UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Dr. Scott Jensen, Plaintiff, v. Minnesota Board of Medical Practice, et al., Defendants.	Court File No. 0:23-CV-01689-JWB-DTS **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

INTRODUCTION

Before and during his campaign for Governor of Minnesota, Defendants repeatedly "investigated" Plaintiff Dr. Scott Jensen ("Jensen") purely for his political speech. They launched five separate investigations over 32 months into Jensen's pure speech based on 18 complaints from politically active non-patients. The "complaints" had nothing to do with the doctor-patient relationship or the "practice of medicine," which is all Defendants may regulate. Some of these "complaints" were as simple as a one-line email or a one-paragraph handwritten note on a form. They sometimes criticized Jensen's own criticism of the government. One forwarded a press release from the Minnesota DFL Party complaining about then-Senator Jensen playing golf during a Zoom committee meeting.

Defendants seized on this partisan political nonsense and used their investigatory power to threaten Jensen's license—his livelihood. They forced Jensen to spend thousands of hours responding. They put him in credible fear of losing his ability to make a living just for speaking publicly about important public-health issues. They forced him to divert time from his campaign and his *actual* practice of medicine to answer for his public speech. Both to the public and to the Defendants, Jensen made his frustration and the actual harm to him caused by these investigations known.

Defendants held the final investigation open, despite clear statutory requirements to finish it up sooner, throughout the entirety of the final year of Jensen's gubernatorial campaign. The cloud of uncertainty it created hung over his head the whole time. At the "conference" that finally took place more than a year after Defendants voted to hold it, Defendants even re-animated previously dismissed complaints to cross-examine him about his speech and then argued that Minnesota law allowed them to do exactly that.

This lawsuit seeks to right the wrong that Defendants have done by using their position as licensors of the medical practice to operate a speech suppression campaign against Dr. Jensen. And it seeks to put a stop to this kind of abuse going forward.

The Court should reject Defendants' motion to dismiss in its entirety.

STATEMENT OF FACTS

I. Dr. Jensen Has Practiced Medicine for 42 Years Without a Patient Complaint.

Dr. Jensen has been practicing medicine in Minnesota for 42 years. Compl. ¶14. He was the Minnesota Physician of the Year in 2016. Compl. ¶238i. Before 2020, he had never been investigated by the Defendants, including the Minnesota Board of Medical Practice ("BMP," the "Board") or its Complaint Review Committee ("CRC," the "Committee"). Compl. ¶14. And even though Jensen has become a more visible public figure since his election to the Minnesota Senate in November 2016, he has *still* never had a patient file a complaint against his license with the Defendants. Compl. ¶1.

II. Beginning in March 2020, Dr. Jensen Began to Publicly Criticize Aspects of the Government Response to COVID-19.

Things changed in 2020 after the onset of COVID-19. On March 30, 2020, Jensen wrote to Minnesota Governor Tim Walz and Commissioner Malcolm, questioning the shut-down of much of Minnesota's economy in response to the pandemic. Compl. ¶51. On April 8, 2020, Jensen criticized MDH's new advisory for COVID-19 death certificates, which advised that COVID-19 be reported "on death certificates for all decedents where the disease caused, is assumed to have caused, or contributed to death." Compl. ¶¶52-53. Jensen believed the advisory was inconsistent with CDC guidelines. He publicly highlighted that

inconsistency. Compl. ¶53. These are public-health issues without a patient-care nexus.

Soon after, the Board received its first complaint about Jensen's public speech. Compl. ¶54.

III. The Board May Only Investigate Complaints Related to the Practice of Medicine, Not Pure Speech on Matters of Public Concern Made to the Public.

The BMP consists of 16 members, appointed by the Governor—then the principal party implementing Minnesota's COVID-19 response—and soon Jensen's chief political rival. Minn. Stat. §147.01, subd. 1; *see e.g.*, Minnesota Governor Tim Walz, Emergency Order 20-04 (Mar. 16, 2020). The Board's "primary purpose is to protect the public from the unprofessional, improper, incompetent, and unlawful *practice of medicine*." Minn. Stat. §147.001, subd. 2 (emphasis added). The Board does not paternalistically protect Minnesotans from doctors' public speech.

A licensed physician does not practice medicine at every waking moment. A person only practices medicine when he or she:

> (1) …represents in any manner that the person is authorized to practice medicine in this state;
>
> (2) offers or undertakes to prescribe, give, or administer any drug or medicine for the use of another;
>
> (3) offers or undertakes to prevent or to diagnose, correct, or treat in any manner or by any means, methods, devices, or

> instrumentalities, any disease, illness, pain, wound, fracture, infirmity, deformity or defect of any person;
>
> (4) offers or undertakes to perform any surgical operation including any invasive or noninvasive procedures involving the use of a laser or laser assisted device, upon any person; or
>
> (5) offers to undertake to use hypnosis for the treatment or relief of any wound, fracture, or bodily injury, infirmity, or disease.

Minn. Stat. §147.081, subd. 3. The Board's authority is also limited to its written procedures. Minn. Stat §147.02, subds. 1, 5.

Moreover, the Board is only "empower[ed]" to investigate certain complaints—"a violation of a statute or rule" if such a violation is one "which the Board is to enforce." Minn. Stat. §214.10, subd. 2; *see* Minn. Stat. §147.161, subd. 1 (requiring that all complaints filed with the Board "be investigated according to section 214.10, subdivision 2"). And before investigating a complaint against a licensee, the BMP must "determine whether the complaint alleges or implies a violation of a statute or rule which the board is empowered to enforce." Minn. Stat. §214.103, subd. 2. Thus, within 60 days, the Board is required to "notify the licensee that the board has received a complaint and inform the licensee of...*whether* an investigation is being conducted." Minn. Stat. §214.103, subd. 1a(a)-(b)(4) (emphasis added).

Nothing in Section 214.103 supports investigation of complaints about a licensee's political speech. *Contra* Def. Br. 3. While the BMP may "seek additional information to determine whether a complaint is jurisdictional or to

clarify the nature of the allegations," it may only do so when "necessary." Minn. Stat. §214.103, subd. 2. Where complaint allegations only relate to political speech and not the "practice of medicine," there is no basis for jurisdiction or further investigation. *See* Minn. Stat. §214.103, subd. 1a, 2.

IV. The Board Received, and Forced Dr. Jensen to Respond to, Numerous Complaints Based on His Political Speech.

Starting on June 22, 2020, Defendants investigated Jensen's license numerous times based on complaints about his public statements. No patient ever complained, and no medical procedures were involved, but that did not stop Defendants.

Complaint One

In Complaint One, a complainant "alleged" that Jensen was "spreading misinformation" in televised interviews and providing "reckless advice over *social media*" by claiming that COVID-19 is "nothing more than the flu." Compl. ¶60, Exhibit 1, at 1 (emphasis added).[1] Complaint One was based on two email chains in April and May of 2020 consisting of (i) a tweet of a local news interview Jensen gave, (ii) a StarTribune article about Jensen allegedly calling into question COVID-19 death counts, (iii) another tweet from Jensen

[1] The BMP's policy was *not* to rely on social media posts in the investigative fact-finding process for complaints. Compl. ¶47. Executive Director Martinez could not have been clearer in her public statements: "Social media for us as a Board is not something we rely upon in our investigative process." Compl. ¶46.

claiming he was "giving reckless advice over social media" because he described several possible views of COVID-19, and (iv) a link to a Minnesota Democratic-Farmer-Labor ("DFL") Party webpage claiming that Jensen was "caught golfing during a board meeting." Compl. ¶62, Exhibit 2. *Id.* at 7.

After receiving this speech complaint, Defendants nonetheless wrote to Jensen stating that the Board "has received complaints regarding public statements you made related to COVID-19." Compl. ¶¶57; 60, Exhibit 1, at 1. Defendants claimed they were "required to make inquiries into all complaints and reports wherein violations of the Medical Practice Act ("MPA") are alleged, including but not limited to Minn. Stat. §147.091, subd. 1(g)." Compl. ¶58. Section 147.091, subdivision 1(g) refers to "unethical or improper *conduct*" which includes "*conduct* likely to harm the public," "*conduct* that demonstrates a willful or careless disregard for the health, welfare, or safety of a patient," or "*conduct* that may create unnecessary danger to any *patient's* life, health, or safety." (emphasis added). The allegations at the heart of Complaint One, however, had nothing to do with *conduct* or Jensen's *patients* at all.

