

# Medical Censorship



By Paul Engel

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- Do American medical boards extort doctors to tow the party line?
- Did American medical boards collude with the federal government to keep medical information away from the American people?
- And people wonder why trust in these institutions has fallen?

There were plenty of infringement on people's rights during the COVID scandemic, and censorship was rampant. Not only did we have members of our own government colluding to censor information they didn't like, but we've had professional associations joining in. Worst of all, the so-called medical professionals seemed to be at the forefront, violating the central tenant of the hippocratic oath, "First, do no harm."

## Background

People talk about how people are losing faith in our institutions, and it doesn't help when those institutions violate our trust. In the case Association of American Physicians and Surgeons Educational Foundation, AAPS, vs American Board of Internal Medicine, ABIM; American Board of Obstetrics & Gynecology, ABOG; American Board of Family Medicine, ABFM; and Alejandro Mayorkas, Secretary, U.S. Department of Homeland Security, the question is did these medical associations collude with the federal government to

cancel medical information critical of government's positions?

The Association of American Physicians and Surgeons Educational Foundation ("AAPS") alleges that the national medical specialty certifiers American Board of Internal Medicine ("ABIM"), American Board of Obstetrics & Gynecology ("ABOG"), American Board of Family Medicine ("ABFM") (together, the "Board Defendants") and Alejandro Mayorkas, as Secretary of the U.S. Department of Homeland Security (the "Department"), coordinated to censor and chill the speech of physicians, including some associated with AAPS, who spoke critically of positions taken by Dr. Anthony Fauci, lockdowns, mask mandates, Covid vaccination, and abortion. This was and continues to be done by labeling dissenting views as misinformation, disinformation, and malinformation, and the Board Defendants have expressly threatened to strip certification from otherwise qualified physicians who express such views. According to AAPS, Appellees' efforts to censor and punish physicians on issues of public concern harmed and continue to harm AAPS.

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The accusation is that these medical boards attempted to censor medical information by falsely labeling it "misinformation," "disinformation," and "malinformation." The whole idea of the scientific process is the search for truth. This works by questioning everything, then testing it to see if it is true. The act of labeling something wrong rather than providing evidence is the antithesis of science. The question in this case isn't just did these organizations collude with each other, but did they collude with the government of the United States to censor information?

### **Claims of Collusion**

Because of these claims of collusion, AAPS sued the board of defendants and Alejandro Mayorkas, Secretary of the Department

of Homeland Security.

AAPS brought a host of claims against the Board Defendants and Department, including First Amendment and antitrust claims. The District Court dismissed all of AAPS's claims with prejudice, reasoning that it lacked standing to assert its claims against the Board Defendants and that the Department mooted claims against it by dissolving the Disinformation Governance Board ("DGB"), which AAPS alleged was responsible for censorship. It also denied AAPS the ability to amend its complaint even once under Galveston Division Local Rule 6, with no analysis for doing so.

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The First Amendment claims can only have limited jurisdiction. As I've said I don't know how many times, the First Amendment limits the laws Congress can pass.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### [U.S. Constitution, Amendment I](#)

So if the Department of Homeland Security abridges someone's freedom of speech, as an agency created by Congress, that would violate the First Amendment, but private organizations cannot. The District Court dismissed all of the claims with prejudice, meaning they could not appeal to the same court. The District Court claimed that the AAPS did not have standing to sue. The court also decided that the issue against the Department of Homeland Security was mooted when the Disinformation Governance Board was dissolved.

### **The Circuit Court Decisions**

That may be what the District Court decided, but the Fifth Circuit Court of Appeals disagreed.

The District Court incorrectly dismissed AAPS's First Amendment claims on standing grounds. AAPS provides sufficient allegations to support standing:

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The Circuit Court says the District Court was wrong. Let the court list the ways:

(1) AAPS asserts an injury-in-fact through the Board Defendants' infringement on its right to hear "willing speakers," and it is premature to require AAPS to name specific "willing speakers" at the pleading stage;

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AAPS claimed that the board's decision threatened the licenses of people willing to speak at their events. Later in the decision we find:

So, AAPS contends, the Board Defendants' threats to strip certification improperly chilled speech without the political accountability of official state medical boards. And, through this chilling of speech, the Board Defendants interfered with the market for medical conferences and posting of such conferences to the internet. Some examples of chilling by the Board Defendants includes ABOG sending letters to all certified physicians threatening to strip them of their invaluable certification for making statements concerning abortion and contraception, or for warning pregnant women that the Covid vaccine could have negative side effects. ABIM and ABFM sent similarly threatening letters on May 26, 2022, to certified physicians for making statements disagreeing with positions taken by Dr. Fauci and the Biden Administration in handling the Covid pandemic. Indeed, AAPS notes that one of its conference speakers had his certification stripped by ABFM

pending appeal.

