No. 23-1687

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DR. STEPHEN T. SKOLY, Jr.,
Plaintiff-Appellant
v.
DANIEL J. McKEE, in his official and individual capacities as the Governor of the State of Rhode Island; NICOLE ALEXANDER-SCOTT, in her official and individual capacities as the former Director of the Rhode Island Department of Health; JAMES McDONALD, in his official and individual capacities as the former Interim Director of the Rhode Island Department of Health; UTPALA BANDY, in her official and individual capacities as the current Interim Director of the Rhode Island Department of Health; MATTHEW D. WELDON, in his official and individual capacities as the Director of the Rhode Island Department of Labor and Training; the STATE OF RHODE ISLAND; the RHODE ISLAND DEPARTMENT OF HEALTH; and the RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING.
Defendants-Appellees

On Appeal from the United States District Court for the
District of Rhode Island

BRIEF OF PLAINTIFF-APPELLANT DR. STEPHEN T. SKOLY, JR.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Plaintiff-Appellant requests oral argument and believes it would significantly aid this Court. This appeal presents important questions about the scope of qualified immunity particularly in light of COVID-19 era governmental edicts. Oral argument would allow the Court to explore these issues with counsel.

JURISDICTIONAL STATEMENT

This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331 because the federal law claims arise under the Constitution and statutes of the United States. This action is brought pursuant to 42 U.S.C. § 1983. On July 20, 2023, the District Court granted Defendants' Motion to Dismiss and entered final judgment, disposing of all claims of all parties. Addendum (Add) ___; Joint Appendix (JA) 13. On August 17, 2023, Plaintiff timely filed a notice of appeal. JA 120. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting Defendants' Motion to Dismiss Plaintiff's First Amendment retaliation claim under 42 U.S.C. § 1983 for failure to state a claim against Defendants' Daniel McKee and Nicole Alexander-Scott.
2. Whether the District Court erred in granting Defendants' Motion to Dismiss Plaintiff's Equal Protection and Due Process claims under 42

U.S.C. § 1983 for failure to state a claim against Defendants' Daniel McKee Nicole Alexander-Scott, James McDonald, and Utpala Bandy.

STATEMENT OF THE CASE

1. Dr. Skoly's Dental and Surgical Practice

Prior to October 1, 2021, Dr. Skoly operated Associates in Oral and Maxillofacial Surgery, a private dental and surgical practice in Cranston, Rhode Island since 1988. He and his five surgical assistants treated forty patients a day, excluding emergencies, five days a week. The procedures Dr. Skoly and his staff performed ranged from simple dental extractions to complex surgical procedures including but not limited to, maxillofacial reconstructive surgery, realignment of fractures of the jaw, gunshot wounds, and cancers of the head and neck. In addition to his private practice, which comprised approximately 95% of his patients, Dr. Skoly was retained by the State of Rhode Island to provide oral and maxillofacial services to residents of the State's institutions. JA 17

In this capacity, Dr. Skoly was an oral and maxillofacial surgeon—and for the past 17 years, the only oral and maxillofacial surgeon—

contracted to provide services for residents of the Eleanor Slater Hospital, the State's psychiatric rehabilitative hospital operated by the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities & Hospitals. Eleanor Slater is an institutional facility for patients with acute and long-term physical illnesses, and patients with mental health conditions. It contains a unit that houses psychiatric inmates confined under the authority of the Rhode Island Department of Corrections. JA 17

Since 1990, Dr. Skoly was also the only oral and maxillofacial surgeon at the Adult Correctional Institute ("ACI"), the State's penitentiary complex in Cranston. He performed 10 to 20 procedures during his weekly visits to ACI. Complex surgeries required Eleanor Slater and ACI residents to be transported to the more sophisticated operating theatre at Dr. Skoly's Cranston oral and maxillofacial facility. Dr. Skoly serviced an institutionalized patient in his Cranston office about every day. The institutionalized patients could not travel to the Cranston office by themselves. They needed to be accompanied by facility staff members. JA 18

