APPENDIX

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APPENDIX A

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL THOMAS, MD, Plaintiff-Appellant, v. KATHLEEN HARDER, MD; *et al.*, Defendants-Appellees.	NO. 23-35456 D.C. NO. 3:22-CV-00944-JR **MEMORANDUM***

BEFORE: CHRISTEN, NGUYEN, AND HURWITZ, CIRCUIT JUDGES.

Plaintiff Paul Thomas, M.D., appeals the district court's orders granting Defendants' motion to dismiss the operative complaint and denying leave to amend. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we review the district court's dismissal de novo and its denial of leave to amend for abuse of discretion. *Garmon v. County of Los Angeles*, 828 F.3d 837, 842 (9th Cir. 2016). We affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. The absolute immunity that is "generally accorded to judges and prosecutors functioning in their official capacities" may also "extend[] to agency representatives performing functions analogous to those of a prosecutor or judge." *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922–23 (9th Cir. 2004). To assess whether a function is comparable to that of a judge, and thus entitled to absolute immunity, we consider six nonexclusive factors. *Buckwalter v. Nev. Bd. of Med. Exam'rs*, 678 F.3d 737, 740 (9th Cir. 2012).[1] This inquiry focuses on the "nature of the function performed, not the identity of the actor who performed it." *Id.* (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)).

We have repeatedly concluded that members of state medical boards are entitled to absolute immunity for actions undertaken in connection with disciplinary proceedings. *See Olsen*, 363 F.3d at 924–26; *Buckwalter*, 678 F.3d at 741–46; *Mishler v. Clift*, 191 F.3d 998, 1003–09 (9th Cir. 1999). Having analyzed the facts and circumstances of this case in light of the *Butz* factors, we reach the same conclusion here about the members of the Oregon Medical Board (OMB).

Dr. Thomas argues that even if the *Butz* factors favor a finding of absolute immunity, OMB members are not entitled to absolute immunity because they violated state law, Or. Rev. Stat. § 677.205(3), by

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[1] These *Butz* factors include: "(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal." *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) (citing *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

issuing an emergency suspension before formally filing a verified complaint. *See Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1379 (9th Cir. 1989). But unlike in *Chalkboard*, where Arizona executive officials lacked any authority to impose summary suspensions of day care centers, the OMB indisputably possesses the authority to suspend medical licenses on an emergency basis. *See* Or. Rev. Stat. § 677.205(3). Even if the OMB did not follow the proper procedures under state law—a question we do not decide—its actions "are no less judicial ... because they may have been committed in error." *Mishler*, 191 F.3d at 1006.[2]

2. We next consider whether Dr. Thomas alleged sufficient facts to state a claim against the OMB's staff members. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Here, the amended complaint does not allege any facts in support of the conclusory assertion that OMB staff investigators Boemmels and Brown "wrote false and misleading allegations." Nor does the amended complaint elaborate on how Boemmels and Brown engaged in the "[f]abrication of evidence." Similarly, with respect to supervisory liability, the amended complaint summarily concludes that OMB Medical

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[2] We similarly reject Dr. Thomas's argument that the OMB violated state law because it lacked evidence that his practice of medicine was "an immediate danger to the public," Or. Rev. Stat. § 677.205(3). The OMB's exercise of a judicial function renders the OMB members absolutely immune even if that "exercise of authority is flawed by the commission of grave procedural errors." *Mishler*, 191 F.3d at 1006 (quoting *Stump v. Sparkman*, 435 U.S. 349, 359 (1978)).

Director Farris either "participated in or directed the fabrication of evidence" or "failed to act to prevent it," but advances no facts in support of these assertions. These conclusory allegations do not suffice to state a plausible claim for relief. *See Iqbal*, 556 U.S. at 678.

3. The district court did not abuse its discretion by denying Dr. Thomas leave to amend in order to allege additional facts concerning the OMB staff members. "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). Based on the allegations advanced in Dr. Thomas's proposed Second Amended Complaint (SAC), we conclude that amendment would be futile because the staff members are entitled to qualified immunity.

Qualified immunity protects public officials from § 1983 liability unless a plaintiff shows "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citation omitted). To assess qualified immunity at the motion to dismiss stage, "we consider whether the complaint alleges sufficient facts, taken as true, to support the claim that the officials' conduct violated clearly established constitutional rights." *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 2018). Here, the proposed SAC fails to adequately allege a constitutional violation. The SAC repeatedly concludes that the OMB staff members fabricated evidence, or supervised the fabrication of evidence, but it lacks sufficient factual allegations to support a claim to relief. *See Iqbal*, 556 U.S. at 678. Moreover, even if Dr. Thomas had alleged a plausible constitutional violation, he identifies no precedent that clearly establishes "the violative nature of [this] particular conduct ... in light of the specific context of

the case." *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (per curiam) (citations omitted).

AFFIRMED.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Case No. 3:22-cv-00944-JR Filed July 6, 2023

PAUL THOMAS, MD,

Plaintiff,

v.

KATHLEEN HARDER, *et al.,*

Defendants.

ORDER

Michael H. Simon, District Judge.

United States Magistrate Judge Jolie A. Russo issued Findings and Recommendation (F&R) in this case on June 5, 2023. Judge Russo recommended that this Court deny as futile Plaintiff's motion for leave to amend his complaint.

Under the Federal Magistrates Act (Act), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party objects to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3). For those

portions of a magistrate judge's findings and recommenda-tions to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

Plaintiff timely filed an objection. Plaintiff objects to the finding that the staff of the Oregon Medical Board (OMB), who are not Board members, are entitled to absolute immunity. The Court has reviewed *de novo* the discussion of the F&R and adopts this portion.

Plaintiff also objects that the F&R improperly penalized Plaintiff for alleging facts "on information and belief." The F&R, however, specifically stated that alleging facts on information and belief was an acceptable pleading practice and "does not provide a basis for finding futility." ECF 20 at 6. The F&R noted generally that a party may be subject to sanctions if that party were to allege facts on information and belief and later it was discovered

that the party had no good faith basis for alleging those facts at the outset. That is an accurate statement of the law. It provides no support for Plaintiff's objection that Judge Russo "should have determined that it was entirely appropriate for Dr. Thomas to plead facts on information and belief." Further, Plaintiff's request *is* the conclusion that Judge Russo reached. This objection is overruled.

Finally, Plaintiff contends that the F&R does not address whether the members of the OMB have absolute immunity, whether the challenged statutes are void for vagueness, and whether qualified immunity applies. Judge Russo, however, explained that Plaintiff intends to appeal the dismissal of the OMB members and thus continues to allege claims against them, Because the claims against them are barred by absolute prosecutorial immunity, however, the F&R recommends this Court find the claims against the OMB members futile and decline to allow leave to amend to the extent the second amended complaint includes claims against them. ECF 20 at 5. Judge Russo also noted that the Court previously had concluded that the statutes were not unconstitutionally vague and thus recommends the Court deny leave to amend to include the proposed Fifth Claim for Relief. *Id.* at n. 2. To the extent Plaintiff's argument can be construed as an objection that the F&R did not address the statutory claim or claims against the OMB members, those objections are overruled. To the extent the F&R is not clear that Plaintiff's proposed claims are also futile because the OMB members have absolute immunity, the statutes are not void for vagueness, and qualified immunity applies, the Court makes that express finding for the same reasons the Court previously dismissed Plaintiff's claims on those grounds.

The Court ADOPTS the Findings and Recommendation, ECF 11. The Court DENIES Plaintiff's motion for leave to amend, ECF 16. Because the Court has previously dismissed Plaintiff's claims and Plaintiff was unable to demonstrate that he can amend his complaint to bring viable claims, the Court DISMISSES this case with prejudice.

IT IS SO ORDERED.