Defendants claim they sent this letter, and others, to Jensen in order to "seek additional information to determine whether the complaint is jurisdictional or to clarify the nature of the allegations." *Compare* Minn. Stat. §214.103, subd. 2. But this letter asked Jensen simply to "respond" and include "relevant documentation." Exhibit 1, at 1. Defendants failed to say what

information could be needed to determine jurisdiction over Complaint One. And they threatened Jensen with disciplinary action for failure to comply with their unclear demands. Compl. ¶72.

Without any guidance from Defendants, Jensen was in the impossible position of having to "justify" his political speech. Compl. ¶79. He provided a 60-plus-page response, which took hours of his time to write. Compl. ¶¶74; 79. Jensen identified examples of other public health officials comparing COVID-19 to the seasonal flu, including Dr. Michael Osterholm of the University of Minnesota, who was, according to Plaintiff's knowledge, never threated by Defendants for the crime of speaking his mind. Compl. ¶¶80-81. The Board eventually dismissed Complaint 1 after "a thorough review" in July 2020. Compl. ¶86.

Complaint Two

Complaint Two was also based on public speech. The complainant submitted a handwritten note to the BMP alleging, without any evidence, that Jensen "continues to mislead and lie about COVID-19" by comparing COVID-19 to the 2009 H1N1 pandemic *on Facebook*. Compl. ¶93, Exhibit 4. Defendants claimed this single-handwritten accusation required it to investigate whether Jensen had violated Section 147.091, subdivision 1(g) and 1(k). Compl. ¶90. Again, this statute targets *conduct* which is "unethical or improper" or *conduct* which "departs from or fails to conform to the minimal standards of acceptable

and prevailing medical *practice*." Minn. Stat. §147.091, subd 1(g), (k) (emphasis added). Here, it was used to target Jensen's *speech*.

Defendants again threatened Jensen in the letter about Complaint Two, asserting that Jensen could be disciplined for a failure to "cooperate fully." Compl. ¶101, Exhibit 3, at 1. Jensen therefore attempted to respond, a task that took hours. His written response included scholarly data, medical literature, and also noted that the allegations against him were "nebulous and broad," so that he had "no way" of knowing "how to respond." Compl. ¶110. Defendants said nothing for six weeks. Compl. ¶111. Jensen's follow-up email apparently spurred Defendants to meet the very next day, and the complaint was then dismissed. Compl. ¶112, Exhibit 5.

Complaint Three

Complaint Three arose in April 2021, right after Jensen announced his candidacy for governor. Compl. ¶¶119-120. The impetus for Complaint Three? A random member of the public accused Jensen of "'very publicly minimizing[']and "'deliberately downplaying' COVID-19 deaths" based on some tweets. Compl. ¶123. This time, however, the Board reviewed the complaint and dismissed it without demanding a response or notifying Jensen. Compl. ¶128. The Board thus recognized that it could dismiss frivolous complaints based on pure speech, like Complaints One and Two, without requiring Jensen to explain why he is not a "danger to public health." However, Defendants

informed Jensen that Complaint Three would "remain on file." Compl. ¶130, Exhibit 6. And later, its allegations would be recycled against Jensen.

V. Despite the Threat of Further Investigations, Dr. Jensen Continued to Speak Publicly About COVID-19, Albeit With Hesitation and Under Threat to His Livelihood.

Complaints One through Three chilled Jensen's speech. Compl. ¶¶75-76, 105-106, 112, 131, 136. Jensen, no matter the results of the upcoming election, intended to continue the practice of medicine. Compl. ¶119. But he was now in the difficult position of potentially losing his medical license because of pure speech, and it affected him. He told Defendants this after it took them six weeks to update him on the status of Complaint Two. In an email to Brian F. Anderson of the BMP, Jensen wrote that "this anonymous complaint accusing me of being a 'danger to public health' has an ongoing chilling and suppressing effect on my ability to candidly and honestly share my perspectives and thoughts with patients and constituents." Compl. ¶112, Exhibit 5, at 1.

A person of ordinary firmness would have been silenced completely by threats to their livelihood over their political speech. Compl. ¶¶75, 105, 136. But Jensen continued to, with some trepidation, speak as an independent voice who questioned the dominant political narrative. Compl. ¶133. Thus, he was not silenced completely, but he alleges that he modified his speech *because of and in response to* the ongoing threat of investigation. Compl. ¶136.

As part of his ongoing advocacy, Jensen submitted an affidavit in support of the plaintiffs in the *America's Frontline Doctors* case in the Northern District of Alabama. Compl. ¶135. Jensen's political opponents—and the Defendants—punished this exercise of First Amendment rights.

Complaint Four

Complaint Four arose in August 2021 when another random member of the public complained to Defendants about the *America's Frontline Doctors* plaintiffs filing a TRO motion in that lawsuit "against the emergency use authorization permitting the use of COVID-19 vaccines in children under the age of 16." Compl. ¶¶137-139, Exhibit 7, at 1.

Complaint Four alleged that the TRO motion made false claims about the risk to children from COVID-19 and "will lead to measurable harm." Exhibit 7, at 1. This allegedly violated Section 147.091, subdivision 1(g), which only targets "unethical or improper" *conduct*. Despite the statute's limitations, Defendants forced Jensen to answer for the *allegations* made in a petition for a TRO *filed on behalf of others* and *written by their attorneys*. Compl. ¶145. He was asked to respond with "[a] description of your current practice situation," "[t]he current status of the TRO and/or the U.S. District Court's ruling on the matter," and "[a]ny additional information that you would like the Board to consider in its review of this matter." Exhibit 7, at 1.

Jensen's August 17, 2021 response spanned 62 pages. Compl. ¶¶157-158. His response included citations to toxicology reports and medical journals, and an explanation that his affidavit was written to support the petition because he feared that 12-17-year-olds "would be potentially subject to a de facto mandate as has happened to so many other American citizens." Compl. ¶¶158-159.

Despite Jensen only having two weeks to respond, the BMP was silent for the next six weeks. Compl. ¶161. In the meantime, Jensen's speech was chilled and Jensen self-censored. Compl. ¶¶154-155. Yet again, Jensen had to ask for a status update, and Defendants yet again decided to dismiss Complaint Four the very next day. Compl. ¶162.

This time, however, Defendants more explicitly threatened further investigation. They wrote that while the investigation would be closed at the time, it could be re-opened in the future upon receipt of information not previously considered, or upon receipt of similar complaints or reports regarding Jensen's practice of medicine. Compl. ¶¶163-167, Exhibit 9, at 1. That threat caused Jensen to further self-censor. Compl. ¶172.

VI. As Dr. Jensen's Campaign Continued, Defendants Doubled Down.

Jensen continued his campaign for governor despite feeling threatened and chilled from speaking because he could be subjected to another investigation

from anything he said on the campaign trail. Compl. ¶¶173-74. Still, his campaign required him to speak about the ever-evolving COVID-19 crisis and the government's response. But instead of speaking freely and without fear, because of Defendants' repeated unconstitutional investigations, he was forced to tailor his message and take great care to explain when he was speaking as a candidate versus a family doctor. Compl. ¶¶228-232.

In one example, he publicly voiced his opinion on social media challenging a newly announced Executive Order which would have compelled 100 million Americans to take the COVID-19 vaccine. Compl. ¶175. Jensen's disagreement with federal policy proved problematic to Defendants. Less than three weeks after Complaint Four was dismissed, he received Complaint Five. Compl. ¶177.

Complaint Five

Complaint Five was, like the others, based on complaints from random members of the public—none of whom were Jensen's patients or had anything to say about Jensen's practice of medicine. Compl. ¶182.

One was from a Nurse Practitioner complaining that Jensen was not wearing a mask "when practicing medicine or at the State Fair." Compl. ¶183a, Exhibit 11.[2] The Nurse Practitioner went on to complain that Jensen "has a far-reaching platform *beyond his exam rooms*"—a platform that is also beyond

[2] Masks were not required at the Minnesota State Fair in 2021.