Dr. Skoly designed his Cranston dental facility to include a large elevator to accommodate the type of gurney transported in an ambulance so that patients being brought from Eleanor Slater Hospital could easily and safely access the oral and maxillofacial operatories. In treating the residents of Eleanor Slater and ACI, Dr. Skoly worked in prolonged and close physical contact with the institutions' health care workers and other employees. They were accustomed to this work environment and trained to utilize the strictest measures of infection control even prior to the pandemic. JA 18

2. **During the Pandemic, Dr. Skoly and His Staff Continued to Serve His Community**

Despite the growing fears surrounding COVID-19 and the inception of the pandemic, Dr. Skoly and his team continued to serve his patients and the community just as he had done before the virus. Dr. Skoly and his staff were well versed on infection control recommendations and safety precautions in the healthcare space long before the onset of the pandemic as compliance with Center for Disease Control Infection Control guidelines and Occupational Safety and Health Association ("OSHA") training were

mandatory under the Rhode Island Dental Practice Act in order to maintain a license. Wearing a surgical mask has always been second nature to a dental professional particularly in the environment where a dental surgical procedure may result in rebound splatter or spray. Operating in close proximity to both patient and staff as well as over an open mouth, where saliva and loose particles may be present is the known and accepted setting for anyone practicing dentistry and is the only way that dental procedures can be performed. Regardless of pre-existing infection control practices, Dr. Skoly and his staff engaged in scrupulous masking and other hygiene requirements as well as supplemented these procedures with safety precautions and guidelines recommended by the RIDOH Provider Advisory, the CDC Health Advisory, OSHA, the American Dental Association and the American Association of Oral and Maxillofacial Surgeons. Additionally, daily meetings were held with staff for educational purposes and to confirm compliance with implemented practices. To date, Dr. Skoly is not aware of any patient who tested positive for COVID-19 because of receiving dental treatment at his office. JA 19

3. **The Temporary Emergency Regulation and October 1, 2021 Compliance Order**

a. The First Temporary Emergency Regulation

On August 17, 2021, the Governor, through the RIDOH, promulgated a temporary emergency regulation 216-RICR-20-15-8 ("Temporary Emergency Regulation") mandating that "all health care workers and health care providers be vaccinated against COVID-19 by October 1, 2021." JA 19

The Temporary Emergency Regulation applied to Dr. Skoly, who, under Rhode Island law, is a "health care provider." Although licensed to provide healthcare services, Dr. Skoly is not a "healthcare worker," who is someone who works in a healthcare facility, not a private dental office such as Dr. Skoly's. The justification for the vaccine mandate was the protection of "vulnerable populations." As stated on Rhode Island's government website:

> Health care workers and providers interact with Rhode Island's most vulnerable populations: individuals who are immunocompromised and individuals with co-morbidities. These vulnerable populations are at risk for adverse health outcomes from COVID-19. As COVID-19 positive individuals are often asymptomatic or presymptomatic,

> health care workers and health care providers may unintentionally spread infection to these vulnerable patients. In order to protect these vulnerable populations, RIDOH is mandating that all health care workers and health care providers be vaccinated against COVID-19 by October 1, 2021.

The vaccine mandate permitted medical exemptions for severe or immediate allergic reaction to the vaccine, or a component of the vaccine, or a history of myocarditis or pericarditis. No other medical exemption was permitted. JA 20

As a condition of continued employment, the recipient of a medical exemption was "required to wear a procedure mask or higher-grade mask (*e.g.*, KN95 or N95) in the course of their employment." Other than masking, the vaccine mandate placed no restriction on the medically exempt worker's presence in the facility or the physical interaction between the vulnerable patient and the medically exempt worker. JA 20