DATED this 6th day of July, 2023.

/s/ *Michael H. Simon*
Michael H. Simon
United States District Judge

JUDGMENT

Michael H. Simon, District Judge.

Based on the Court's ORDER,
IT IS ADJUDGED that this case is DISMISSED with prejudice.

DATED this 6th day of July, 2023.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge
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APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Case No. 3:22-cv-00944-JR Filed June 5, 2023

PAUL THOMAS, MD,

Plaintiff,

v.

KATHLEEN HARDER, SAURABH GUPTA, ERIN CRAMER, ROBERT CAHN, JAMES LACE, CHARLOTTE LIN, PATTI LOUIE, JENNIFER LYONS, ALI MAGEEHON, CHERE PEREIRA, CHRIS POULSEN, ANDREW SCHINK, JILL SHAW, ANTHONY DOMENIGONI, PAULA LEE-VALKOV, RICK GOLDSTEIN, ERIC BROWN, JASON BOEMMELS, DAVID FARRIS,

Defendants.

FINDINGS AND RECOMMENDATION

RUSSO, Magistrate Judge:

Plaintiff, Dr. Paul Thomas, brings this action alleging violation of his civil rights against defendants who are current and former members of the Oregon Medical Board (OMB) and OMB staff members.

On February 8, 2023, the Court dismissed plaintiff's complaint because OMB members have

absolute immunity with respect to OMB disciplinary decisions. However, the Court allowed plaintiff to seek leave to amend if he believes he has a basis for filing a second amended complaint. Order (ECF 15). Plaintiff now seeks leave to file a second amended complaint. For the reasons stated below, the motion for leave to amend should be denied

BACKGROUND

Plaintiff alleges OMB board members maliciously and unjustifiably destroyed his pediatric medical practice by stripping him of his medical license because he provided his patients with accurate information about childhood vaccines with which they disagree.

The proposed second amended complaint provides scant new allegations with respect to the OMB member defendants. While plaintiff adds further allegations regarding the dangers of vaccines to children and plaintiff's actions to warn parents,[1] he primarily focuses his amended allegations on the three non-board defendants: OMB investigators Eric Brown and Jason Boemmels, and their supervisor Dr. David Farris. With respect to these defendants, plaintiff alleges:

Defendant Boemmels sent the December 26, 2018 letter notifying plaintiff of an investigation by OMB about a complaint, regarding a patient plaintiff alleges he has not treated, related to vaccinations not administered consistent with the CDC and evidence-based medicine practices. Proposed Second Amended Complaint (ECF 16-1) at ¶¶ 82, 84. Plaintiff alleges OMB members as well as defendants Boemmels and Farris have unique knowledge of who made the

[1] Proposed Second Amended Complaint (ECF 16-1) at ¶¶ 70, 75, 76, 77, 78, 79, 80.

complaint and its basis but OMB maintains strict confidentiality of complaints and its investigations. *Id*. at ¶ 83. Plaintiff alleges Boemmels inquired why plaintiff's vaccination schedule for children differed from the CDC recommendations and focused not on the purported patient complaint but on a book written by plaintiff and plaintiff's website. *Id*. at ¶¶ 85-88.

Plaintiff alleges, in short, Boemmels' obliged plaintiff:

> To prove that no vaccination is safer than vaccination. The requests ignore the fact that the manufacturers expressly state in documentation that comes with each vaccine that use of these vaccines on pregnant women has not been shown to be safe. Despite the lack of any testing on pregnant women, the Oregon Medical Board is only interested in pushing the vaccine schedule and it saw Dr. Thomas as a noncompliant obstacle that needed to be eliminated.

Id. at ¶ 89.

Plaintiff then asserts the "nature of Jason Boemmels' complaint was a vindictive investigation into wrongthink rather than any complaint from a patient. Because Dr. Thomas' professional evidenced-based treatment of his patients did not comport with the "recommendations" of the CDC, Jason Boemmels was dispatched to search for a crime to pin on Dr. Thomas." *Id*. at ¶ 90.

Plaintiff then claims, "upon information and belief," the December 26, 2018 letter originated from inside OMB who instructed Boemmels to investigate plaintiff because of his book "The Vaccine Friendly

Plan." *Id*. at ¶ 91. Also "upon information and belief," plaintiff contends Boemmels fabricated the factual allegations in the letter and would not have pursued this action on his own initiative. *Id*. at ¶ 92.

Plaintiff next alleges defendant Brown, "[o]n information and belief ... directed Jason Boemmels to pursue an investigation to find something to pin on Dr. Thomas. Under the guise of legal authority, Eric Brown and Jason Boemmels used this initial "complaint" about a child never treated by Dr. Thomas to investigate Dr. Thomas in search of a crime." *Id*. at ¶ 93.

On December 4, 2020, OMB issued an emergency suspension of plaintiff's license on the basis that he was a danger to the public. *Id*. at ¶¶ 7, 99. Plaintiff asserts Brown:

> wrote the letter transmitting a copy of the Board's emergency suspension order to Dr. Thomas. On information and belief, Eric Brown wrote the Order of Emergency Suspension ("Order"). On information and belief, Jason Boemmels contributed to the contents of the Order. On information and belief, David Farris, due his position in management, approved the contents of the proposed order of Emergency Suspension before it was submitted to the Board.

Id. at ¶ 113.

Plaintiff alleges, "on information and belief," Brown and Boemmels concocted false facts as grounds for his suspension to aid OMB in silencing plaintiff. *Id*. at ¶¶114–142. Plaintiff further asserts:

> On information and belief, the goal of Brown, Boemmels, and Farris was to

> shutdown Dr. Thomas' practice and false pretenses were sufficient to achieve that goal. On information and belief, Brown sought to create a semblance of a story using falsehoods, omissions, non sequitors, and innuendo to provide just enough cover for the Board's goal of shutting down Dr. Thomas.
>
> The speed with which the Board acted after learning of Dr. Thomas' peer-reviewed paper would, on information and belief, require management participation and coordination. On information and belief, Farris directed Brown to write the Order with support from Boemmels.

Id. at ¶¶ 145–46.

As with his First Amended Complaint, plaintiff alleges: defendants violated his: (1) First Amendment right to free speech, by imposing content-based restrictions on his professional speech; (2) Fourteenth Amendment right to procedural due process, by acting outside of their statutory authority to suspend his license, fabricating and supervising the fabrication of evidence, and relying on an unconstitutionally vague statute; and (3) Fourteenth Amendment right to substantive due process, by taking arbitrary and unreasonable action in suspending plaintiff's license. As noted above, the Court previously dismissed all claims except for the due process claim based on vagueness because the OMB members and the OMB staffers enjoyed absolute and qualified immunity and dismissed the due process claim based on vagueness finding none of the challenged statutes unconstitutionally vague. In addition, the Court found the allegations of supervisor liability insufficient to establish liability

under 42 U.S.C. § 1983. Defendants assert the proposed amended complaint is futile because the new allegations are insufficient to overcome immunity, and nothing has changed with respect to the purported vagueness of the state statutes at issue.