Defendants' jurisdiction. Exhibit 11, at 4. Other complainers[3] had merely read news articles written about Jensen—not even first-hand accounts of his speech—and complained that he was not following "science." Compl. ¶183, Exhibit 18. One pharmacist complained that "Dr. Jensen wants to practice medicine. He also wants to practice politics. But he is harming patients by trying to practice both." Compl. ¶183, Exhibit 17. A final handwritten complaint accused Jensen of spreading "misinformation" and reported that "I am not a patient of Dr. Jensen's, but I am a concerned citizen." Compl. ¶183, Exhibit 19, at 2. These complaints solely targeted Jensen's public statements, which in 2021 were of public concern and central to his campaign. Compl. ¶184.

Even though these complaints were all about speech to the public and not the practice of medicine, Defendants claimed authority to investigate under Section 147.091, subdivision 1(g) and 1(k) which target *conduct* and *medical practice*. Jensen was told he could defend his political speech if he "would like"—but under threat of "disciplinary action" for failure to cooperate. Exhibit 10, at 2. Again, Jensen self-censored in response. Compl. ¶195.

Jensen submitted another response, once again spending hours of his time responding to anonymous complaints by random members of the public who were non-patients. Compl. ¶198, Exhibit 20. As Jensen's letter explained, an

[3] Paragraph 183 of the Amended Complaint details the complaints that comprise Complaint Five.

anonymous complainer's "opinion is enough to trigger an orchestrated attack on my license, my livelihood, and my patients." Exhibit 20, at 1. Regarding accusations that Jensen was inappropriately using ivermectin to treat COVID-19 symptoms, he explained that when patients ask for ivermectin, "I consider such requests on an individual basis" and have "written a handful of prescriptions for ivermectin for COVID-19." *Id.* at 2.

Such prescriptions were never, and still are not, forbidden by any Minnesota medical licensing board or the FDA. Defendants knew this. And the only reason Jensen ever even mentioned his lawful "off-label" prescriptions was because of Defendants' unconstitutional investigation into his license. Defendants knew this too. Compl. ¶¶204, 212. They doubled down anyway.

In a December 21, 2021, follow-up letter, Defendants asked for Jensen's patient records "for the most recent 3-5 patients to whom you prescribed ivermectin to treat COVID-19." Compl. ¶¶205-07. Defendants were on a "fishing expedition," but found nothing. Compl. ¶212.

Instead, Defendants stayed silent for over a year, despite requirements in Minnesota law that Defendants update a licensee on the status of a complaint every 120 days and resolve complaints within a year. Minn Stat. §214.103, subd. 1a(c), (e). Compl. ¶¶215-16. Defendants kept Complaint Five open and intentionally failed to follow Minnesota law to suppress Jensen's speech

leading up to the election. Compl. ¶¶222-26. Unfortunately, their unlawful efforts proved successful, and Jensen's speech was chilled. Compl. ¶¶223, 226.

VII. Dr. Jensen Was Required to Answer for His Political Speech in a Conference—Which Defendants Determined Would Occur But Failed to Tell Him About for Over a Year.

Little did Jensen know, on December 3, ***2021***, the CRC voted 2-1 to approve an in-person conference to require him to answer for his political speech. Compl. ¶240-41. Nearly 14 months later, on January 25, 2023, Jensen was given notice of the conference. Compl. ¶243.

Defendants warned Jensen that "[t]he purpose of the conference is to discuss [Jensen's] ability to practice medicine and surgery with reasonable skill and safety to patients." Compl. ¶247. All 18 complaints (across the five investigations discussed above), most of which had been dismissed and none of which contained allegations from a patient or anyone with knowledge of Jensen's patient care, were apparently reopened and at issue again. Compl. ¶¶251-53. Despite never receiving "newly discovered information," or uncovering a "pattern of *behavior* or *conduct*" as is required to reopen a complaint, Defendants reopened all complaints to investigate Jensen's pattern of *speech*. Minn. Stat. §214.103, subd. 8(b) (emphasis added). Defendants asserted that the allegations against Dr. Jensen included violations of Minn. Stat. §147.091, subd. 1(g), (k), (o) and (s), which pertain to unethical *conduct*,

conduct that departs from minimal standards, improper management of medical records, and inappropriate prescribing of drugs.

Yet the entire focus of the conference, for over an hour and a half, was on Jensen's political speech. Compl. ¶272. As Defendant Henry stated at the conference, "by statute we have the ability to oversee the professional conduct of physicians licensed in Minnesota, and the issues around free speech, we are not in that position." Compl. ¶273. Nevertheless, Defendants were unable to stay within their statutory jurisdiction at the conference by commenting that "anybody that's listening to me," could be considered a patient and thus speaking to them would be the practice of medicine. Compl. ¶278. Indeed, Defendants asserted that "medicine is *all* speech" and the only allowable speech is what a doctor "in that field with that level of education *would assume is the facts*." Compl. ¶¶280-81. At the conference, Defendants made clear that they believe the Board *can* and *should* investigate political speech, which continues to threaten Jensen to this day. Compl. ¶289.

VIII. The Board's Actions Harmed Dr. Jensen and Others.

The conference was not just an affront to Jensen's dignity; he also spent hours and days preparing for the conference, paid for counsel, and took time away from work. Compl. ¶286. This was in addition to the hours Jensen had spent previously responding to the Board's investigations. Compl. ¶238(a).

Jensen suffered in other ways as well.[4] He lost time that he could have spent campaigning and lost revenue from patients he did not have time to see given the constant burden of responding to Defendants. Compl. ¶238(a)-(c). He also resigned his position as part of the University of Minnesota Family Practice Department faculty because of the investigations into his license. As a direct result of Defendants' investigations, he has been and still is subject to further investigation by the American Board of Family Medicine, which is a serious threat to his ability to see a large number of patients and his livelihood. Compl. ¶238(d)-(e).

Jensen's speech was chilled, and he alleges it exhaustively. Further, other doctors in Minnesota have self-censored because of the abusive investigations into Jensen's license. Compl. ¶294. Doctors in Minnesota now practice medicine in constant fear of being targeted for speech on matters of public concern. Compl. ¶295. Defendants' *de facto* gag order remains in place to this day.

IX. Procedural History.

Jensen initially brought this lawsuit on June 6, 2023. ECF 1. Defendants filed a motion to dismiss, and a hearing was held on December 1, 2023. ECF 38. At that hearing, Defendants' counsel admitted that Defendants used pure

[4] Paragraph 238 details some of the actual injuries caused to Dr. Jensen by the Defendants' retaliation against him for his political speech.

political speech as pretext to fish for possible violations of law that *might* relate to doctor-patient relationships. Compl. ¶¶236-37. Indeed, counsel stated that the Board "has a valid interest in following up [on complaints] to see if the same statements are being made to the licensee's patients directly." Compl. ¶236. At bottom, the hearing demonstrated a credible threat of prosecution for any doctor in Minnesota who speaks publicly about public health. Compl. ¶237.

The Court granted Defendants' motion to dismiss for lack of standing and invited Plaintiff to file an amended complaint. ECF 39. Plaintiff did so, and Defendants' motion to dismiss soon followed. ECF 42; 44.

ARGUMENT

Defendants seek to evade accountability, claiming that Jensen's thorough allegations of harm directly caused by Defendants' actions—which allegations the Court assumes are true at this stage—somehow fail to demonstrate that Jensen has suffered a redressable injury. They also claim immunity from suit and that this controversy is moot. Defs. Br. 10.[5] And yet they go even further, asking the Court to bless their speech-policing. To do so, they obliterate the line between protected speech and professional conduct subject to regulation. But courts have long drawn this line, and Defendants are easily on the wrong side of it.

[5] Jensen refers to Defendants' memorandum of law, ECF 47, as "Defs. Br."

I. Legal Standard.

Because Defendants attack the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6), the Court should apply the standards from Rule 12 and Rule 8.

Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the...claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court may only grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) if the Complaint, taken as a whole, lacks "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 *Twombly*, 550 U.S. at 570). A claim only lacks "facial plausibility" when the plaintiff fails to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

The Court must also assume the truth of the Amended Complaint's allegations here and take all reasonable inferences in Jensen's favor. *Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 730 (8th Cir. 2015). Moreover, Jensen cannot be required to "rule out every possible lawful explanation for the conduct he challenges," as that "would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject."

Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 597 (8th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

II. Dr. Jensen Detailed the Retrospective Injuries He Suffered Because of Defendants' Unconstitutional Investigations.

Defendants fail to address Jensen's standing to assert his claims for retrospective relief against the individual-capacity defendants. In Count One of the Amended Complaint, Jensen alleges that Defendants deprived him of his First Amendment rights by investigating him and forcing his responses without a constitutional or statutory basis, based purely on his political speech. Compl. ¶¶298-315. *In addition to* the chilling effect the investigations had on his speech, Jensen alleges that the investigations caused "the present harm of expending time and money to respond to the investigations." *Id.* ¶314. Jensen demands retrospective money damages for these violations of his free-speech rights. *Id.* ¶315 (seeking "nominal, actual, general, and compensatory damages for damage to his personal dignity, reputation, and constitutional rights").

These are concrete and particularized harms that give rise to standing. *See Baird v. State Bar of Ariz.*, 401 U.S. 1, 7-8 (1971). In *Baird*, the Supreme Court held that "views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law. Clearly Arizona has engaged in such questioning here." *Id.* Thus, Baird *could*

not be asked whether she had ever been associated with the Communist Party. *Id.* at 4-5. Arizona's *inquiry itself*—into Baird's associations—was beyond the scope of its authority and violated Baird's First Amendment rights. *Id.* at 7-8.

Likewise, where a government defendant threatened arrest because the plaintiff was protesting and the plaintiff alleges First Amendment injury, "standing for retrospective relief may be based on past injuries." *PETA v. Rasmussen*, 298 F.3d 1198, 1202 (10th Cir. 2002); *accord Straw v. Utah*, No. 23-4036, 2023 U.S. App. LEXIS 16152, at *7 (10th Cir. June 27, 2023) ("Mr. Straw had standing to seek retrospective monetary relief for any actual damages he suffered from the alleged constitutional violation.").

Likewise, where a former union member sought a refund of dues taken from her in violation of her First Amendment rights, those money damages were sufficient to confer Article-III standing. *Lutter v. JNESO*, 86 F.4th 111, 126-27 (3d Cir. 2023) ("Her operative complaint sufficiently alleges the invasion of her First Amendment right against the compelled subsidization of speech.").

Defendants fail to acknowledge that past injuries caused by the infringement of First Amendment rights are sufficient for standing. Instead, they claim that only "[t]wo types of injuries confer standing for First Amendment relief," which could be described as the "credible threat" and "self-censorship" theories. Defs. Br. 11. Defendants cite *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016), for this premise. But

they omit a key word that *Klahr* itself quoted: "two types of injuries may confer Article III standing to seek ***prospective*** relief." *Klahr*, 830 F.3d at 794 (emphasis added) (quoting *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003)). The two theories Defendants identify do not cover retrospective relief.

Defendants' recitation of First Amendment standing theory is incomplete and fails to address the actual damages Jensen has alleged in the Amended Complaint caused by the Defendants' unconstitutional investigations. As such, the Court should find that Jensen has adequately alleged his claims for retrospective relief premised on First Amendment injury.

III. Dr. Jensen Alleged First Amendment Standing to Seek Prospective Relief.

Standing for a First Amendment claim requires that a plaintiff: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The First Amendment standing inquiry is "lenient" and "forgiving" in the "doctrine's first element: injury-in-fact." *Dakotans For Health v. Noem*, 52 F.4th 381, 386 (8th Cir. 2022) (internal quotes omitted).

"In the First Amendment context, 'two types of injuries may confer Article III standing to seek prospective relief.'" *Klahr*, 830 F.3d at 794 (quoting *Ward*, 321 F.3d at 1267). Jensen has suffered both. First, Jensen alleged "an intention

to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). Jensen still wants to engage in political speech, but as Defendants' statements at the conference show, *see* Facts Section VII, Jensen is likely to be investigated for such speech. Second, Jensen alleged that he self-censored, another injury-in-fact. *Noem*, 52 F.4th at 386.

A. Dr. Jensen still faces a credible threat of prosecution for his speech.

"[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *Klahr*, 830 F.3d at 794 (internal quotes omitted). A tilted inquiry is warranted in this case. Indeed, "[t]he First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances." *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 464 (1979). The government cannot infringe upon this right "by imposing sanctions for the expression of particular views it opposes." *Id.* Moreover, "[c]riticism of public officials lies at the very core of speech protected by the First Amendment." *Green v. City of St. Louis*, 52 F.4th 734, 739 (8th Cir. 2022) (quotation omitted). As does all speech on "matters of public concern," *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Thornhill v. Alabama*, 310

U.S. 88, 101-102 (1940)), and speech in campaign for political office, *see FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1650 (2022).

In Complaint One, Defendants investigated Jensen for "public statements you made related to COVID-19." Compl. ¶57. The same applied to each remaining complaint and investigation: Jensen was singled out for "sanctions," in the form of a lengthy investigative process and threats on his livelihood, "for the expression of particular views." *Smith*, 441 U.S. at 464. These were views on important political matters: how COVID-19 deaths should be certified in Minnesota, Compl. ¶53, mask mandates, church closures, Compl. ¶134, and topics other doctors also opined about, Compl. ¶80.

Jensen still wants to talk to the public about public health matters. Compl. ¶¶288-89. But absent relief from this Court, he does so under threat of prosecution from Defendants. *Id.* In 2020, Defendants claimed they were "required" to investigate "all complaints and reports wherein violations of the MPA are alleged," Compl. ¶180, Ex. 1, even if those complaints are for "public statements" protected by the First Amendment. Again, in the 2023 conference, Defendants claimed that Jensen's comments made "not in a professional way, but just speaking," were within Defendants' regulatory authority. Compl. ¶277. Still today, Defendants cannot identify any limit to their power to regulate the "practice of medicine" that would prevent First Amendment harm.

Under controlling precedent, therefore, Jensen has standing to seek prospective relief.

Start with *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014). There, like Jensen, the plaintiffs "intended future conduct" that "concern[ed] political speech." *Id.* at 162. Next, the Court had "no difficulty concluding that petitioner's intended speech is 'arguably proscribed' by the law' because a government panel had already found "probable cause" to believe the statute was violated by "the same sort of statement petitioners plan to disseminate in the future." *Id.* Because there was "a history of past enforcement," the "threat of future enforcement" was "substantial." *Id.* at 164. If the plaintiffs "continu[ed] to engage in comparable electoral speech," they had standing. *Id.* at 162.

Similarly, in *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021), the court held that plaintiffs had standing even though "it is not yet clear" whether their "intended speech will be proscribed by the Statute." *Id.* at 700. There, the State argued that the plaintiff's proposed speech was "not prohibited by the Statute," but it was at least "arguable" that plaintiffs could face prosecution, so the case could proceed. *Id.* at 698, 700.

Defendants' argument that "Plaintiff makes no claim that he intends to engage in further conduct that could potentially constitute prohibited conduct for licensed physicians under section 147.091, subdivision 1 of the Medical

Practice Act," is, first, inaccurate. Defs. Br. 11. Jensen actually alleges that he is "still active in the media. He still speaks with patients and members of the public every day." Compl. ¶289. He alleges that he "continues to tailor his speech carefully to avoid potential prosecution by Defendants for speech on matters of public concern, such as public health." Compl. ¶322; *see also* Compl. ¶235. And he alleges that Defendants' actions have an "ongoing chilling and suppressing effect" on his speech. Compl. ¶231.

