No. 24-752

IN THE

Supreme Court of the United States

PAUL THOMAS,

Petitioner,

v.

KATHLEEN HARDER, *et al.,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This Court has been sparing in extending quasi-judicial immunity to government officials outside of the judicial branch. It has never extended quasi-judicial immunity to the functions of investigators and supervisors or to a state medical disciplinary board. Dr. Paul Thomas brought suit under 42 U.S.C. § 1983 against the members and staff of the Oregon Medical Board for intentionally persecuting him for his research and views on childhood vaccines, and for forcing him out of his medical practice.

QUESTION 1: Are members of the Oregon Medical Board entitled to absolute immunity or qualified immunity?

QUESTION 2: Are investigators and management staff of the Oregon Medical Board entitled to absolute immunity or qualified immunity?

TABLE OF CONTENTS

Pages

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TABLE OF AUTHORITIES

Pages

Cases

Statute and Rule

Other Authorities

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Association of American Physicians and Surgeons ("AAPS") is a national association of physicians, founded in 1943. AAPS is dedicated to protecting the patient-physician relationship, and has been a litigant in this Court and in other appellate courts. *See, e.g.*, *Ass'n of Am. Physicians & Surgs. v. Mathews*, 423 U.S. 975 (1975); *Ass'n of Am. Physicians & Surgs. v. Tex. Med. Bd.*, 627 F.3d 547 (5th Cir. 2010);

[1] *Amicus* Association of American Physicians and Surgeons provided the requisite ten days' prior written notice to counsel for all the parties. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than this *amicus curiae*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Ass'n of Am. Physicians & Surgs. v. Clinton, 997 F.2d 898 (D.C. Cir. 1993).

This issue of absolute immunity for government officials who retaliate against a physician's medical license in infringement on his First Amendment rights is a matter in which AAPS has strong interests.

SUMMARY OF ARGUMENT

Absolute immunity is inappropriate for state officials who make licensure decisions, because of the substantial potential for career-ending retaliation, discrimination, and other constitutional violations. As a judicially created doctrine that is anachronistic today except as applied to judges and the President, absolute immunity for other public officials is an invitation to tyranny without accountability. The more recently developed doctrine of qualified immunity provides public officials all the protection they need for actions taken in good faith, without giving them blanket immunity from accountability for real wrongdoing.

A half-century ago the Supreme Court expanded absolute immunity beyond judges to also protect prosecutors, legislators, and federal agency officials engaging in adjudicatory or prosecutorial activities. Subsequently "[t]his Court has generally been quite sparing in its recognition of claims to absolute official immunity." *Forrester v. White*, 484 U.S. 219, 224 (1988). But the decision below runs afoul of this limitation, by granting sweepingly broad absolute immunity to state licensing agencies prone to retaliation against licensees' exercise of First Amendment rights.

The First Amendment rights of physicians and all professionals are imperiled by the Ninth Circuit decision below. Veterinarians, attorneys, accountants, and judges themselves who may become subject to lawfare-style disciplinary proceedings against their law licenses are all at risk if retaliation against professional licenses is enshrouded in absolute immunity. The Ninth Circuit decision further puts at risk many others who hold government licenses for protection, recreation, or business needs such as gun permit holders and liquor licensees. Without accountability for retaliatory actions by government, it becomes unsafe for any professional or licensee to speak out on controversial issues such as transgender operations or abortion. Absolute immunity denies legal recourse and thus thwarts legal accountability for abuse of power by licensing authorities.

As he has a First Amendment right to do, Paul Thomas, M.D., published valid scientific information comparing the lower incidence of illness in unvaccinated children to the higher incidence among those who had been vaccinated. The Oregon Medical Board (OMB) retaliated by suspending Dr. Thomas's medical license 11 days later, in its direct assault on freedom of speech. This is not the kind of government action which absolute immunity should ever protect. Such censorship by government is anathema to a free society.

This conduct by the OMB is not an isolated incident, but is typical of the OMB's pattern of infringement on First Amendment rights. For example, the OMB has proposed a new rule authorizing it to revoke medical licenses based on a physician's "microaggressions", which can be mere

statements by a physician with which someone else disagrees or misinterprets. As criticized by law professor Jonathan Turley, the OMB even seeks to require physicians "to report 'indirect or subtle behaviors' that 'reflect negative attitudes or beliefs,'" or else the non-reporting physician will be subjected to discipline. @JonathanTurley, *X* (June 19, 2024).

First Amendment rights are in grave jeopardy today, as many no longer feel that they can freely speak out. Absolute immunity for state officials who infringe on First Amendment speech is contrary to the precedents of this Court, and to the Constitution. The Petition should be granted to reverse the decision below against Dr. Thomas, and thereby restore accountability to government retaliation against a professional licensee.