DISCUSSION

A. OMB MEMBERS

Plaintiff intends to appeal the dismissal of the OMB members and thus continues to plead claims against them. Given that the claims against the defendant OMB members are barred by absolute prosecutorial immunity, the Court should find the claims against them are futile and decline to allow leave to amend to the extent the second amended complaint includes claims against them.[2]

B. PLEADING ON INFORMATION AND BELIEF

As noted above, plaintiff makes liberal use of pleading facts based on "information and belief." Defendants assert these allegations simply hide the fact that plaintiff is merely pleading conclusions rather than facts upon which a trier of fact could find a plausible basis for relief. However, the Federal Rules of Civil Procedure allow parties to plead facts on "information and belief" if the facts "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed.R.Civ.Proc. 11(b)(3); Fed.R.Civ.Proc. 11, Advisory Committee's Note ("[S]ometimes a litigant may have good reason to believe that a fact is true ... but may

[2] The Court previously determined the statutes at issue are not unconstitutionally vague. Thus, the Court should find that leave to amend to include the proposed Fifth Claim for Relief should also be denied as to all defendants.

need discovery ... to gather and confirm the evidentiary basis for the allegations"); United *States v. Sequel Contractors, Inc.*, 402 F.Supp.2d 1142, 1154 (C.D. Cal. 2005) ("Rule 11(b)(3) authorizes ... pleading [on information and belief] where the party forms a belief, based on a reasonable inquiry, that the allegations are likely to have evidentiary support after a reasonable opportunity for further investigation" (internal quotation marks omitted)). This is not to say that pleading facts based on information and belief cannot be later sanctionable if discovery reveals no good faith basis for alleging the facts at the outset. See *Mireskandari v. Daily Mail & Gen. Tr. PLC*, 2013 WL 12129642, at *4 (C.D. Cal. July 31, 2013) ("Plaintiff is cautioned, however, that if defendants are later able to show that his allegations were made without reasonable inquiry and without a basis for believing that they had evidentiary support, the court will entertain an appropriate motion for sanctions under Rule 11."). For now, such form of pleading does not provide a basis for finding futility.

C. OMB Staff

As noted above, the Court previously dismissed claims against OMB members and OMB staff finding all defendants enjoyed absolute immunity. The Court previously determined:

> Defendants Brown and Boemmels were investigators for the OMB, and Defendant Farris is alleged to have been their supervisor. The Ninth Circuit generally does not apply absolutely immunity to investigatory conduct, but only to judicial or prosecutorial conduct. *See Hardwick v. Cnty.*

> *of Orange*, 844 F.3d 1112, 1115 (9th Cir. 2017) *Garmon v. Cnty. of Los Angeles*, 828 F.3d 837, 842-43 (9th Cir. 2016); *Slater v. Clarke*, 700 F.3d 1200, 1203 (9th Cir. 2012).
>
> As noted above, however, Oregon has by statute imbued OMB investigators and staff with absolute immunity. ORS 677.335(1). Judges in this district court have applied this statute to provide absolute immunity to employees other than OMB members. *See, e.g., Dover v. Haley*, 2013 WL 6190165, at *3 (D. Or. Nov. 26, 2013), aff'd, 616 F. App'x 295 (9th Cir. 2015); *Read v. Haley*, 2013 WL 1562938, at *7 (D. Or. Apr.10, 2013). Thus, all Defendants are entitled to absolute immunity.

Order dated February 8, 2023 (ECF 15) at p. 7.

Plaintiff asserts the State cannot immunize its officials from claims under federal law. See *McLaughlin v. Tilendis*, 398 F.2d 287, 290 (7th Cir. 1968) (A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution ensures that the proper construction may be enforced.). However, the state statute at issue does not confer blanket immunity for OMB members and staff, it confers such immunity only when "they are acting similar to prosecutors to the same extent prosecutors and judicial officers enjoy immunity." Or. Rev. Stat. § 677.335(1). Such immunity is recognized under federal law. *See Butz v. Economou*, 438 U.S. 47 (1978) (persons performing adjudicatory functions within federal agencies are entitled to absolute immunity from damages liability

for their judicial acts as are agency officials who perform functions analogous to those of a prosecutor). Plaintiff's broad allegations of nefarious intent and fabrication of evidence fail to demonstrate that OMB staffers were acting in a capacity dissimilar to prosecutors or adjudicators. *See, e.g., Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir.2004) (members of the Idaho State Medical Board, the Board of Professional Development, their staff, and legal counsel were entitled to absolute immunity from suit by the plaintiff under § 1983 because their actions were "procedural steps involved in the eventual decision denying [plaintiff] her license requirement" and "such acts are inextricably intertwined with [defendants'] statutorily assigned adjudicative functions."); *Gambee v. Cornelius*, 2011 WL 1311782, at *3, *6 (D. Or. Apr. 1, 2011) (OMB staff members absolutely immune under federal common law for alleged due process violations in the license revocation process). Indeed, plaintiff specifically alleges these defendants wrote and directed the writing of the suspension order. Accordingly, given that plaintiff has failed to overcome the futility of his vagueness claim, the remaining claims against the non-OMB staffers is also futile given their absolute immunity. As such, the Court should deny the motion for leave to amend. See *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend.").

RECOMMENDATION

For the foregoing reasons, plaintiff's motion for leave to amend (ECF 16) should be denied. A judgment of dismissal should be entered.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 5th day of June, 2023.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Case No. 3:22-cv-00944-JR Filed February 8, 2023

PAUL THOMAS, MD,

Plaintiff,

v.

KATHLEEN HARDER, *et al.,*

Defendants.

ORDER

Michael H. Simon, District Judge.

United States Magistrate Judge Jolie A. Russo issued Findings and Recommendation (F&R) in this case on October 11, 2022. Judge Russo recommended that this Court grant Defendants' motion to dismiss.

Under the Federal Magistrates Act (Act), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party objects to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3). For those portions of a magistrate judge's findings and

recommenda-tions to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

Plaintiff timely filed an objection, to which Defendants responded by incorporating by reference their briefing on the motion to dismiss before Judge Russo. Plaintiff raises several objections. The Court addresses each in turn.

1. Absolute Immunity of OMB Members

Plaintiff's first objection is that the F&R erroneously recommended that Defendants are entitled to absolute immunity. Plaintiff argues that Defendant members of the Oregon Medical Board (OMB) acted outside their statutory authority because they did not comply with the procedures established under Oregon Revised Statutes (ORS) §

677.200 when invoking the emergency temporary license revocation authority of ORS § 677.205(3). Thus, asserts Plaintiff, under *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1990), the members of the OMB are not entitled to absolute immunity.

"The prime categories of executive officials that are entitled to absolute immunity are those whose functions parallel the functions of judges and prosecutors." *Id.* at 1378. When considering absolute immunity for state actors outside of judges and prosecutors, a court must consider whether the "officials were placed, under state law, in the functions equivalent to those of judge or prosecutor." *Id.* Oregon has a statute that provides absolute immunity to the OMB and its investigators and staff. ORS 677.335(1) ("Members of the Oregon Medical Board, members of its administrative and investigative staff, medical consultants, and its attorneys acting as prosecutors or counsel shall have the same privilege and immunities from civil and criminal proceedings arising by reason of official actions as prosecuting and judicial officers of the state.").

Oregon also has a statutory framework for OMB proceedings and license suspensions. Within that framework, ORS § 677.205 requires that the OMB may only temporarily suspend a license without a hearing if it is done "simultaneously with the commencement of proceedings under ORS 677.200." The Court declines to adopt the portion of the F&R discussing ORS §§ 677.200 and 677.205.

The OMB may only temporarily suspend a license without a hearing if it is done at the same time as commencing proceedings under ORS 677.200. Those proceedings must be "substantially in accord"

with: "(1) A written complaint of some person, not excluding members or employees of the Oregon Medical Board, shall be verified and filed with the board;" and "(2) A hearing shall be given to the accused in accordance with ORS chapter 183 as a contested case." The hearing need not be "simultaneous" with the temporary suspension because ORS § 677.205 expressly allows a temporary suspension without a hearing. Thus, the only logical way to read the two statutes together is that the OMB may temporarily suspend a license without a hearing so long as it is simultaneous with the proceedings commencing by having a written complaint of some person being verified and filed with the OMB.[1]

The OMB temporarily suspended Plaintiff's medical license on December 3, 2020. Plaintiff alleges that a notice of disciplinary proceeding or complaint against him was not filed by the OMB until April 22, 2021, months after his temporary suspension. ORS § 677.205, however, does not require that the complaint against Plaintiff be filed *by* the OMB to initiate the "proceedings." Indeed, the complaint must be filed "with" the OMB not "by" the OMB. The statute *allows* members and employees of the OMB to file the complaint, but does not *require* it. For example, if a patient files a complaint with the OMB, and that complaint is verified, the OMB may, under the terms of the statute, temporarily suspend a medical license if the OMB determines that the practitioner poses an immediate danger to the public.