Defendants' argument is also beside the point. They assert that, because Jensen is a licensed physician, they can or must investigate all complaints solely involving political speech. Compl. ¶236-37. They have reopened pre-existing complaints against Jensen without any new information. Compl. ¶253. Jensen doesn't have to allege that he will repeat the same speech that he said before; it is enough that he continues to speak to the public about public health issues, Compl. ¶322, which previously triggered five investigations spanning 32 months. "[P]ast is prologue" in chilling-effect cases. *Marshall v. Amuso*, 571 F. Supp. 3d 412, 427 (E.D. Pa. 2021). All it takes is a random bad-faith partisan *alleging* that Jensen has spoken so-called "disinformation." Jensen intends to continue speaking about public health, Compl. ¶¶288-89, 322, so it is "arguable" that he will be subject to another unconstitutional investigation in the future. *Turtle Island Foods*, 992 F.3d at 700. Under the

"forgiving standard" for First Amendment standing, this case can proceed. *Id.* at 699.

B. Dr. Jensen's speech was chilled and continues to be chilled, and he did self-censor and continues to self-censor.

"Self-censorship can itself constitute injury in fact." *281 CARE Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). "Indeed, 'when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged.'" *Klahr*, 830 F.3d at 794 (internal quotes omitted). Whenever "analyzing a claim of standing through self-censorship, '[t]he relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was 'objectively reasonable.'" *Id.* at 794-95 (quoting *281 CARE Comm.*, 638 F.3d at 627). In other words, where the plaintiff alleges that his speech was chilled, that allegation is accepted as true, but the Court still determines whether his self-censorship is reasonable under the circumstances. *See 281 CARE Comm.*, 638 F.3d at 627. If it is, then there is standing to assert a prospective constitutional injury.

Again, Jensen alleges that he did, and continues to, temper his political speech because of the ever-present threat of investigation. After Complaint One, Jensen self-censored. Compl. ¶76. He did the same in response to Two, Compl. ¶106, Three, Compl. ¶132, Four, Compl. ¶¶155, 172, and Five, Compl.

¶195. In fact, Jensen *told* Defendants that the ongoing investigations had "an ongoing chilling and suppressing effect on my ability to candidly and honestly share my perspective and thoughts with patients and constituents." Compl. ¶112, Ex. 5. While campaigning for governor, Jensen "tailored his message" in response to Defendants' actions, Compl. ¶232, and declined speaking events, Compl. ¶238b.

Jensen's decision to tailor his messaging is reasonable. For *years*, Defendants investigated him for alleged misconduct related to the practice of medicine—despite no patient ever complaining.

And Defendants have provided no limiting construction of "practice of medicine" which could adequately tailor their speech investigations. Random partisans accusing a non-treating physician of "being a danger to public health," Compl. ¶92, Exs. 3, 4, doesn't convert the physician's speech into the "practice of medicine." Nor does that physician filing an affidavit in a lawsuit in another state, Compl. ¶¶134, 135, 158, 159, 169, 301, speaking at a campaign event while he ran for Governor, Compl. ¶220, criticizing the Minnesota Department of Health on television, Compl. ¶60, or any of the other fourteen speech complaints the Board chose to investigate. Yet the investigations happened.

Defendants' refusal to recognize the doctor-patient-nexus line between political speech and the practice of medicine creates an ongoing chilling effect

for Jensen and all Minnesota medical professionals because they are under constant threat of investigation and potential license revocation for political speech. Compl. ¶289. Defendants still claim they can investigate speech, as reiterated in the Conference. Compl. ¶¶277-82. Any reasonable physician in Jensen's position would tailor his speech, or stay silent, knowing that *any* public statement about public health could result in a time-consuming and costly investigation.

Other physicians in a similar position have done just that. Dr. Robert Zajac alleged in a verified complaint that his speech has also been chilled by Defendants' enforcement of the MPA. Compl. ¶¶294-97. Zajac's case further shows that Defendants' broad interpretation of the MPA and track record of investigating speech would chill a person of ordinary firmness from exercising his First Amendment rights.

Defendants' main argument to the contrary is that Jensen *did* continue to speak. But the fact that he continued to speak does not mean his speech was not chilled *at all*. To hold otherwise would ignore that "on a motion to dismiss for lack of standing, this Court accepts as true the factual allegations in the Complaint regarding standing." *U.S. Hotel & Resort Mgmt v. Onity, Inc.*, 2014 U.S. Dist. LEXIS 103608, at *5 (D. Minn. July 30, 2014). It is impossible, under Rule 12, for Defendants to assert that Jensen's speech was not chilled *at all*.

What's left, then, is whether Jensen's decision to continue speaking—with trepidation—undermines his claim of an objective chill. But a "plaintiff does not need to show that he ceased all advocacy to show that his speech has been chilled." *Karol v. City of New York*, 396 F. Supp. 3d 309, 318 (S.D.N.Y. 2019). Defendants admit that the standard is whether the "adverse action taken against [Jensen] would 'chill a person of ordinary firmness' from continuing to speak." *Scheffler v. Molin*, 743 F.3d 619, 621 (8th Cir. 2014); Defs. Br. 15-16. "This is an objective test: [t]he question is not whether the plaintiff [him]self was deterred, though how plaintiff acted might be evidence of what a reasonable person would have done." *Eggenberger v. W. Albany Twp.*, 820 F.3d 938, 943 (8th Cir. 2016) (internal quotes omitted). The ordinary person, after more than 40 years practicing medicine without an investigation, followed by a sudden series of investigations based on speech alone, combined with the stress inherent in a modern political campaign, would have been chilled from exercising his First Amendment rights.

Finally, Defendants claim that any self-censoring decision Jensen *did* make was unreasonable because the Board's investigations were not the type of "concrete consequences" that chill speech. Defs. Br. 16. Defendants characterize their unlawful acts as "inviting" or "requesting responses," "sending letters," "taking statutorily authorized steps," and—most euphemistically—"giving him an opportunity" to answer their demands. This

gaslighting doesn't change that Dr. Jensen's livelihood was threatened, Compl. ¶8, he spent countless hours—over two thousand—defending his license, Compl. ¶¶7, 69, 74, 100, 151, 189, suffered from lost sleep and emotional distress, Compl. ¶238h, took on fewer patients because of Defendants' constant demands on his time, Compl. ¶238c, and even hired counsel to defend his speech at the conference, Compl. ¶286.

Such injuries are sufficiently "concrete" to cause a person of ordinary firmness to censor their speech. *Scheffler*, 743 F.3d at 621. The Eighth Circuit has held that receiving a mere *parking ticket* because of speech is sufficiently concrete to chill future speech. *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003). The reason: "the mayor in *Garcia* successfully used his power to mobilize city resources against the plaintiff in response to her First Amendment activity." *Scheffler*, 743 F.3d at 622. Defendants mobilized the "punitive machinery of government" against Dr. Jensen's speech. *Garcia*, 348 F.3d at 729. If a parking ticket is enough, the Defendants' conduct is enough.

Indeed, the Ninth Circuit has held that "an investigation that lasted more than eight months," longer than the relevant statute permitted,[6] was sufficient to chill a person of ordinary firmness. *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). If that "eight-month investigation into the plaintiffs' activities and

[6] Here, the Board's investigation extended well beyond Minnesota law's time limits. Minn. Stat. §214.103, subd. 1a(c), (e); Compl. ¶¶222–26.

beliefs chilled the exercise of their First Amendment rights," so did Defendants' *32-month investigation* into Jensen's speech. *Id.* at 1226. Jensen is "entitled to seek a remedy." *Id.*

IV. Dr. Jensen Adequately Alleges That Portions of the MPA Are Facially Overbroad and Therefore Unconstitutional.

Defendants improperly conflate standing for Jensen's overbreadth challenge with the merits of that claim. "It is crucial...not to conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action, for the concepts are not coextensive." *Turtle Island Foods*, 992 F.3d at 699 (internal quotes omitted). Like a First Amendment claim for prospective relief, regarding "a First Amendment facial overbreadth claim, actual injury can exist for standing purposes...as long as the plaintiff is objectively reasonably chilled from exercising his First Amendment right to free expression…to avoid enforcement consequences." *Republican Party v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004). As discussed in Argument Section II.B, Jensen has standing.

Whether the overbreadth of a statute "is sufficiently 'substantial' to produce facial invalidity" involves "not standing, but 'the determination of [a] First Amendment challenge on the merits.'" *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (internal citation omitted). That is what Defendants attack, and so Jensen will respond in kind. Defs. Br. 16-19.