The vaccine mandate allowed the N95 masked medically exempt worker to interact with a patient just as a vaccinated worker would. Between October 1, 2021, and March 11, 2022, the Defendants medically

exempted between 299 and 365 Rhode Island health care workers from the vaccine mandate. JA 20-21

b. Dr. Skoly's Decision to Not Be Vaccinated

In 2006, Dr. Skoly contracted Lyme disease, which caused two attacks of Bell's Palsy. The palsy paralyzed the muscles around Dr. Skoly's eyes. The muscles around his right eye still display a mild residual droopiness that worsens when Dr. Skoly is experiencing fatigue. Dr. Skoly was aware of medical literature demonstrating an association between COVID-19 vaccination and the onset of Bell's Palsy. After consulting with his doctor and making a risk-benefit analysis that took into consideration his naturally acquired immunity as well as his history of Bell's Palsy, Dr. Skoly determined that it was in his medical best interests not to get vaccinated at that time. JA 21

In September 2021, Dr. Skoly tested positive for IgG COVID-19 antibodies. After consulting with his doctor and making a risk-benefit analysis that took into consideration his naturally acquired immunity as

well as his history of Bell's Palsy, Dr. Skoly determined that it was in his medical best interests not to get vaccinated at that time. JA 21

Dr. Skoly also pleaded that the State was violating his right to Due Process of Law by refusing to issue him a medical exemption based on his history of Bell's Palsy paralysis and his prior COVID infection. That Bell's Palsy is a risk factor for COVID-19 vaccination has been documented in the scientific literature, including the CDC's VAERS Report. Dr. Skoly feared that vaccination would re-activate the Bell's Palsy paralysis that, according to the scientific literature, is dormant in his body. In the medical opinion of Dr. Pappas, cited in the Complaint, Dr. Skoly's fear was "well-grounded in the existing science." Dr. Pappas opined, "In view of Dr. Skoly's known history of Bell's Palsy, his confirmed natural immunity from prior COVID-19 infection and known protection it provides, the potential debilitating effect a recurrent Bell's Palsy incidence can produce, and the recently observed increased incidences of Bell's Palsy related to COVID-19 vaccines, it is my medical opinion that Dr. Skoly should not get a COVID-19 vaccine. The potential significant harm to Dr. Skoly outweighs any benefit

vaccination would incur to him or any patient he treats, particularly if he adheres to the strict masking protocols of dental surgery." The Complaint further argued that, because of his naturally acquired immunity, the infection risk that Dr. Skoly presented to a vulnerable patient was no greater than that presented by a vaccinated doctor, certainly smaller than that presented by the unvaccinated worker (exempt for medical or religious reasons), and drastically smaller than that presented by the COVID-19 infected health care workers being permitted to work in close physical proximity to patients (because of the shortage created by not permitting people like Dr. Skoly to practice medicine). JA 26-27

On September 30, 2021, Dr. Skoly discussed his decision with a journalist, who reported the conversation in The Providence Journal. JA 21

c. The Compliance Order

On October 1, 2021, pursuant to Rhode Island Statutes § 23-1-20, Defendant Alexander-Scott issued Dr. Skoly a Notice of Violation and Compliance Order. The Notice of Violation and Compliance Order made the factual finding that, "On October 1, 2021, the Providence Journal

reported that Respondent [Dr. Skoly] stated that (a) he was not vaccinated, (b) did not meet the medical exemption incorporated in the regulation, and that he intended to directly engage in patient care or activity in which he or others would potentially be exposed to infectious agents that can be transmitted from person to person." Based on the above finding, the Notice of Violation and Compliance Order directed Dr. Skoly "to cease professional conduct as a health care provider … unless and until he has complied with the terms and conditions of 216-RICR-20-15-8." JA 42-43

Dr. Skoly complied. He closed his private practice (two hundred patients a week) and ceased serving the residents of Eleanor Slater and ACI. Dr. Skoly terminated the employment of his five surgical assistants and other staff. Hoping one day to be allowed to rehire a staff and resume practice, he continued to pay his $7,000 monthly rent and other overhead. JA 21-22

In support of the Notice of Violation and Compliance Order, Defendants caused ACI to post at several locations within its buildings a

poster of Dr. Skoly with the warning that he was not to be permitted on ACI's premises. JA 22