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[1] Defendants argue that Plaintiff's contention that a complaint must be "filed" is "patently false." Plaintiff's contention, however, derives directly from ORS § 677.200(1), which requires that a complaint be "filed with the board."

Thus, the mere fact that the OMB did not issue its notice of disciplinary proceedings to Plaintiff until April 22, 2021, does not mean that no complaint was filed and verified against Plaintiff before that date. Indeed, Plaintiff's allegations show that there was a complaint by someone else.

Plaintiff alleges that on July 23, 2020, the OMB notified Plaintiff that it was investigating a complaint lodged against Plaintiff regarding his research into vaccinated versus unvaccinated children. Am. Compl. ¶ 77. Plaintiff also alleges that the "answer" Plaintiff provided to the OMB regarding that complaint "did not comport with the Board's dogmatic opinion." *Id.* ¶ 81. Plaintiff further alleges that he issued a "peer-reviewed paper" about how much healthier unvaccinated children are compared to vaccinated children, and that a few days after that paper became available online, the OMB investigator "reviewed the case" with the investigative committee and the investigative committee sent the "case" to the OMB, who then temporarily suspended Plaintiff's license. *Id.* Based on Plaintiff's allegations, it appears to have been the July 23, 2020 complaint, investigation, and "case" that served as the basis for his suspension.

Even assuming no complaint was filed with the OMB as that term is used in ORS § 677.200 until the OMB itself issued its disciplinary notice to Plaintiff in April 2021, that does not resolve whether the OMB members are entitled to absolute immunity. That would simply mean that OMB members, who plainly have the statutory authority to temporarily suspend Plaintiff's medical license, would have failed to follow the proper procedures in doing so. Plaintiff argues that under *Chalkboard*, the members then

would not be entitled to absolute immunity. *Chalkboard*, however, did not involve agency personnel who had statutory authority but failed to follow the proper procedures to execute that authority. In *Chalkboard*, the Ninth Circuit concluded that state law authorized only prosecutors to seek an injunction in court to summarily close day care centers and that Department of Health Services (DHS) personnel were not authorized to summarily close day care centers. *Id.* at 1379. Thus, the DHS personnel were not entitled to absolute immunity because they did not have authority "under state law, in the functions equivalent to those of judge or prosecutor with regard to [the day care center's] summary closure." *Id.* at 1378.

Here, however, *Chalkboard* does not apply to Plaintiff's claims. U.S. District Judge Ann Aiken reached the same result when she dismissed similar claims in a different case. Judge Aiken explained:

> Plaintiff's reliance on *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1990), for the proposition that defendants' actions are not within the scope of immunity because they violated state law, is misplaced. In *Chalkboard*, the court determined that an Arizona agency did not have statutory authority to carry out an emergency closure of a day care center; that power was held by another agency. *Id.* at 1378-79. The lack of agency authority in *Chalkboard* is not present in this case. Plaintiff does not dispute that the Board is authorized to investigate and discipline physicians or that it can effect emergency license suspensions.

> Thus, plaintiff's allegations are unlike those in *Chalkboard*; he simply alleges that the Board failed to properly adhere to its procedures in exercising its authority under Oregon law. As defendants note, plaintiff's various arguments that defendants skipped important steps in the process or omitted information from documents are not relevant to the absolute immunity inquiry. The acts of the Board in their exercise of statutory authority "are no less judicial or prosecutorial because they may have been committed in error." *Mishler* [*v. Clift*], 191 F.3d [998,] 1006 [9th Cir. 1999] (citing *Stump v. Sparkman*, 435 U.S. 349, 359, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)).

Gambee v. Cornelius, 2011 U.S. Dist. LEXIS 35944, 2011 WL 1311782, at *5 (D. Or. Apr. 1, 2011).

Plaintiff also objects that the F&R does not go through the factors from *Butz v. Economou*, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978), arguing that whether the OMB is subject to absolute immunity requires a court to analyze those factors in each case for each act taken. The F&R cited many cases that had found medical boards, including the OMB, making disciplinary decisions were entitled to absolute immunity. The Court disagrees that the F&R was required separately to analyze the *Butz* factors. The argument Plaintiff makes in his objection is a rehash of his argument that the OMB failed to follow the proper procedures, was thus outside its statutory authority, and therefore not entitled to absolute immunity under the *Butz* factors.

Gambee, cited by the F&R, however, analyzed the *Butz* factors and addressed similar arguments.

2. Absolute Immunity for non-OMB Members

Plaintiff argues that Defendants Eric Brown, Jason Boemmels, and David Farris, who are not members of the OMB, are not entitled to absolute immunity because they did not serve in the role equivalent to judges or prosecutors. Plaintiff asserts that the F&R incorrectly treated all Defendants together in applying absolute immunity.

Defendants Brown and Boemmels were investigators for the OMB, and Defendant Farris is alleged to have been their supervisor. The Ninth Circuit generally does not apply absolutely immunity to investigatory conduct, but only to judicial or prosecutorial conduct. *See Hardwick v. Cnty. of Orange*, 844 F.3d 1112, 1115 (9th Cir. 2017) *Garmon v. Cnty. of Los Angeles*, 828 F.3d 837, 842-43 (9th Cir. 2016); *Slater v. Clarke*, 700 F.3d 1200, 1203 (9th Cir. 2012).

As noted above, however, Oregon has by statute imbued OMB investigators and staff with absolute immunity. ORS 677.335(1). Judges in this district court have applied this statute to provide absolute immunity to employees other than OMB members. *See, e.g., Dover v. Haley*, 2013 U.S. Dist. LEXIS 167951, 2013 WL 6190165, at *3 (D. Or. Nov. 26, 2013), *aff'd*, 616 F. App'x 295 (9th Cir. 2015); *Read v. Haley*, 2013 U.S. Dist. LEXIS 52691, 2013 WL 1562938, at *7 (D. Or. Apr.10, 2013). Thus, all Defendants are entitled to absolute immunity.

Plaintiff also objects to the F&R's conclusion that the Amended Complaint fails to state a claim against

Brown, Boemmels, and Farris. Plaintiff argues that the F&R fails to accept as true the allegations in the Amended Complaint. For Farris, Plaintiff asserts that supervisory liability is actionable under § 1983 and that Plaintiff adequately alleged such liability. "A defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989)). The requisite showing can be established by demonstrating that the supervisor: (1) set in motion a series of acts by others or knowingly refused to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict constitutional injury; (2) had his or her own culpable action or inaction in the training, supervision, or control of his or her subordinates; (3) acquiesced in the constitutional deprivation by subordinates; or (4) engaged in conduct that shows reckless or callous indifference to the rights of others. *Id.* at 1207-08; *see also Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018) ("The requisite causal connection can be established by setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury." (citing *Starr*, 652 F.3d at 1207-08)). "A plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the

deprivation of [the plaintiff's] civil rights." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

Plaintiff does not sufficiently allege *facts* supporting Farris's supervisory liability. Plaintiff simply alleges that Farris participated in, directed, or knew of and failed to prevent the "fabrication of evidence" that led to Plaintiff's alleged deprivation of rights. Plaintiff improperly alleges "simply conclusions" and his supervisory claims fail. *Barren*, 152 F.3d at 1194.