Defendants first incorrectly argue that Jensen must "establish that no set of circumstances exists under which [the challenged law] would be valid." Defs. Br. 17. Rather, a facial overbreadth challenge in the First Amendment context is a "second type of facial challenge," *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quote omitted), that serves as "an exception to [the] normal rules regarding the standards for facial challenges," *Musser v. Mapes*, 718 F.3d 996, 1001 (8th Cir. 2013).

For Jensen's overbreadth challenge, he must allege that a "substantial number" of the challenged provisions of the MPA's "applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (internal quote omitted). He has easily done so. *E.g.*, Compl. ¶¶291-97, 309, 324, 332.[7] This is because while Minn. Stat. §§147.091, subd. 1(g)(1) & (2) & (k), and 147.161, subd. 1 *say* they target conduct, the vast majority of their applications chill public speech about public health.

Start with defining the legitimate sweep of the MPA. The Supreme Court has clearly defined what a medical licensing agency can regulate in the First Amendment realm: speech "as part of the *practice* of medicine." *Nat'l Inst. of*

[7] Defendants' claim that "Plaintiff's Amended Complaint fails to set forth allegations of facial unconstitutionality," Defs. Br. 17, is obviously false.

Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371-72 (2018) ("*NIFLA*")[8] (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992)). Defendants can also regulate conduct in a way that merely incidentally burdens speech, such as through medical-malpractice investigations. *Id.* at 2373. But these regulations *must* be tied to "a procedure" and may not target "speech as speech." *Id.* at 2373-74; *see also Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring). "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 2373 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

The Ninth Circuit put it well:

> At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine. . . Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment.

Pickup v. Brown, 740 F.3d 1208, 1227-28 (9th Cir. 2014). This is because "regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to

[8] Defendants' attempt to sidestep *NIFLA*, because it "involved compelled speech," Defs. Br. 18, fails because *NIFLA* explains the limitations on Defendants' regulatory authority vis-à-vis speech. 138 S. Ct. at 2371-75.

suppress unpopular ideas or information." *NIFLA*, 138 S. Ct. at 2374 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994)). The Court noted that these have been the habits of regimes like "Nazi Germany." *Id.* (internal citation omitted).

The State can therefore regulate the provision of medical procedures and the doctor-patient relationship—the *practice* of medicine. But it cannot regulate what doctors *say to the public* about *public health issues*—those are issues of pure speech, and the doctor speaking to the public on Facebook is akin to the old-time pamphleteer on the stump.

But Defendants advocate an incredibly broad sweep for the MPA. Jensen's speech, which Defendants *still* claim they could police, *see* Defs. Br. 12, was uttered outside the doctor-patient relationship. Therefore, while the MPA purports to only regulate "the practice of medicine," Minn. Stat. §147.001, subd. 2, the provisions enforced against Jensen sweep in a "substantial number" of unconstitutional applications because Defendants have construed *all* speech *about* medicine to count as the *practice of medicine*, Compl. ¶¶275-83.

Jensen is not alone, and Defendants acknowledge that he alleged that the MPA's speech regulations affect third parties as well. *Compare* Defs. Br. 19 *with* Compl. ¶¶291-97. Dr. Robert Zajac is a good example of another licensee who told this Court under oath that he suffered because he uttered non-State-

approved statements about COVID-19. Thus, Jensen has identified an instance in which another individual has been impacted differently from him, though in a similarly unconstitutional application.

But overbreadth allegations are not limited to actual cases of unconstitutional application of the law to others. Rather, "the overbreadth doctrine requires courts to assume and evaluate *purely hypothetical* fact patterns to vindicate First Amendment interests of parties not even before the court." *Green v. Miss USA, LLC*, 52 F.4th 773, 800 (9th Cir. 2022) (emphasis in original). And Jensen has: he alleges that Defendants are using and have used the identified MPA provisions to police speech made by *any other* licensee "not in a professional way, but just speaking." Compl. ¶277-81. Jensen also alleges that "Defendants believe, to the present date, that the Medical Practice Act empowers them to investigate Minnesota medical licensees for their speech unrelated to patient care, and Defendants may therefore prosecute Dr. Jensen and any other Minnesota medical licensee in the future for their speech unrelated to patient care." Compl. ¶288.

Thus, Jensen has fulfilled what this Court required in *Final Exit Network, Inc. v. Ellison*, 370 F. Supp. 3d 995, 1014 (D. Minn. 2019). The problem for the *Final Exit Network* plaintiff was that the statute allowed the government to prosecute third parties for the *exact same* conduct as the plaintiffs', related *only* to how to make a "final exit" from this world. *Id.* at 1014. In that case, the

statute could still be facially unconstitutional because of a content-based restriction, but overbreadth was the wrong theory.

Here, in contrast, Jensen alleges that Dr. Zajac spoke about COVID-19 *generally*, but his speech was different, and different investigations resulted. Compl. ¶¶295-96. Other medical professionals will also have their own opinions and can be prosecuted for their pure speech about public-health topics other than COVID-19, vaccines, and so on. Compl. ¶¶288-294. As the Defendants read the MPA, a future Board can prosecute doctors for *encouraging* masking based on complaints from random anti-maskers. Or for encouraging or discouraging people toward euthanasia, abortion, medical marijuana or other drug use, and on and on. Defendants' interpretation and application of the MPA truly weaponizes the agency into a thought police for doctors. Jensen's allegations and this discussion provide what the Court needs to deny Defendants' motion to dismiss Jensen's overbreadth claims.

V. Dr. Jensen Has Standing for His Remaining Claims.

Jensen has adequately alleged First Amendment injury for his unconstitutional conditions, viewpoint discrimination, and equal protection claims. Defendants' arguments to the contrary frequently "conflate Article III's requirement of injury in fact with a plaintiff's potential causes of action," *Turtle Island Foods*, 992 F.3d at 699, but nevertheless fail.

A. Jensen has adequately alleged that Defendants violated the unconstitutional conditions doctrine.

Defendants conflate standing regarding unconstitutional conditions with he merits. This Court already correctly noted that standing for an unconstitutional-conditions claim is premised on the same allegations that must be made to plead a First Amendment injury. *Jensen v. Minn. Bd. of Med. Prac.*, No. 23-cv-1689-JWB-DTS, 2024 U.S. Dist. LEXIS 57435, at *11 (D. Minn. Mar. 29, 2024). Plaintiff's allegations in the Amended Complaint—that he suffered concrete retrospective First Amendment harm, that his speech was and continues to be chilled, and that he self-censored and continues to self-censor—are adequate to support his claim that the State is denying him the benefit of practicing medicine (being licensed) without being forced to forfeit his right to speak publicly about political matters. *See* Compl. ¶358.

As detailed above, Defendants' role is to regulate the practice of medicine in Minnesota. But holding a license to practice medicine may not be conditioned on espousing preferred speech. "The government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). "[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Id.* at 606. Consistently,

if Defendants forced Jensen to self-censor to avoid investigation, which he has alleged, Compl. ¶358, Jensen has stated a claim for relief.

Defendants claim that the investigations here "pertain[] to government regulation, rather than to provisions of a benefit." Defs. Br. 21 (citing *Telescope Media Group v. Lucero*, 936 F.3d 740, 762 (8th Cir. 2019)). Again, this is a merits issue. But even so, *Telescope Media* does not support Defendants. There, the plaintiffs were not seeking to practice within a licensed profession and continue their licensure without government harassment. Rather, they were videographers—an unlicensed profession—seeking freedom from compelled speech under the Minnesota Human Rights Act. *Id.* The case doesn't fit here.

Here, Jensen's license to practice medicine is a benefit provided by the State of Minnesota. His license was and is threatened by Defendants' investigations targeting his speech on matters of public concern. The Board's proffered excuse? "Licensee willingly subjected himself to such statutorily mandated complaint resolution processes by joining a licensed profession." Defs. Br. 20.[9] Defendants' position is that a professional *forfeits* his speech rights when he joins a licensed profession. He only retains constitutional *permissions*—if benevolently granted by Defendants. This is what the unconstitutional conditions doctrine prohibits. *Ark. Times LP v. Waldrip*, 37 F.4th 1386, 1391

[9] The Jensen investigations were not "statutorily mandated." Complaint Three was dismissed without investigation.

