive relief against a state

1 official with respect to whether or not -- you know, because
2 the -- the theory behind that, as the Court is aware, is that
3 they -- that an unconstitutional act or statute does not
4 empower the sovereign with the immunity that it would have and
5 that's -- so it's only the official that would be the one
6 subject to that.

7 THE COURT: And so any injunctive relief would have
8 to be limited to members of the board in their official
9 capacities?

10 MS. MILLER: Yes, Your Honor.

11 THE COURT: All right. Let's turn to absolute
12 immunity. The law requires that I consider three questions.
13 Does a board member, like a judge, perform a judicial
14 adjudicatory function, deciding facts, applying law, resolving
15 disputes on the merits? Second, does a board member, like a
16 judge, decide cases sufficiently controversial that in the
17 absence of absolute immunity that board member would be
18 subject to possibly damages actions? Third, does a board
19 member, like a judge, adjudicate disputes against a backdrop
20 of multiple safeguards designed to protect a physician's
21 constitutional rights? Of course, these elements are taken
22 from *Bettencourt*.

23 Dr. Nass appears to contest all three prongs here, but I
24 think the second one is controlled by *Bettencourt*. The
25 board's members here, like those in *Bettencourt*, decide cases

1 that are sufficiently controversial that in the absence of
2 immunity they could be subject to numerous damages actions.
3 Let me stop there. Attorney Smith, do you agree?

4 MR. SMITH: The question becomes what functions
5 we're looking at. The -- the thrust of our opposition on the
6 judicial immunity -- well, let me back up and start from
7 another perspective.

8 We don't dispute that the board's actual adjudicative
9 conduct, in other words, the actual adjudicatory hearing and
10 its decision, that those are barred by absolute immunity. So
11 being absolute immunity, if they decided that for retaliatory
12 or bad faith purposes they're still protected one way or
13 another. But what they are not protected for -- and again
14 this goes to what, you know, *Bettencourt* and other courts have
15 talked about, is the functions. Again it's not the identity
16 of the official; it's what function are they performing. For
17 example, prosecutorial immunity, there are cases where
18 prosecutors are not entitled to it because even though they
19 have the title prosecutor they're engaged in investigative
20 conduct.

21 So getting more directly to the question you asked on
22 the second prong, sufficiently controversial that absent
23 immunity they'd be subject to multiple damages actions.
24 Again, when you're looking at their investigative conduct,
25 there's no reason why they should be treated any different

1 than police officers or other public officials engaged in
2 investigations and investigative conduct. And, again, they
3 still do have some immunity which may protect them in many
4 cases, qualified immunity. And as the Supreme Court has said,
5 the presumption being that qualified is sufficient in most
6 cases.

7 So that was a long answer to the fairly straightforward
8 question, but I think the -- the main point is that we need to
9 look at the function being performed and the functions that
10 we're challenging.

11 THE COURT: All right. Attorney Miller, do you
12 agree that essentially a carve-out for the preliminary
13 investigative functions possibly -- depends on what the facts
14 show, of course, but if I were to find ultimately or if a jury
15 were to find ultimately that the board members were not really
16 acting in an adjudicatory capacity as all, they were acting as
17 investigators, do you agree with the analysis that Attorney
18 Smith just offered?

19 MS. MILLER: So if -- if factually the -- the Court
20 was able to extract out and say that this was solely an
21 investigative function not related either to adjudication or
22 prosecution, which is going to be hard for them to do because
23 all of this conduct occurred at the same time that they were
24 proceeding to an adjudicatory hearing, but if you were able to
25 pull that and say this was purely investigative, that perhaps

1 then, if it wasn't going to lead to an adjudication, if it
2 wasn't going to lead to a prosecution, then I would agree that
3 you would be able to say that that's a function that -- where
4 they wouldn't have the quasi-judicial or prosecutorial
5 immunity. But the cases typically are talking about let's say
6 executive decisions or other decisions where you could
7 absolutely pull it out.

8 I also want to point out that, you know, the description
9 under *Younger*, you know, where we're talking about the fact
10 that these are judicial proceedings, the proceedings are
11 judicial in nature, includes that a judicial inquiry
12 investigates -- this is case law -- language from one of the
13 Supreme Court cases that is cited in the brief, and
14 unfortunately I don't have exactly which case it was, but --
15 but investigates and declares and enforces liability. So
16 investigation is part of adjudication, and that can't be
17 separated in this case. Everything is connected together.