For Brown and Boemmels, Plaintiff asserts that the facts alleged in Paragraphs 96-112 regarding the alleged deficiencies in the Board's disciplinary findings are facts that apply to Brown and Boemmels. The Amended Complaint, however, alleges these facts specifically against only "the Board." The facts alleged against Brown and Boemmels are that they "wrote false and misleading allegations" against Plaintiff and that they did not interview the individuals cited in their report but instead relied on "second-hand information." Am. Compl. ¶¶ 149–51.

In the analogous criminal context, the Ninth Circuit has held that for a claim of fabrication of evidence, a plaintiff "must, *at a minimum*, point to evidence that supports at least one of the following two propositions: "(1) Defendants continued their investigation ... despite the fact that they knew or should have known that [the plaintiff] was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (emphasis in original).

Plaintiff does not allege sufficient *facts* to state a claim based on a fabrication of evidence.

3. Vagueness

Plaintiff objects that in the F&R's discussion of whether the statutes governing the procedures on medical licensing are unconstitutionally vague, the F&R does not accept Plaintiff's alleged facts as true. Plaintiff recites alleged facts that the F&R purportedly should have accepted, relating to the dangers of childhood vaccinations and the positive results of not vaccinating children.

It is unclear whether Plaintiff is bringing a *facial* or an *as applied* vagueness challenge. The alleged facts would not be relevant to a facial challenge but might be relevant to an as applied challenge. The Amended Complaint appears to allege an as applied challenge—asserting that a person of reasonable intelligence could not ascertain that Plaintiff's specific conduct was forbidden by the statutes. Plaintiff's response to Defendants' motion to dismiss argues a facial challenge, namely that the statutes do not provide any standard by which any person could ascertain any understandable standard of regulation and that the statutes allow too much discretion by the OMB.

"[A] challenged statute enjoys a presumption of constitutionality." *Forbes v. Napolitano*, 236 F.3d 1009, 1012 (9th Cir. 2000). "A law is unconstitutionally vague if it does not give 'a person of ordinary intelligence fair notice of what is prohibited' or if it is 'so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Tingley v. Ferguson*, 47 F.4th 1055,

1089 (9th Cir. 2022) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). "For facial vagueness challenges, [courts] tolerate uncertainty at the margins; the law just needs to be clear in the vast majority of its intended applications." *Id.* For as-applied challenges, courts "consider whether a statute is vague as applied to the particular facts at issue." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 18 (2010).

For both types of challenges, the Court adopts the F&R's discussion regarding the text of the statutes and case law interpreting similar statutes. That is sufficient to defeat a facial challenge. The statutes are not vague "in the vast majority" of their intended applications. *Tingley*, 47 F.4th at 1089.

For an as-applied challenge, even accepting Plaintiff's well-pleaded factual allegations as true, the statutes still are not unconstitutionally vague. Plaintiff alleges that over the course of his medical career he came to disagree with the recommended vaccine schedule and that he believes children are healthier when they are not vaccinated. Plaintiff, however, does not allege that he does not understand that the vaccine schedule is recommended and is considered the standard of care by the medical profession or the OMB. Indeed, he alleges the opposite, that the OMB and the medical profession refuse to consider that altering the recommended vaccine schedule allegedly provides better outcomes for children. His allegations show that he understands that the statutes require that he perform under the standard of care and that he understands what the OMB and the medical profession consider to be the standard of care; he just does not agree with the current standard of care.

That he does not agree with the current standard of care, however, does not render the statutes vague.

4. Qualified Immunity

Plaintiff objects that the F&R misapplied qualified immunity. The F&R stated that Plaintiff alleges that Defendants violated Plaintiff's rights by investigating and disciplining him and that Defendants are statutory authorized to do so. The F&R noted that Plaintiff alleges Defendants fabricated evidence, but that such allegations are conclusory and may be disregarded. Thus, all that is left is that Defendants investigated and disciplined Plaintiff. The F&R, therefore, recommended granting qualified immunity because no binding precedent held such conduct unlawful.

Plaintiff argues that simply because Defendants are statutorily authorized to investigate and discipline doctors does not mean that can do so unlawfully. The F&R (and this Court), however, rejected Plaintiff's conclusory allegations that Defendants fabricated evidence. That leaves only an investigation and disciplinary action with which Plaintiff disagrees and for which Plaintiff alleges he has scientific evidence to dispute. Plaintiff's disagreement with his investigation, however, does not render Defendants' conduct constitutionally deficient or not subject to qualified immunity.

5. Conclusion

The Court ADOPTS IN PART the Findings and Recommendation, ECF 11, as supplemented herein. The Court GRANTS Defendants' motion to dismiss,

ECF 6. Plaintiff is not automatically granted leave to amend because, the Court dismisses his claims, among other reasons, based on absolute and qualified immunity. Plaintiff may file a motion for leave to amend within 30 days if Plaintiff believes he has a basis on which to file a Second Amended Complaint.

IT IS SO ORDERED.

DATED this 8th day of February, 2023.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Case No. 3:22-cv-00944-JR Filed October 11, 2022

PAUL THOMAS, MD,

Plaintiff,

v.

KATHLEEN HARDER, SAURABH GUPTA, ERIN CRAMER, ROBERT CAHN, JAMES LACE, CHARLOTTE LIN, PATTI LOUIE, JENNIFER LYONS, ALI MAGEEHON, CHERE PEREIRA, CHRIS POULSEN, ANDREW SCHINK, JILL SHAW, ANTHONY DOMENIGONI, PAULA LEE-VALKOV, RICK GOLDSTEIN, ERIC BROWN, JASON BOEMMELS, DAVID FARRIS,

Defendants.

FINDINGS AND RECOMMENDATION

RUSSO, Magistrate Judge:

Defendants Kathleen Harder, Saurabh Gupta, Erin Cramer, Robert Cahn, James Lace, Charlotte Lin, Patti Louie, Jennifer Lyons, Ali Mageehon, Chere Pereira, Chris Poulsen, Andrew Schink, Jill Shaw, Eric Brown, Jason Boemmels, and David Farris move to dismiss plaintiff Paul Thomas's complaint pursuant to Fed. R. Civ. P. 12(b)(6). For

the reasons stated below, defendants' motion should be granted.

BACKGROUND

Plaintiff is a pediatrician who has been practicing medicine for over thirty years. Am. Compl. ¶ 46 (doc. 5). In 2003, plaintiff began investigating the Centers for Disease Control and Prevention's ("CDC") recommended vaccine schedule and concluded that it exposed children to unsafe levels of mercury and aluminum. *Id.* at ¶¶ 51–52, 63. Plaintiff states he "has shown, with peer reviewed scientific inquiry, that children who do not follow the CDC recommended vaccine schedule are much healthier than fully vaccinated kids." *Id.* at ¶ 55.

Plaintiff opened his own clinic in 2008 and has treated over 11,000 pediatric patients in that clinic. *Id.* at ¶ 56. In 2016, plaintiff published a book that describes and advocates for an alternative vaccine schedule. *Id.* at ¶ 57. Plaintiff alleges that none of 1,000 children who followed his "vaccine-friendly plan" were diagnosed with autism, in contrast to the one in forty-five children diagnosed with autism nationally. *Id.* at ¶¶ 71–72.