(8th Cir. 2022) ("This includes making government benefits contingent on...agreeing not to engage in protected speech."). Jensen has stated an unconstitutional-conditions claim.

B. Plaintiff has standing to bring his viewpoint-discrimination claim.

Defendants simply repeat their standing arguments related to chilling effect and self-censorship. They make further *merits* arguments, again, about whether Jensen has adequately stated a viewpoint-discrimination claim. Defs. Br. 21-22. They also rehash their arguments that Jensen hasn't adequately alleged injury. He has, as detailed above. Jensen will address Defendants' merits arguments below.

C. Defendants violated the equal protection clause by singling out Dr. Jensen because of his public speech.

Again, Defendants largely argue whether Jensen has stated an equal-protection claim and call it standing. Defs. Br. 23-25. For a class-of-one equal-protection claim, Jensen must allege that "[]he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Jensen's allegations that Defendants' conduct injured him, detailed above, apply to whether he has stated an equal-protection claim. But Jensen also alleged another injury-in-fact applicable to equal-protection claims: other

licensees have not been investigated for their speech saying the opposite of what Jensen has said. Compl. ¶¶341-345; *see Citizen Ctr. v. Gessler*, 770 F.3d 900, 913 (10th Cir. 2014) ("Unequal treatment can serve as injury in fact.").

These allegations are sufficient at the Rule 12 stage to proceed to discovery into specific instances in which other licensees were not investigated for different speech approved by Defendants. *See Tatel v. Mt. Lebanon Sch. Dist.*, 637 F. Supp. 3d 295, 330-31 (W.D. Pa. 2022).

Given that the complaint process is protected from disclosure by Minnesota law, it is not reasonable at this stage to expect Jensen to be able to produce in a complaint specific contrary examples of non-investigation. "The *Twombly* plausibility standard...does not prevent a plaintiff from pleading facts alleged 'upon information and belief' where the facts are peculiarly within the possession and control of the defendant." *Energizer Brands, LLC v. P&G*, No. 4:16-CV-223 (CEJ), 2016 U.S. Dist. LEXIS 65326, at *8 (E.D. Mo. May 18, 2016) (internal citations omitted).

Further, Jensen has alleged that there is no rational basis for discriminating between his speech and that of any other licensee. Compl. ¶346. If, after discovery, no instances of dismissed complaints (or failure to investigate a doctor's speech after receiving an email from a random partisan) based on different speech arise, the situation may be different at summary

judgment. But the Court should deny the *motion to dismiss* Jensen's equal-protection claim based on standing.

VI. Qualified Immunity Does Not Protect the Individual-Capacity Defendants.

The individual-capacity Defendants do not have qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Whether an official has qualified immunity depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." *Davis v. Scherer*, 468 U.S. 183, 191 (1984) (internal citations omitted).

Defendants fail to establish the defense. First, Defendants were not "performing a discretionary function" when they investigated Jensen's speech 18 times over nearly three years. The Board had a *non*-discretionary threshold duty to dismiss without "investigation" *all* the complaints against Jensen because they only involved Jensen's speech to the public on matters of public concern. Facts Section III. They knew they could do this because they did so with Complaint Three.

Further, there is no discretion to compel answers to illegal demands for information. *See* Defs. Br. 6, 15, 22. In every case, these "opportunities" were

presented to Jensen under penalty of further sanctions for refusal to provide written answers or appear for an in-person conference. Again, Defendants have no statutory authority to investigate political speech. If they somehow do, the statute is unconstitutional. And Jensen alleges that they *knew* it was improper for them to police speech. *E.g.*, Compl. ¶¶273-74.

Defendants also claim that their "process of jurisdictional determination and how best to proceed through the complaint-resolution process involve decision-making based on a vast array of subjective, individualized assessments." Defs. Br. 33. This is also nonsense. Whether a one-off email from a random partisan about Jensen's campaign speeches has to do with speech or conduct is simple and requires zero investigation. The apparent galaxy of rigors involved with the complaint-resolution process for *conduct* related to the *practice of medicine* is not at issue here.

Second, it is clearly established that medical licensing boards may not police speech qua speech, both under Minnesota law and the First Amendment. Defendants know that Minn. Stat. §147.081, subd. 3 limits their authority to the definition of "practice of medicine." *See* Facts Section III. Further, the First Amendment under *NIFLA*, *Lowe*, and *Pickup* clearly establish that medical licensing boards cannot police doctors' public speech on matters of public concern. *See* Argument Section IV. And the "right to be free from retaliation is clearly established as a first amendment right." *Burton v. Martin*, 737 F.3d

1219, 1237 (8th Cir. 2013) (internal quote omitted). And the Court decided *NIFLA*, which involved the regulation of physician speech in particular, just *two years* before Defendants launched their first unlawful investigation. Defendants knew that Jensen's speech was beyond the scope of their authority.

Finally, while *Harlow* remains good law, qualified immunity itself should be eliminated except in rare cases where split-second decisions are made. *See Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) ("our §1983 qualified immunity doctrine appears to stray from the statutory text"); *Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor and Ginsburg, JJ., dissenting) (citing William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018)); *Green v. Thomas*, No. 3:23-cv-126-CWR-ASH, 2024 U.S. Dist. LEXIS 90805, at *41-60 (S.D. Miss. May 20, 2024) (explaining why qualified immunity is unsound and inconsistent with Section 1983, especially where "[f]or nearly two years, the State of Mississippi falsely accused Desmond Green of capital murder").

The individual-capacity Defendants were not engaged in discretionary actions because their authority was limited. They violated clearly established First Amendment law. They do not have qualified immunity.

VII. The Official-Capacity Defendants Are Not Entitled to Sovereign Immunity as to Prospective Relief.

Defendants also incorrectly claim that sovereign immunity shields the official-capacity defendants from suit. But a "suit against a state official may go forward in the limited circumstances identified by the Supreme Court in *Ex parte Young*." *281 CARE Comm.*, 638 F.3d at 632. At the Rule 12 stage, the Court merely conducts a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* (quoting *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland,* 535 U.S. 635, 645 (2002)). Jensen alleges a present and ongoing threat of prosecution for expressions of protected speech, *see* Compl. ¶290, so the official-capacity defendants are proper defendants under *Ex parte Young*.

Defendants' violations of Jensen's First Amendment rights arose from conditions still present today: he intends to continue speaking about public-health issues, which he is currently doing. *E.g.,* Compl. ¶¶235, 289, 322. Defendants also admit this: "it is possible that the Board could receive a complaint regarding Plaintiff's license in the future, and the Board might investigate the complaint." Defs. Br. 27. Yet Defendants claim that this is insufficient under *Ex parte Young* because Jensen "does not allege that the

Board is engaged in any *pending or imminent enforcement action* against Plaintiff." *Id.* at 27-28.

Defendants are wrong in two ways. First, their own complaint "closure notices" informed Jensen that they could be reopened at any time, and they have in the past reopened closed complaints against Jensen. Compl. ¶¶132, 167, 169, 172, 288. Second, *281 CARE Committee* controls at the Rule 12 stage because only "some connection" between the official-capacity defendant and the challenged law or actions is required for *Ex parte Young* to apply. 638 F.3d at 632. Here, the official-capacity defendants are *directly responsible* for enforcing the provisions of the MPA. This is a far greater connection than Lori Swanson had to Minn. Stat. §211B.06, where she was merely a secondary enforcer. *281 CARE Comm.*, 638 F.3d at 632-33.

This case easily meets the *Ex parte Young* exception to sovereign immunity as to prospective relief against the official-capacity Defendants at the Rule 12 stage.

VIII. Defendants' Mootness Arguments Fail.

It is axiomatic that there is no application of the mootness doctrine possible for claims for retrospective relief. *E.g., Straw v. Utah*, No. 23-4036, 2023 U.S. App. LEXIS 16152, at *8 (10th Cir. June 27, 2023) (plaintiffs who show actual injury from a constitutional violation may recover damages under 42 U.S.C. §1983). Defendants' mootness argument is frivolous if directed at past

damages. As for prospective relief, Defendants' argument is bound up in their standing argument already addressed: the ongoing chilling effect on Jensen and his ongoing self-censorship.