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AAPS provided examples of the Board Defendants threatening their certifications for expressing ideas, but could the AAPS link those threatening letters to the abridgment of speech?

(2) AAPS can trace its injuries back to the Board Defendants' actions because physicians would likely "react predictably" when confronted with a threat of decertification: they would choose self-censorship over professional self-immolation; and

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Hmmm, if these boards threaten the certifications, and by extension the careers, of doctors who express ideas not promoted by government actors, that would seem to be an "injury-in-fact."

(3) AAPS's injuries are redressable, as a ruling in its favor would allow for physicians to attend and speak at AAPS events (and thus allow AAPS to exercise its right to hear) without fear of decertification.

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Lastly, the injuries suffered by AAPS could be redressed. After all, without threats to their certifications, physicians would be more likely to speak at AAPS's events.

## **Department of Homeland Security**

What about the complaint against the Department of Homeland Security?

However, it was right to dismiss AAPS's claims against the Department because its complaint as currently written lacks sufficient allegations to overcome the government's good faith carveout to the mootness doctrine's voluntary cessation

exception. But it mistakenly dismissed this claim with prejudice, even though jurisdictional dismissals (such as those made on standing and mootness grounds) are typically done without prejudice. So we MODIFY this dismissal to be without prejudice and AFFIRM as modified.

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The Circuit Court claims that the AAPS's claim against DHS couldn't overcome what's called government's "good faith carveout" to the mootness exception. The "good faith carveout" or "good faith exception" means, if the government acted in good faith, courts tend to side with them. But when the government established the "Disinformation Governance Board," were they acting in good faith? After all, it was a blatant violation of the First Amendment and was shut down after just four months.

### **Medical Monopolies**

There is a more serious question that we should answer, and that is the power of private associations when they collude with government.

The Board Defendants have medical certification monopolies over their respective specialties. These certifications are primarily based on multiple-choice medical examinations. Board certifications constitute a de facto essential credential for physicians to practice and participate in most hospitals and insurance networks. Meaning that, while physicians are not required to have board certification to practice (state medical boards control licensure), lacking such certification significantly hampers their ability to do so. Stripping a physician of his certification is tantamount to revoking his license to practice medicine, given how few hospitals and networks permit uncertified, yet licensed, physicians to join. AAPS says that this monopoly status affords the Board Defendants an ability to exercise great power over physicians'

speech.

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Here I find myself with an interesting conundrum. On the one hand I see the importance of accrediting organizations. After all, who is better to determine the qualification for a doctor, the government or other doctors? While state medical boards may issue licenses, most hospitals and insurance networks require their physicians to have these certifications. However, when these organizations become politicized, they do great harm to the medical profession. What could be worse than a politicized certification board? A certification board colluding with government actors.

AAPS alleges that the Board Defendants colluded with the Biden Administration, imposing such censorship to promote the Administration's political preferences in exchange for government endorsement of their certifications. The letters sent by the Board Defendants were, according to AAPS, sent nearly simultaneously and with similar terminology as "part of a broader campaign by the Biden Administration to advance its particular partisan agenda concerning Covid-19 and abortion." AAPS contends that this collusion, resulting in attendant censorship and chilling of speech, infringed on its First Amendment protections and interfered with its ability to participate in the marketplace.

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AAPS claims that these Board Defenders were working with the Biden Administration to advance the government's political agenda. This is very interesting, but before digging deeper, let's see some of the evidence AAPS brought to the case.

Around the same time that the Board Defendants sent their letters, the Department created the (now defunct) DGB. The Department issued a press release in May 2022, directing the Homeland Security Advisory Counsel ("HSAC") to "make

recommendations for how the Department can most effectively and appropriately address disinformation that poses a threat to the homeland, while protecting free speech and other fundamental rights.”

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AAPS points out that the Department of Homeland Security created the Disinformation Governance Board (DGB) around the same time that the Board Defendants sent their letters. Since the DGB was closed only a few months later, the District Court claimed the complaint against the DOJ was moot. But was the complaint against the DOJ or the DGB? And what would a First Amendment case be without a misrepresentation of what the Amendment actually says?