According to plaintiff, defendants—members of the Oregon Medical Board ("Board")—have been "hellbent on ruining him" since 2018 and singled him out "because he dares to give parents factually accurate information about the risks of the childhood vaccines." *Id.* at ¶ 74. Between 2018 and 2020, the Board issued complaints, letters, and records requests to plaintiff, and ultimately issued an emergency suspension of plaintiff's license to practice medicine on December 3, 2020. *Id.* at ¶¶ 75–81; *see also* Defs.' Mot. Dismiss 5 (doc. 6) ("[t]he suspension

lasted from December 4, 2020 through June 3, 2021"). The Board based the temporary suspension on "cases where [plaintiff's] conduct violated ORS 677.190(1)(a), as defined by ORS 677.188(4)(a), unprofessional or dishonorable conduct which exposed his patients to the risk of harm, as well as gross or repeated acts of negligence in violation of ORS 677.190(13)." Defs.' Mot. Dismiss Ex. A, at ¶¶ 3.2–3.3 (doc. 6-1).[1] In particular, the Board found that plaintiff failed to adequately vaccinate children, document parental refusal of vaccines, and follow the appropriate standard of care. *Id.* at ¶¶ 2.2, 3.

Plaintiff alleges the Board's grounds for suspending his license "were frivolous, full of falsehoods, and failed to meet the threshold of an imminent threat to public welfare and safety." Am. Compl. ¶ 96 (doc. 5). Plaintiff disputes the extent to which he treated the patients in question and whether the injuries they suffered were a result of that treatment. *Id.* at ¶¶ 96–125.

Plaintiff initiated this lawsuit on June 30, 2022. He filed his Amended Complaint, the operative complaint here, on August 3, 2022, asserting claims against defendants under 42 U.S.C. § 1983. In

[1] Although the complaint does not include defendants' Order of Emergency Suspension, plaintiff's allegations are based on and refer extensively to it. Am. Compl. ¶¶ 84-87, 96-126, 138-69, 181-89 (doc. 5), such that the Court considers the Order in evaluating the present motion. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) ("[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim ... the district court may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)") (citations omitted).

particular, plaintiff alleges that defendants violated his: (1) First Amendment right to free speech, by imposing content-based restrictions on his professional speech; (2) Fourteenth Amendment right to procedural due process, by acting outside of their statutory authority to suspend his license, fabricating and supervising the fabrication of evidence, and relying on an unconstitutionally vague statute; and (3) Fourteenth Amendment right to substantive due process, by taking arbitrary and unreasonable action in suspending plaintiff's license. *Id.* at ¶¶ 33-43. As relief, plaintiff seeks "at least 35 million dollars" in damages. *Id.* at ¶ A.

STANDARD

Where the plaintiff "fails to state a claim upon which relief can be granted," the court must dismiss the action. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). For the purposes of a motion to dismiss, the complaint is liberally construed in favor of the plaintiff and its allegations are taken as true. *Rosen v. Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983). Regardless, bare assertions that amount to nothing more than a "formulaic recitation of the elements" of a claim "are conclusory and not entitled to be assumed true." *Ashcroft v. Iqbal*, 556 U.S. 662, 680–81, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Rather, to state a plausible claim for relief, the complaint "must contain sufficient allegations of underlying facts" to support its legal conclusions. *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

DISCUSSION

Defendants assert that plaintiff's claims fail because, among other reasons, (1) they are entitled to absolute judicial immunity or, alternatively, qualified immunity; and (2) the challenged statutes are not unconstitutionally vague.

I. Absolute Judicial Immunity

State officials may be absolutely immune to suit if the challenged actions are functionally comparable to those of a prosecutor or judge. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 923 (9th Cir. 2004). In *Butz v. Economou*, the Supreme Court identified several factors to determine whether official conduct resembles judicial or prosecutorial conduct such that the official should be immune. 438 U.S. 478, 512–13 (1978).

It is well established that, under the *Butz* factors, the Board is absolutely immune for the quasi-judicial and quasi-prosecutorial actions it took to suspend plaintiff's license. *See, e.g., LaTulippe v. Harder*, 574 F. Supp. 3d 870, 882–83 (D. Or. 2021) (members of Oregon Medical Board absolutely immune for judicial acts related to suspension of a physician's license); *Gambee v. Williams*, 971 F. Supp. 474, 477 (D. Or. 1997) (members of Oregon Board of Medical Examiners absolutely immune for "acts performed in their statutory capacity as quasi-judicial prosecutors or judges"); *Olsen*, 363 F.3d at 925–26 (members of Idaho State Board of Professional Discipline absolutely immune for non-ministerial acts related to disciplinary hearing process concerning a physician assistant's license); *Mishler v. Clift*, 191 F.3d 998, 1007 (9th Cir. 1999)

(members of Nevada State Board of Medical Examiners absolutely immune for quasi-judicial acts in disciplinary process to revoke a physician's license); *Buckwalter v. Nev. Bd. of Med. Exam'rs*, 678 F.3d 737, 742 (9th Cir. 2012) (members of Nevada State Board of Medical Examiners absolutely immune for suspending a physician's authority to prescribe medication because "the Board Members' summary suspension power is analogous to a judicial function"). Indeed, the Ninth Circuit has expressly stated "[t]here is no question that acts occurring during the disciplinary hearing process fall within the scope of absolute immunity; holding hearings, taking evidence, and adjudicating are functions that are inherently judicial in nature." *Mishler*, 191 F.3d at 1008.

Plaintiff makes little attempt to distinguish or even acknowledge these cases, and instead argues that defendants exceeded their statutory authority under ORS 677.205 and are thus not entitled to absolute immunity, per the Ninth Circuit's holding in *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1989). Specifically, plaintiff disputes the Board's compliance with the statute because the Board issued its emergency suspension on December 3, 2020, and did not file a complaint until April 22, 2021. Am. Compl. ¶¶ 81, 84 (doc. 5).

Initially, this District has explicitly rejected a virtually identical argument. *See Gambee v. Cornelius*, 2011 U.S. Dist. LEXIS 35944, 2011 WL 1311782, at *5 (D. Or. Apr. 1, 2011) ("[p]laintiff's reliance on *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir.1990), for the proposition that defendants' actions are not within the scope of immunity because they violated state law, is misplaced").

Further, ORS 677.205(3) merely provides that "the board may temporarily suspend a license without a hearing, simultaneously with the commencement of proceedings under ORS 677.200[.]" ORS 677.200, in turn, requires that "any proceeding for disciplinary action . . . be substantially in accord with" the stated procedure, requiring a written complaint and a hearing. Thus, ORS 677.205(3) requires only the simultaneous *commencement* of disciplinary proceedings, not the simultaneous filing of a complaint or holding of a hearing. There is no well-pleaded factual content in the complaint indicating that defendants failed to commence or adhere to the proper procedures upon the emergency suspension of plaintiff's license, but even if they did, defendants' actions "are no less judicial or prosecutorial because they may have been committed in error." *Mishler*, 191 F.3d at 1006. Accordingly, defendants did not act outside of their statutory authority such that they should be denied absolute immunity.

All but one of plaintiff's claims challenge the Board's investigation, documentation, and adjudication of his license suspension.[2] None of the actions challenged are ministerial such that they fall outside the scope of judicial immunity articulated in *Mishler*. Accordingly, defendants' motion should be granted as to all but plaintiff's Fifth Claim for Relief.

II. Qualified Immunity

[2] The only claim that falls outside the ambit of absolute immunity is plaintiff's Fifth Claim for Relief, which alleges that the statutes relied on by the Board are unconstitutionally vague. That claim is discussed in Section III, below.

Defendants contend that even if they are not subject to absolute judicial immunity, they are entitled to qualified immunity. State officials enjoy qualified immunity if they rely on established law, or if they reasonably misapprehend the applicable law. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). "If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Id.* Under *Saucier v. Katz*, the relevant question is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." 533 U.S. 194, 202 (2001). This standard protects "all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991).