ARGUMENT

Allowing viewpoint discrimination by government to be shielded by a veil of absolute immunity presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). If state officials, here the OMB, are cloaked with absolute immunity while retaliating against Petitioner Paul Thomas, M.D., for publishing a peer-reviewed medical article, then no Oregon licensee can safely speak out controversially today.

I. Extending Absolute Immunity to Infringement by Government on First Amendment Rights Is an Unsettled Issue to be Resolved in Favor of the First Amendment.

The decision by the Ninth Circuit below gives carte blanche to a partisan medical board to end the careers of physicians based on what they say scientifically. No

meaningful First Amendment rights by licensed physicians on controversial topics in medicine, such as Covid, transgender operations and abortion, survive in Oregon if the decision below stands.

As recently explained by three Justices of this Court:

> Freedom of speech serves many valuable purposes, but its most important role is protection of speech that is essential to democratic self-government, see *Snyder* v. *Phelps*, 562 U. S. 443, 451-452 (2011), and speech that advances humanity's store of knowledge, thought, and expression in fields such as science, medicine, history, the social sciences, philosophy, and the arts, see *United States* v. *Alvarez*, 567 U. S. 709, 751 (2012) (Alito, J., dissenting).

Murthy v. Missouri, 603 U.S. 43, 77 (2024) (Alito, J., dissenting, joined by Thomas and Gorsuch, JJ., parallel citations omitted).

Nothing in the precedents establishing absolute immunity justifies extending it to allow infringement on First Amendment rights. "[T]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486 (1991). "'For executive officials in general, … our cases make plain that qualified immunity represents the norm.'" *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982)). "In any event, 'federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of

that scope.'" *Cleavinger v. Saxner*, 474 U.S. at 201 (quoting *Butz* v. *Economou*, 438 U.S. 478, 506 (1978); *Harlow* v. *Fitzgerald*, 457 U.S. at 808).

In a series of decisions in the 1970s, absolute immunity was conferred by this Court on judges, prosecutors, and the President, but for reasons having nothing to do with decisions of this type by a licensing authority. In contrast with judges, state medical board members typically lack experience with and fidelity to due process and instead function more like executives than like courts. A meaningful right of appeal of a judge is readily available, in contrast with medical board decisions. Moreover, the absolute immunity granted to a judge for approving sterilization of a child is from the *Roe v. Wade*-era, by a one-vote margin, and is tenuous authority today. *See Stump v. Sparkman*, 435 U.S. 349, 365 (1978) (Stewart, Marshall, and Powell, JJ., dissenting) ("beyond the pale of anything that could sensibly be called a judicial act"). Yet the Ninth Circuit decision below cited *Stump* for extending absolute immunity. *Thomas v. Harder*, No. 23-35456, 2024 U.S. App. LEXIS 25147, at *3 n.2 (9th Cir. Oct. 4, 2024).

In limited situations, prosecutors enjoy absolute immunity for actions that are subject to independent review by a judge prior to punishment. But there is no such timely independent review of the actions taken by a medical board, as when it summarily suspended the medical license of Dr. Thomas 11 days after he published an article disfavored by those in power. In addition, prosecutors are restrained by internal policies of their office, such as the one that prohibits the Department of Justice from prosecuting a sitting President of the United States. There are no such

policies restraining a state medical board determined to take retaliatory action against a physician, which has a severe chilling effect on sharing information.

This Court carefully narrowed its allowance of absolute immunity for some activities of a state criminal prosecutor in *Imbler v. Pachtman*:

> We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.

424 U.S. 409, 430-31 (1976). Were a prosecutor empowered also to be the judge and executioner, as a state medical board is, this limited rationale for extending absolute immunity does not apply.

Absolute immunity afforded to the United States President is likewise inappropriate for a state medical board. Separation of powers doctrine requires extending absolute immunity to the President, but does not apply to actions taken by a state medical board. As this Court explained last summer:

> The President occupies a unique position in the constitutional scheme, as "the only person who alone composes a branch of government." ... [W]e conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility.

Trump v. United States, 603 U.S. 593, 610, 614 (2024)

(citations and inner quotations omitted, emphasis in original). Nothing in this rationale even remotely supports extending absolute immunity to a state medical board.

When absolute immunity is extended to adjudicatory actions, it typically covers only conduct closely related to the judicial process. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) ("A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are ***not*** entitled to absolute immunity.") (emphasis added); *Forrester*, 484 U.S. at 229 (holding that a judge was not entitled to absolute immunity for firing an employee).

While the decision below relied on a Ninth Circuit precedent that "[t]here is no question that acts occurring during the disciplinary hearing process fall within the scope of absolute immunity," that precedent refers to "holding hearings, taking evidence, and adjudicating [which] are functions that are inherently judicial in nature." *Mishler v. Clift*, 191 F.3d 998, 1008 (9th Cir. 1999) (relied on by *Thomas v. Harder*, 2024 U.S. App. LEXIS 25147, at *3 n.2). The *Mishler* court held that a "swearing to the truth of facts in the disciplinary complaint" was ***not*** entitled to absolute immunity. 191 F.3d at 1008. Nor should absolute immunity apply here.