“The First Amendment protects the right to hear as well as to speak,” so that which “silences a willing speaker . . . also works a constitutional injury against the hearer.” *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1211 (5th Cir. 1982) (citing *Va. State Board of Pharmacy v. Va. Citizens Consumer Couns., Inc.*, 425 U.S. 748, 756 (1976))

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Except the First Amendment does not protect a person’s right to hear, but a person’s right to speak, publish, and to peaceably assemble. If you had the right to hear, then you could not be prevented from attending a concert simply because you didn’t purchase a ticket. The venue would be denying your right to hear.

### **Dissent**

Judge James C. Ho filed a dissent, but I don’t think that’s the proper term for it.

James C. Ho, Circuit Judge, dissenting in part:

Doctors deserve our tremendous respect. We trust them to



provide us with the best available medical advice and treatment. But they're not perfect. Doctors are "susceptible to peer pressure, careerism, ambition, and fear of cancel culture, just like the rest of us." *Whole Women's Health v. Paxton*, 10 F.4th 430, 468 (5th Cir. 2021)

At various times throughout history, medical care has suffered—and patients have been harmed, even killed—because doctors succumbed to social pressure and desire for approval and advancement. ... We may "look back in disbelief at [doctors] who ridiculed and ostracized proponents of handwashing and sterilizing surgical instruments to prevent disease and infection." ... But we would do well to learn from our past. Yes, we should absolutely follow the science. But that doesn't mean we should always follow scientists. Because scientists don't always follow the science.

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So far, a very good argument against medical censorship, but the dissent goes on.

In this case, a medical association contends that certain medical boards and federal officials have conspired—and continue to conspire—to censor and even destroy the careers of any physician who dares to express the "wrong" viewpoints on a wide range of medical topics, including but not limited to Dr. Anthony Fauci, COVID-19 lockdown policies, mask mandates, vaccines, and abortion.

These are alarming allegations. After all, these issues are far from scientifically settled as Defendants claim. They should remain the subject of open and rigorous discussion—not self-censorship and cancellation. ...

I agree with the majority that the district court erred. I would simply go further, and accordingly dissent in part. I would remand this case for further proceedings on all of the association's claims—including those against the government

officials sued here, which the majority dismisses as moot.

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So this “dissent” sounds more like a concurrence, since the judge actually agrees with the majority opinion, with the exception that he would remand the case on all of AAPS’s claims, not just some.

**Conclusion**

This is the decision of the Fifth Circuit, and it may be appealed to the Supreme Court. From my point of view, there are things we can learn and questions we should ask about our medical institutions. As James Madison wrote for the National Gazette, March 27, 1792:

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

[James Madison, National Gazette, March 27, 1792](#)

That means that physicians have a property in the certifications they have earned. When those certifications, and by extension their ability to practice their profession, are threatened for any reason other than their medical actions, those doctors have been deprived of both their liberty and property without due process of law, which violates the Fifth Amendment.

No person shall ... be deprived of life, liberty, or property, without due process of law;

[U.S. Constitution, Amendment V](#)

When private organizations punish doctors for what they say, it is not a violation of the First Amendment, it is a violation of the due process clause. And if the AAPS is correct, and these medical associations colluded with the Department of Justice, then the DOJ has violated the First

Amendment's Free Speech and Free Press clauses.

This is the conundrum: Do we want government bureaucrats to regulate the qualification of doctors or do we want other doctors to do so? As Judge Ho said, doctors are just as susceptible to peer pressure and careerism as anyone. So where does that leave us? I think the best solution is to treat medical certifications as the property they were designed to be. If a doctor can pass the exam, they not only hold the certification, but it is their property. Like any other property, it should only be taken away when it is used unjustly. In other words, not because of what a physician says or writes, but for violations of the standards in the exams that led to the certification. I think both the association, and members of its various boards, should be held liable for the unjust abuses of their certification powers. After all, if you cannot sue the entities that has taken your property unjustly, how can you seek a redress of your grievance?

I also think, since the power to regulate medical care is not delegated to the United States, any department or agency thereof should be prohibited from influencing their standard by criminal statute. It is not enough to simply say a department or agency cannot influence board standards, but there must be punishment for those who do.

I cannot think of another way to constitutionally protect both the medical profession and the professionals that practice it. If we want to avoid future politicization of medical boards, then they must be held accountable for their actions. If the board can justify their actions to rescind someone's certification based on their actions, they are fulfilling their role in protecting us from unqualified doctors. If they cannot defend their actions, they are not qualified to question the fitness of doctors to practice.

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