Here, plaintiff alleges the board members violated his constitutional rights by fabricating evidence,[3] investigating him, and suspending his medical license. Am. Compl. ¶¶ 33–43 (doc. 5). No precedent clearly establishes the illegality of defendants' actions; to the contrary, the Board acted under explicit statutory authority that allows it to

[3] Plaintiff makes only vague and conclusory assertions that defendants Brown and Boemmels "wrote false and misleading allegations" when investigating, and that the other defendants "knew of the fabrication of evidence and failed to act to prevent it." Am. Compl. ¶¶ 149–69 (doc. 5). These allegations, without more, fail to establish a plausible claim for relief. Additionally, "[i]t is well established that section 1983 does not impose liability upon state officials for the acts of their subordinates under a respondeat superior theory of liability," so plaintiff's claims against the supervising defendants also fail in that regard. *Rise v. Oregon*, 59 F.3d 1556, 1563 (9th Cir. 1995) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691–94, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)).

initiate investigations and prosecute disciplinary actions against licensees. ORS 677.320, 677.200. Accordingly, even if defendants are not absolutely immune, they should be entitled to qualified immunity from damages.

III. Unconstitutionally Vague Statutes

Plaintiff alleges that the statutes governing his license suspension are unconstitutionally vague in violation of his procedural Due Process rights. Am. Compl. ¶¶ 170–80 (doc. 5). Specifically, plaintiff argues ORS 677.190(1)(a) (as defined in ORS 677.188(4)), ORS 677.190(13), ORS 677.205(3), and ORS 183.430(2) are impermissibly vague because they do not "giv[e] a person of reasonable intelligence notice that [his] conduct of providing informed consent, or that improving the health of children, is a violation." *Id.* In contrast, defendants assert the standards in those statutes are "highly specific" and "identifiable," and that plaintiff merely disagrees with the standards as enforced. Defs.' Mot. Dismiss 26–29 (doc. 6).

A statute violates the Fourteenth Amendment if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015).[4] But "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304 (2008). The proscribed conduct need not be

[4] The only statute plaintiff alleges that is subject to arbitrary enforcement is ORS 677.190(1)(a), so this Court addresses only the prong of the inquiry relating to that statute. *See* Am. Compl. ¶ 174 (doc. 5).

specifically defined; rather, standards may be "measured by common understanding and practices[.]" *Roth v. United States*, 354 U.S. 476, 491 (1957) (quotation marks and citation omitted).

The level of scrutiny applied to the challenged statute depends on the statute's purpose and its penalties. The Supreme Court has noted that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498–99 (1982). Further, vagueness challenges face an uphill battle: "Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quotation marks omitted).

The challenged statutes are part of the state's regulation of medical providers. Similar to economic regulations, these laws should be subject to less scrutiny than criminal statutes regulating layperson conduct because medical providers can be expected to consult the governing bodies about appropriate standards of conduct. Additionally, ORS 677.205—the statute providing the basis of plaintiff's license suspension—calls only for civil penalties, not criminal, further weighing in favor of less scrutiny. ORS 677.205(7). Regardless of the level of scrutiny applied, however, the overwhelming majority of cases support a finding that none of the challenged provisions are unconstitutionally vague, as detailed below.

A. ORS 677.190(1)(a), as defined by ORS 677.188(4)

ORS 677.190(1)(a) enables the Board to suspend or revoke a physician's license for "[u]nprofessional or dishonorable conduct." That phrase is defined as "conduct unbecoming [of] a person licensed to practice medicine ... or detrimental to the best interests of the public," including "any conduct or practice which does or might constitute a danger to the health or safety of a patient or the public," and the "[w]illful performance of any ... medical treatment which is contrary to acceptable medical standards." ORS 677.188(4)(a)-(b).

At the outset, plaintiff is correct that these statutes do not specify that providing informed consent or improving children's health are punishable. Contrary to plaintiff's assertions, however, defendants did not suspend his license for doing either of those things. Rather, the Board cited several instances of plaintiff's unprofessional conduct, including his failure to refer sick patients for additional testing, failure to document informed consent discussions, and failure to administer necessary vaccines as required by the standard of care.[5] *See generally* Defs.' Mot. Dismiss Ex. A (doc. 6-

[5] Defendants' Order of Emergency Suspension states, in part: "When making determinations about professional conduct, negligence and gross negligence in the practice of medicine, the Board relies upon sources that are well recognized in the medical community and are relied upon by physicians in their delivery of care to their patients. [The CDC's recommended vaccine schedule] provides a series of vaccinations for children that start at birth and continue through the ages of childhood to provide immunizations for number of diseases that are potentially debilitating or fatal [and are] preventable ... This schedule has been relied upon for many years, is updated

1). Concerning the latter, plaintiff's complaint acknowledges that he did not provide information or childhood vaccinations in accordance with the CDC's guidelines. Plaintiff also does not meaningfully dispute several other aspects of the Board's Order. The statute authorizes the Board to initiate disciplinary action for a single "practice" or "performance." ORS 677.188(4)(a)-(c).

In any event, courts have widely upheld statutes with similar language. First, Oregon courts have specifically upheld ORS 677.190(1)(a) and a similar statute regulating dentists' conduct. *Bennett v. Bd. of Med. Exam'rs*, 31 Or. App. 467, 470, 570 P.2d 986 (1977) (ORS 677.190(1)(a) was not unconstitutionally vague or overbroad) (citing *Bd. of Med. Exam'rs v. Mintz*, 233 Or. 441, 378 P.2d 945 (1963)); *see also*

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periodically, and is widely accepted as authoritative in the medical community. ... Licensee has breached the standard of care and has placed the health and safety of many of his patients at serious risk of harm" by "publish[ing] an alternative vaccination schedule that decreases the frequency of many recommended vaccines and omits others" and "fraudulently assert[ing] that following his vaccine schedule will prevent or decrease the incidence of autism and other developmental disorders. Licensee uses this claim to solicit parental 'refusal' of full vaccination for their children, thereby exposing them to multiple potentially debilitating and life-threatening illnesses[.]" Defs.' Mot. Dismiss Ex. A, at ¶¶ 2-3.2.2 (doc. 6-1). Consistent therewith, Oregon law specifies that parents who seek to exempt their child from the state's immunization requirements must provide either: (1) proof of an "indicated medical diagnosis" from "a physician or a representative of the local health department"; or (2) a written form "signed by the parent" indicating they received vaccine educational training from their health care provider or otherwise sanctioned by the Oregon Health Authority "about the risks and benefits of immunization that is consistent with information published by the Centers for Disease Control and Prevention." ORS 433.267(1)(b)-(c); OAR 333- 050-0010-333-050-0140.

Hurley v. Or. State Bd. of Dental Exam'rs, 29 Or. App. 223, 225–26, 562 P.2d 1229 (1977) ("unprofessional conduct" as used in ORS 679.140(1)(c) was not unconstitutionally vague); *Megdal v. Or. State Bd. of Dental Exam'rs*, 288 Or. 293, 298, 605 P.2d 273 (1980) (same).