II. Licensing Agencies – Including State Medical Boards – Are Prone to Retaliation and Discrimination for which Absolute Immunity Is Particularly Inappropriate.

In sharp contrast with the narrow traditional

applicability of absolute immunity as set forth in Point I above, the possibility and even proclivity of licensing agencies to retaliate or discriminate based on viewpoint and even religious beliefs render them very poor candidates for being shielded by absolute immunity. "It has long been recognized that absolute immunity envisions the tyranny of abuse of power on an individual basis by persons clothed with authority." *Lucas v. State*, 141 S.W.3d 121, 132 (Tenn. Ct. App. 2004).

The Third Circuit recognized a cause of action for the suspension of parents' foster care license, analogous to the suspension of Dr. Thomas's medical license by OMB. *Lasche v. New Jersey*, No. 20-2325, 2022 U.S. App. LEXIS 5364 (3d Cir. Mar. 1, 2022). In *Lasche*, foster parents holding religious views against same-sex marriage had their foster license suspended and their foster child removed, after state officials learned of the parents' beliefs which were mainstream merely a quarter-century ago. *Id.* at *12. In late 2017 these parents were told they were being considered for approval to adopt their foster children, but then in 2018 state officials learned of the parents' religious opposition to same-sex marriage. The state officials then obtained a court order to remove a foster child from the parents, and within months the state officials summarily suspended the parents' foster license without notice. *Id.* at *14.

The Third Circuit held that:

> the timing of the retaliatory actions would ordinarily suffice for causation. Within a month of [another] same-sex couple's decision not to adopt the foster children, the individual defendants failed to provide the statutorily required notice of a family

> court hearing, and they obtained a court order at that hearing to remove Foster Child 1 from the Lasches. That timing is unusually suggestive. The [state agency's] decision to suspend the Lasches' foster parent license is further removed temporally. But in light of the prior pattern of antagonism regarding the family court hearing and the removal of Foster Child 1, ***the timing of those events is still suggestive of retaliation***.

Id. at *13-14 (emphasis added). The Third Circuit then remanded for the cause of action to proceed.

Gun permits are being denied based on applicants' social media posts, which are an exercise of First Amendment rights analogous to a physician publishing a controversial peer-reviewed article as Dr. Thomas did. For example, a licensed attorney in New Jersey was denied renewal of his gun permit without an interview and based merely on public officials reviewing his social medial posts.[2] He has filed a lawsuit in federal court for this infringement of his constitutional rights, and absolute immunity should not shield this state action from legal accountability. *Saadeh v. Township of Springfield, NJ*, Civ. No. 2:24-cv-11246-MEF-SDA (D.N.J. filed on Dec. 17, 2024).

The likelihood of corruption in licensure is also too great for absolute immunity to apply to its decision-making. The gun permits of more than two dozen people in New York City were revoked after

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[2] See Darwin Nercesian, "New Jersey Attorney Sues Over Gun Permit Denial Due To Pro-Palestinian Politics," *National Gun Forum* (Jan. 7, 2025) https://www.nationalgunforum.com/threads/new-jersey-attorney-sues-over-gun-permit-denial-due-to-pro-palestinian-politics.224220/ (viewed Feb. 8, 2025).

allegations that a middleman obtained the permits by paying bribes to New York Police Department cops who were in the NYPD Licensing Division. *See* Philip Messing, "NYPD hunting sketchy gun permits connected to corruption probe," *New York Post* (May 2, 2016).[3]

Liquor licenses, on which many businesses heavily depend to remain open, are subject to retaliation based on contentious local politics. In properly denying a defendant's assertion of absolute immunity, a federal court summarized the view of the Seventh Circuit as follows:

> the action of renewing or not renewing an Illinois liquor license is a bureaucratic and administrative act—not a judicial act … [for which there are] requirements of notice, a hearing, a record, and a reasoned decision.

Henry's on Main, LLC v. Vill. of Rochester, No. 24-cv-3040, 2024 U.S. Dist. LEXIS 188515, at *9 (C.D. Ill. Oct. 16, 2024) (inner quotations and citations omitted). That court opined that absolute immunity would apply if the judicial safeguards enumerated above were all complied with, but they were not in the summary suspension of Dr. Thomas below.