18 And going back to *Younger* even, you know -- I know I'm
19 switching on the judge -- Your Honor a little bit -- but
20 seeking a declaratory judgment or trying to carve out the
21 declaratory judgment there are just as much going to interfere
22 with the ongoing state proceedings with respect to what
23 they're asking for.

24 THE COURT: And so the Supreme Court decision that
25 you just referred to but can't recall the name of, is that

1 cited in your papers?

2 MS. MILLER: It is, it may be -- it's either the *New*
3 *Orleans* case or one of the other but the -- it is cited in
4 because it -- because that quote is included in the brief, I
5 believe.

6 THE COURT: All right. Let's talk for a moment
7 then -- well, let's turn to qualified immunity. And, Attorney
8 Smith, I want to ask you, regarding the -- of course the
9 requirement that for qualified immunity to not apply here
10 you're going to have to establish that the right was not
11 clearly -- was clearly established, rather, at the time of the
12 defendant's alleged violation. And the case law that you cite
13 on that point, none of that relates to a proceeding like this
14 one, and that is a medical licensure board investigating
15 disciplining a licensee.

16 So aren't you required to proffer some case law for me
17 to be able to reach the conclusion that the constitutional
18 right violated was clearly established at the time of the
19 violation?

20 MR. SMITH: We're not required to provide a case
21 directly on point. It really is a question that turns on
22 whether this is an obvious violation under the existing state
23 of the law such that any reasonable official would know that
24 their actions are unlawful. And that's really the framework
25 under which I would suggest that this issue is controlled. We

1 don't have a case of the -- of a medical board or licensing
2 board doing precisely what was done here and it being declared
3 unconstitutional, but we have decades of precedent explaining
4 that public officials violate the First Amendment when they
5 commit official reprisal for a person's public speech. And
6 it's unclear to me precisely what aspect of that or aspect of
7 the facts here would remove the case from that proposition of
8 law.

9 You know, in more recent years it seems as if the First
10 Circuit has taken a, you know, more -- more generous approach
11 to qualified immunity in terms of determining what can give
12 fair notice to reasonable officials. And consistent with that
13 shift, here I -- the case law is just so abundant that
14 officials cannot retaliate against speech and the violation
15 here is such a straightforward issue. We have a complaint
16 that in our view plausibly alleges that the board saw
17 something that Dr. Nass said publicly that they didn't like
18 and that they exercised their authority against her for the
19 purpose of retaliating against her.

20 So when you look at all the case law, the case law does
21 give fair notice of this. There's no reasonable argument that
22 any First Amendment exceptions apply, particularly including
23 professional speech with the Supreme Court's decision in *NIFLA*
24 from 2018, which indicates that there's no special category of
25 unprotected speech for professionals.

1 So against that backdrop I do suggest that we get beyond
2 qualified immunity or at a minimum additional factual
3 development would be required and this is an issue to be
4 readdressed on summary judgment, like what the First Circuit
5 said in the -- in *Irish 1* where it -- where it held that that
6 sort of issue needed further factual development and needed to
7 be decided on a full record.

8 THE COURT: Thank you.

9 Attorney Miller, it seems like we are living at a time
10 in which this question of qualified immunity does require
11 factual development. Why shouldn't -- why shouldn't the
12 complaint survive on this point so that there can be factual
13 development before a judge renders a qualified immunity
14 decision?

15 MS. MILLER: Your Honor, the -- the board would
16 contend that it is not clearly established that the -- that
17 the board's attempt to regulate Dr. Nass, even though it
18 incidentally involved her speech, amounts to a constitutional
19 violation. In this particular case, they -- what the board
20 would be aware of was the -- the case law that indicated that,
21 including in the First Circuit and in *NIFLA*, that just
22 because -- you know, if they are going to -- they can
23 professionally regulate her under circumstances where it
24 incidentally affects her speech, and that's what they did
25 here.