IX. Defendants' Arguments on the Merits Also Fail.

Defendants substantially intertwine standing and merits arguments, so to the extent Jensen's responses address the merits, they are incorporated here. To summarize, Jensen's claims are based on the deprivation of his First Amendment rights, Defendants' retaliation against him, Defendants' viewpoint discrimination against him, Defendants' unequal treatment of him, and the imposition of unconstitutional conditions on maintaining his license.

A. Neither the MPA provisions nor Defendants' actions are or were narrowly tailored to a compelling government interest.

Defendants' wrongful acts have a common thread: either the enabling statutes themselves, or the Defendants' improper interpretations and actions, punish political speech. They are therefore subject to strict scrutiny. *Meyer*, 486 U.S at 421. There is no government interest in punishing political speech out of a paternalistic drive to limit speech for the public's benefit. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 790 (1988). And the terms of the statutes are so broad that no reasonable reading of them could call them "narrowly tailored." After all, they have been used to intentionally regulate speech by calling it

conduct. *NIFLA*, 138 S. Ct. at 2373. This is why there's such a spilling of ink about standing here: Defendants are doomed on the merits.

Section 147.091, subdivision 1(g)(1) and (2) are facially unconstitutional as content- and viewpoint-based regulations of speech. Their existence, coupled with Defendants' actions alleged in this case, demonstrate an ongoing objective chill of Jensen's political speech. Compl. ¶290. The law allows Defendants to impose disciplinary action on a licensee for:

> (g) Engaging in any unethical or improper conduct, including but not limited to:
> (1) conduct likely to deceive or defraud the public;
> (2) conduct likely to harm the public.

Minn. Stat. §§147.091, subdivision 1(g)(1), (2). These provisions inherently target speech and are presumptively invalid: it is hard to imagine what "deceptive" or "defrauding" "conduct" would not be determined by reference to the substance of what someone says. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, each investigation was designed to question what Jensen said and why he said it. The government cannot simply call speech "conduct" to justify its laws governing expression. *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) (applying *NIFLA*).[10]

[10] And a statute governing "conduct" cannot be so overbroad that it "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008).

Defendants claim the MPA imposes a *duty* to investigate every doctor's speech on every hot-button political issue upon a random bad-faith partisan's complaint. So if another doctor starts talking about medical risks inherent in getting an abortion—or not getting an abortion—or any other controversial issue with an intersection with medicine, and a person doesn't like it, Defendants can force that doctor to respond to political banter with medical research and spend hours not treating patients or campaigning.

Perhaps most important, the law and the Defendants' actions are irreconcilable with *NIFLA*. There is no such thing as the "practice of medicine" without the doctor-patient nexus, which forms the critical line between speech and conduct. Yet, the statute targets "conduct likely to deceive or defraud *the public*" or "likely to harm *the public*." Medical professionals do not practice medicine on the public, only on individual patients, so any speech falling under those provisions is non-incidental.

Moreover, Jensen's public speech is far afield of the conduct the Supreme Court has stated licensing bodies may regulate. *See NIFLA*, 138 S. Ct. at 2373. Subdivision 1(g) chills speech because it is overbroad and not narrowly tailored to address the "practice of medicine." Compl. ¶¶275, 278, 282, 283, 290-97. There is no government interest supporting the law because it targets so much political speech.

Subdivision 1(k) of the same statute, which allows discipline for "[c]onduct that departs from or fails to conform to the minimal standards of acceptable and prevailing medical practice in which case proof of actual injury need not be established," is also unconstitutional as applied to Dr. Jensen. As the complaints show, Defendants only invoked subdivision 1(k) pretextually to target Dr. Jensen's speech. To the extent subdivision 1(k) is invoked to investigate speech without the necessary doctor-patient nexus, or not incidental to a medical procedure as required in *NIFLA*, it is unconstitutional.

B. Defendants' broad reading of the MPA enabled their retaliation and content- and viewpoint-based discrimination.

Viewpoint discrimination, as Defendants acknowledge, Defs. Br. 21, occurs when government targets the "particular views taken by speakers." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Plaintiff has already cited examples of other doctors *not* being targeted for their similar political speech, Compl. ¶¶80-81, while his speech was investigated *because of its content*.[11] And Defendants clearly stated that the only allowable speech is "what a doc...would assume is the facts." Compl. ¶280. Jensen amply alleges that Defendants investigated him because of perceived "disinformation"—quintessential viewpoint-based investigation.

[11] Whether Defendants received complaints about other physicians' speech and chose not to investigate, Defs. Br. 21, is impossible for Dr. Jensen to know at this stage of the proceedings.

As further evidence of retaliation and viewpoint discrimination, Defendants also disregarded two statutes designed to ensure speedy complaint resolution. Compl. ¶¶217-25. Defendants opened their fifth investigation in December 2021 and held it open during the entire final year of Jensen's gubernatorial campaign despite a statutory mandate to close it. *Id.* Defendants don't even try to explain this away. Defendants then subjected Jensen to an in-person conference, for which he was compelled to hire legal counsel, where he was forced to "justify" his pure speech on matters of public concern and answer for being called a "danger to public health." Defendants' First Amendment violations changed the whole character of Jensen's campaign. Jensen thoroughly alleged the harms these actions caused him. *See* Argument Section II; Compl. ¶238 a-i.

The statutes that purportedly enabled this conduct are unconstitutional both facially and as-applied. The Court should thus deny Defendants' motion to dismiss.

X. The Supreme Court Should Revisit the Sovereign Immunity Doctrine as it Applies to Section 1983.

Jensen concedes that current sovereign immunity and Section 1983 precedent require this Court to dismiss his claims against the Board itself. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). Likewise, Jensen concedes that under current law, the Court can dismiss the official-capacity

Defendants as to the claims against them for *retrospective* relief. *See Edelman v. Jordan*, 415 U.S. 651, 663 (1974). However, these cases were wrongly decided and ought to be reconsidered by the Supreme Court.[12]

Congress can abrogate a state's sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The Court has held differently, but Section 1983 *did* abrogate the states' sovereign immunity because Congress enacted it pursuant to the Fourteenth Amendment, whose prohibitions "are directed to the States." *Quern v. Jordan*, 440 U.S. 332, 355 (1979) (Brennan & Marshall, JJ., concurring) (internal quotation omitted).

There is also nothing in the text of Section 1983 to draw distinctions between individual- and official-capacity defendants and prospective-versus-retrospective relief. A state official's liability for an individual-capacity suit is in most cases indemnified by the State itself. *See Edelman*, 415 U.S. at 665 ("It is not pretended that these payments are to come from the personal resources of these appellants."). The most logical and consistent interpretation of Section 1983 is that it abrogated the states' immunity entirely.

Finally, the Court's holding in *Will*, following *Quern*, 440 U.S. 332 (1979), that "a State is not a 'person' within the meaning of §1983," 491 U.S. at 65, is

[12] Defendants should withdraw their assertion that Jensen has not presented an argument for modifying or reversing existing law in support of these claims. Defs. Br. 26.

not supported by the statutory and historical evidence. As Justice Brennan noted in his *Quern* concurrence, the Dictionary Act of 1871, enacted "less than two months before the enactment of the Civil Rights Act, provided that 'in all acts hereafter passed…the word "person" may extend and be applied to bodies politic and corporate…unless the context shows that such words were intended to be used in a more limited sense.'" 440 U.S. at 356 (Brennan & Marshall, JJ., concurring). Justice Brennan showed that "in 1871 the phrase "bodies politic and corporate" would certainly have referred to the States." *Id.* at 356-57.

Therefore, the Supreme Court should reconsider *Edelman*, *Quern*, *Pennhurst*, *Will*, and their progeny to find the Board and the official-capacity defendants suable under Section 1983 for retroactive damages. The case before the Court provides an excellent vehicle for consideration.

CONCLUSION

For the reasons stated herein and through arguments of counsel, Dr. Scott Jensen respectfully requests that the Court deny Defendants' motion to dismiss.

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Respectfully submitted,

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