Holding a professional license from a state regulatory board has some considerations similar to an employment relationship, for which courts do not extend absolute immunity but instead allow causes of action for retaliation based on First Amendment speech. In *Smith v. Cleburne County Hosp.*, 870 F.2d 1375 (8th Cir. 1989), a physician sued a public hospital

[3] https://nypost.com/2016/05/02/nypd-hunting-sketchy-gun-permits-connected-to-corruption-probe/ (viewed Feb. 8, 2025).

alleging that it terminated his staff privileges in retaliation for his speech, in violation of the First Amendment. The Eighth Circuit held that the physician was not a salaried public employee but had a valid cause of action for the retaliation:

> While there is not a direct salaried employment relationship, there is an association between the independent contractor doctor and the Hospital that [has] similarities to that of an employer-employee relationship. For instance, there is an application process for privileges, there are required duties to be performed by both parties, and there are potential liabilities each party is responsible for jointly and severally for tortious conduct.

Id. at 1381. The application process for licensure by a state medical board is similar to the application process for medical staff privileges, such that absolute immunity should not extend to suspensions or revocations in either case. *See also Davis v. West Community Hospital*, 755 F.2d 455, 461 (5th Cir. 1985) (allowing a cause of action based on a free speech claim by a surgeon whose staff privileges were suspended by a public hospital).

The Fifth Circuit has properly held that retaliation against a licensee's exercise of First Amendment rights may not even be entitled to qualified immunity, let alone absolute immunity. *See Copsey v. Swearingen*, 36 F.3d 1336, 1346 (5th Cir. 1994) ("[T]he district court erred in awarding qualified immunity …. The relevant question here is … whether … a reasonable official would have known that his action was illegal."). In a finding likewise apt here, "[a] reasonable officer, we think, would have to know that

revoking a blind vendor's license in retaliation for such publicly-aired complaints violated the First Amendment." *Id.*

The OMB implemented a partisan agenda by summarily suspending Petitioner Dr. Thomas's medical license in retaliation against his peer-reviewed article on a matter of public concern about vaccination. Under the foregoing precedents and their reasoning, absolute immunity should not apply.

III. The Multi-Factored *Butz v. Economou* Test Is Inadequate to Address Retaliation Against First Amendment-Protected Speech.

The Supreme Court precedent on absolute immunity, *Butz v. Economou*, is nearly a half-century old and predates the epidemic today of government retaliation against those who speak out in criticism of government policies. 438 U.S. 478 (1978). In this era of weaponized government, *Butz* can no longer get the job done in assessing when absolute immunity should apply. The retaliation by the OMB against Dr. Thomas, merely 11 days after the publication of his peer-reviewed medical article, presents an ideal vehicle for revisiting and updating the *Butz* test.

Proximity in timing between speech and retaliation is a well-recognized indicator of an improper motive. *See Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988) ("Given the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision, a jury logically could infer that [plaintiff] was terminated in retaliation for his speech.") (inner quotations omitted). Here, the unusually harsh

discipline of suspending Dr. Thomas's medical license occurred shortly after he published a peer-reviewed article about harm from vaccination. A cause-and-effect could be inferred by a jury.

Yet the *Butz* test is unworkable on this issue, and has led to deep, irreconcilable conflicts among the circuit courts as set forth in the Petition. (Pet. 9-11) *Compare Buser v. Raymond*, 476 F.3d 565, 569 (8th Cir. 2007) (applying absolute immunity to a medical board proceeding) *with DiBlasio v. Novello*, 344 F.3d 292 (2d Cir. 2003) (rejecting absolute immunity for a medical board disciplinary proceeding). This reflects how the *Butz* test is not really the Rule of Law at all.

Butz identified too many amorphous factors to consider in assessing whether to apply absolute immunity, including:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

Cleavinger v. Saxner, 474 U.S. at 202 (citing *Butz v. Economou*, 438 U.S. at 512). These factors all weigh against absolute immunity for medical boards, and even more importantly fail to adequately protect fundamental First Amendment rights.

Only one of the above archaic six *Butz* factors even touches upon the problem of retaliatory infringement on constitutional rights by government, and this

solitary factor is plainly inadequate to fully protect the First Amendment right to speak out candidly. In the context of an abrupt revocation of a professional license as held by Petitioner Dr. Thomas, there are no safeguards to protect the important First Amendment rights at stake. The Ninth Circuit decision below cited *Butz*, without reasoned explanation, for extending absolute immunity to the OMB. *Thomas v. Harder*, 2024 U.S. App. LEXIS 25147, at *2) ("Having analyzed the facts and circumstances of this case in light of the *Butz* factors, we reach the same conclusion [of absolute immunity] here about the members of the Oregon Medical Board (OMB).").

Official retaliation against someone for speaking out or exercising his freedom of religion is repugnant to the U.S. Constitution. Absolute immunity should never protect or encourage such retaliation, and *Butz* should be clarified to ensure legal accountability.

CONCLUSION

For the above reasons and those in the Petition, this Court should grant the Writ for Certiorari.

Respectfully submitted,

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