1 If you take a look at the statutes under which they're
2 complaining of, Section 3282-A, which is the board's
3 disciplinary provisions, those provisions are unprofessional
4 conduct, incompetence, and engaging in fraud, deceit, or
5 misrepresentation. Those are the only ones that would
6 potentially apply to the conduct that Dr. Nass committed. And
7 none of those, with the exception of misrepresentation or
8 engaging in fraud, deceit, would on their face even implicate
9 speech, but the underlying facts would have to do that.

10 So in this case, you know, from the -- the board members
11 it's not clearly established that just because she speaks that
12 she's protected -- that there's a -- it amounts to a
13 constitutional violation. There's speech involved in medical
14 care every single day, informed consent. And -- and as we
15 mentioned before, there's nothing that -- that prevents -- or
16 the board should not be prevented from being able to regulate
17 a licensee who -- who lies to their patients or prospective
18 patients. I think the case law is clear that it is actually
19 in the board's favor with respect to the conduct that -- that
20 they're complaining about.

21 I also wanted just to let you know that it was *New*
22 *Orleans* case, Your Honor, that has that language about
23 investigating when it's adjudicatory, and it's at 491 U.S. 350
24 at 370.

25 THE COURT: Thank you.

1 Attorney Smith, I'll give you the final word on the
2 subject.

3 MR. SMITH: Thank you, Your Honor.

4 THE COURT: As well as any other final argument that
5 you might wish to make.

6 MR. SMITH: Appreciate that, Your Honor.

7 With respect to this issue of qualified immunity in the
8 board's defense, I'm mindful of the standard of review that
9 we're on a 12(b)(6) motion, so the facts are limited to the
10 complaint and the documents attached to the complaint, to the
11 extent their authenticity is not disputed and the facts are
12 all taken in the light most favorable to the plaintiff. So,
13 again, while the board may offer other justifications later,
14 it's premature to rely on any of those at this juncture.

15 And as I listen to AAG Miller's argument on this clearly
16 established issue, with all due respect, it appeared as if
17 she's conflating the issue of whether Dr. Nass's speech is
18 protected to what conduct violates the First Amendment. It's
19 been clearly established for decades that First Amendment
20 prohibits governmental officials from engaging in an official
21 reprisal for speaking out. The Supreme Court said that in
22 *Crawford* or -- excuse me -- in *Hartman*. It said it is
23 settled -- that's its word -- that as a general matter the
24 First Amendment prohibits government officials from subjecting
25 an individual from retaliatory action, including criminal

1 prosecutions, for speaking out. And in *Crawford* the Supreme
2 Court explained that the reason for that is that that type of
3 threat of retaliation inhibits free speech. So in terms of
4 there being a constitutional violation for retaliation, that
5 is a very well-settled issue.

6 And then I would suggest that it is also well settled
7 that Dr. Nass's speech in this case was protected speech. It
8 was speech about highly charged issues in politics, in
9 medicine but it was becoming a political issue, and some of it
10 even involved statements made to a Maine state agency
11 legislating.

12 So we are at the apex of First Amendment protection for
13 the speech that she engaged in. And all of that gives fair
14 notice to the board that retaliating against her for making
15 those statements, as the complaint plausibly alleges it did,
16 is unprotected or that they could be subject to liability for
17 engaging in that conduct.

18 THE COURT: Thank you.

19 MR. SMITH: Thank you.

20 THE COURT: Well, counsel, you've presented some
21 very important questions. It seems to me that both sides have
22 done a very effective job in making their best arguments. And
23 I apologize, Attorneys Miller and Smith, for bollixing up your
24 names along the way, but I think I got them straight now.

25 So I want to thank you for your presentations. I'm

1 going to carefully consider these arguments. I'll issue a
2 written decision. And with that we stand adjourned, thank
3 you.

4 (Time noted: 11:03 a.m.)

5 **C E R T I F I C A T I O N**

6 I, Lori D. Dunbar, Registered Merit Reporter, Certified
7 Realtime Reporter, and Official Court Reporter for the United
8 States District Court, District of Maine, certify that the
9 foregoing is a correct transcript from the record of
10 proceedings in the above-entitled matter.

11 Dated: January 17, 2024

12 /s/ Lori D. Dunbar

13 Official Court Reporter
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