Notably, in *Mintz*, a case concerning a physician, the Oregon Supreme Court found that, because "the standards [of unprofessional conduct] are those which are accepted by the practitioners in the community," the Board's discretion is not unfettered and the standard is not unconstitutionally vague. 233 Or. at 448. "The fact that it is impossible to catalogue all of the types of professional misconduct is the very reason for setting up the statutory standard in broad terms and delegating to the board the function of evaluating the conduct in each case." *Id.*

Second, courts have generally approved of standards similar to the statute's reference to "unprofessional," "dishonorable," or "unbecoming" conduct. *See, e.g., Parker v. Levy*, 417 U.S. 733, 757 (1974); *Janusaitis v. Middlebury Volunteer Fire Dept.*, 607 F.2d 17, 27-28 (2d Cir. 1979); *In re Bithoney*, 486 F.2d 319, 324 (1st Cir. 1973); *Anderson v. Evans*, 660 F.2d 153, 160 (6th Cir. 1981); *Dilliard v. State Bd. of Med. Exam'rs*, 69 Colo. 575, 577-78, 196 P. 866 (1921); *but see Bence v. Breier*, 501 F.2d 1185, 1190 (7th Cir. 1974) (invalidating police department rule proscribing "conduct unbecoming a member and detrimental to the service").[6]

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[6] In *Bence*, the Seventh Circuit found that "'unbecoming' and 'detrimental to the service' have no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned. Like "beauty," their content exists only in the eye of the beholder. The subjectivity implicit in the

Some courts' reasoning suggests that, while broad in itself, this statutory language may be narrowed by context, and that generally observable codes of conduct may inform the standard. *See In re Bithoney*, 486 F.2d at 324-25 ("when placed in context, as part of a rule directed to a discrete professional group, the terms [took] on definiteness and clarity. The legal profession has developed over a considerable period of time a complex code of behavior and it is to that code that such words as 'conduct unbecoming a member of the bar' refer.").

Third, courts have rejected vagueness challenges to statutory text referencing patient and public health. *See, e.g., United States v. Vuitch*, 402 U.S. 62, 71-72 (1971); *Reid v. Engen*, 765 F.2d 1457, 1463 (9th Cir. 1985); *ETP Rio Rancho Park, LLC v. Grisham*, 522 F. Supp. 3d 966, 1034–39 (D. N.M. 2021); *Nnebe v. Daus*, 665 F. Supp. 2d 311, 332–33 (S.D. N.Y. 2009). These courts found that "general usage and modern understanding" inform the interpretation of "health" standards such that an ordinary person can understand their meaning. *See Vuitch*, 402 U.S. at 72.

Finally, statutes requiring a doctor's judgment or referring to generally acknowledged professional standards also withstand Due Process challenges. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 191–92 (1973);

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language of the rule permits police officials to enforce the rule with unfettered discretion, and it is precisely this potential for arbitrary enforcement which is abhorrent to the Due Process Clause ... There is simply no benchmark against which the validity of the application of the rule in any particular disciplinary action can be tested." 501 F.2d at 1190. Unlike those standards and unlike beauty, here, the community's medical standards and patients' health provide verifiable benchmarks against which the Board can measure licensees' conduct.

Varandani v. Bowen, 824 F.2d 307, 311–12 (4th Cir. 1987); *Waltz v. Herlihy*, 682 F. Supp. 501, 507-08 (S.D. Ala. 1988). Courts note the need for a practical standard measured by generally accepted practices, and the legislature's inability to prescribe exact standards for the evolving medical field. *See Waltz*, 682 F. Supp. at 507–08 (upholding statute in the context of the statutory scheme and "in conjunction with medical norms and standards"); *Varandani*, 824 F.2d at 312 ("[t]he definition of adequate medical care cannot be boiled down to a precise mathematical formula; it must be grounded in what, from time to time, other health professionals consider to be acceptable standards of health care").

Similarly, the court in *Rathle v. Grote* commented on the particular difficulty of regulating the medical profession with precision:

> The health sciences are dynamic and, as a result, it is impossible to compile a list of every conceivable form of "acceptable" and "unacceptable" medical practice. Courts have therefore recognized that "statutes affecting medical practice need not delineate the precise circumstances constituting the bounds of permissible practice." Instead, the health professions are regulated by statutes of general terminology, complemented by continually evolving and changing non-statutory standards fashioned to meet contemporary norms.

584 F. Supp. 1128, 1132 (M.D. Ala. 1984) (upholding a statute providing for suspension of a physician's license if the physician practices "in such a manner

as to endanger the health of [his or her] patients") (citations omitted).

In contrast to all these cases, in *Tucson Woman's Clinic v. Eden*, the Ninth Circuit struck down a statute requiring doctors to treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality," because those words are subjective and "widely variable." 379 F.3d 531, 554–55 (9th Cir. 2004).

Based on this precedent and the statute's plain language, plaintiff was on notice of what conduct would run afoul of the statute's prohibition on "[u]nprofessional or dishonorable conduct" that endangers public health or contradicts "acceptable medical standards." As defendants note, "certainly putting others at risk of infection with a communicable disease" constitutes a danger to public health. Defs.' Mot. Dismiss 25 (doc. 6). The statute also provides sufficiently workable standards for the enforcing officials, who must explain why the licensee's conduct is contrary to these standards, as the Board did here. Like in *Mintz*, the Board does not have unfettered discretion to arbitrarily enforce vague rules. In sum, although the standards in ORS 677.190(1) are necessarily broad, they are not so vague as to interfere with plaintiff's Due Process rights.

B. ORS 677.190(13)

ORS 677.190(13) enables the Board to suspend or revoke a physician's license due to "gross negligence or repeated negligence in the practice of medicine[.]" This standard is informed by ORS 677.265(1)(c), which prescribes a physician's standard of care as "that degree of care, skill and diligence that is used

by ordinarily careful physicians in the same or similar circumstances in the community of the physician or a similar community."

Courts have rejected vagueness challenges to language similar to that in ORS 677.190(13). *See, e.g., Panther v. Hames*, 991 F.2d 576, 578-80 (9th Cir. 1993). These courts, in line with those cited above, reason that common sense and understanding may inform and supplement statutory standards. *Id.*; *see also Ketchum v. Ward*, 422 F. Supp. 934, 940 (W.D. N.Y. 1976), *aff'd*, 556 F.2d 557 (2d Cir. 1977) (upholding a criminal negligence statute because the definitions therein contained a "wealth of common meaning").

Negligence is a standard commonly used by legislatures, employed by courts, and interpreted by juries, and is not impermissibly vague. The standard of care gave plaintiff sufficient notice that "[k]nowingly leaving ... children inadequately protected against a preventable, potentially debilitating illness" is prohibited, because that is not something an ordinarily careful physician would do. Defs.' Mot. Dismiss Ex. A, at ¶ 3.5 (doc. 6-1).

C. ORS 183.430(2) and 677.205(3)

ORS 183.430(2) is a part of Oregon's Administrative Procedures Act, and provides that where an "agency finds a serious danger to the public health or safety and sets forth specific reasons for such findings, the agency may suspend or refuse to renew a license without [a] hearing[.]" ORS 677.205(3) enables the Board to temporarily suspend a physician's license if it finds the physician's practice "constitutes an immediate danger to the public." Again, courts have upheld statutes with

similar provisions. *See DiBlasio v. Novello*, 413 Fed. Appx. 352, 358 (2d Cir. 2011) (upholding a statute allowing a state official to revoke a license if the physician poses an "imminent danger" to the public). Likewise, in *Nnebe*, the court held that taxi drivers of ordinary intelligence would understand that arrest for a violent or felony offense could warrant suspension of their license under a statute precluding "direct and substantial threat[s] to the public health." 665 F. Supp. 2d at 333.

Applying this commonsense view, a person of ordinary intelligence—much more, a licensed physician—could understand that the failure to, among other things, provide vaccine guidance consistent with the CDC's recommendations to protect children from communicable diseases would constitute "a serious danger to the public health" and/or pose "an immediate danger to the public." Plaintiff's vagueness challenge to ORS 183.430(2) and 677.205(3) should fail.

RECOMMENDATION

For the foregoing reasons, defendants' Motion to Dismiss (doc. 6) should be granted. Plaintiff's request for oral argument is denied as unnecessary. Any motion to amend the complaint must conform with this Findings and Recommendation and Fed. R. Civ. P. 8(a), and be filed within 30 days of the District Judge's order.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have

fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 11th day of October, 2022.

/s/ Jolie A. Russo
Jolie A. Russo
United States Magistrate Judge