4. Events Between the Notice of Violation and Compliance Order and Its March 11, 2022 Rescission

a. State Officers Suspend Dr. Skoly, and Maintain the Suspension Until March 2022, as Punishment for His Publicly Questioning the Vaccine Mandate

Per the governing statute, Rhode Island Statutes § 23-1-20, the Notice of Violation and Compliance Order includes a proposed Compliance Order. The Order does not become permanent ("effective" in the words of the statute) unless found to have been properly issued after an administrative hearing. JA 22

After his October 1, 2021 suspension, Dr. Skoly promptly commenced a Rhode Island administrative proceeding to prevent the proposed order from becoming effective. Among other things, Dr. Skoly argued that he should be allowed to practice while unvaccinated, just like the medically exempt health workers who were being allowed to practice while unvaccinated so long as they wore N95 masks in the course of treating patients. Defendants Alexander-Scott, McDonald and McKee were urged to

review Dr. Skoly's request in the context of Rhode Island's critical shortage of health care providers and the suspension's adverse impact on Dr. Skoly's numerous patients (including those in the middle of treatment or at the state institutions), many of whom were unable to obtain alternative dental services. JA 27

Dr. Skoly requested that he be qualified as medically exempt based on his medical history of Bell's Palsy, as the vaccine was linked to Bell's Palsy paralysis. He explained that he did not present any greater danger of infection to vulnerable patients than the unvaccinated medically exempt worker. His dental practice implemented the extreme masking and safety precautions required by the dental profession, he explained and his office was not a health care facility treating presumptively COVID-19 positive patients. Dr. Skoly's practices had succeeded in fully protecting his vulnerable patients from infection in the past, so they could reasonably be relied upon to protect his vulnerable patients in the future. Dr. Skoly further explained that he was fully N95 masked, just like the several hundred unvaccinated medically exempt (and, it was noted, the infected

but vaccinated health care workers allowed to work due to the health practitioner shortage). JA 23

And Dr. Skoly explained that he had natural immunity. Because of his prior infection, he had a positive level of IgG Covid-19 antibodies. The scientific literature was unequivocal that, as a COVID-recovered individual, the risk of infection he posed to a vulnerable patient was no greater than the risk posed by a vaccinated doctor. JA 24

Defendants Alexander-Scott, McDonald and McKee rejected Dr. Skoly's arguments. Dr. Skoly was told, with the knowledge and approval of Defendants Alexander-Scott, McDonald, and McKee, that the issue was not about safety, science or medicine. Rather, Dr. Skoly was informed that, because he had "opened his big mouth" by speaking to the press, he had made his suspension a political issue, not a medical one. Therefore, with the knowledge and approval of Defendants Alexander-Scott, McDonald and McKee—who could have rescinded the Notice of Violation and Compliance Order—Dr. Skoly was told that his choice was to submit to vaccination or to stay suspended. JA 24

5. **The Complaint and Motion to Dismiss**

On February 4, 2022, Dr. Skoly commenced this lawsuit. JA 1 Dr. Skoly argued that, by suspending him from practice, the state actors were violating his right to the Equal Protection of Law and Due Process. Upon Dr. Skoly's motion, the Court scheduled a Preliminary Injunction Hearing for February 23, 2022. JA 5 On February 11, 2022, State Defendant McKee extended the Temporary Emergency Order, which had been set to expire on February 13, to March 13, 2022. The substance of the Extended Temporary Emergency Order was identical to the original Temporary Emergency Order.

On February 18, 2022, Dr. Skoly filed an Amended Verified Complaint to address the extension of the Emergency Order. Based upon the new filing, the Court adjourned the Preliminary Injunction Hearing to March 15, 2022. On March 11, 2022, Defendants McDonald and McKee proposed a permanent vaccine regulation ("Proposed Permanent Vaccine Regulation") to replace the Extended Temporary Emergency Regulation. JA 91-94

The Proposed Permanent Vaccine Regulation accepted two core arguments that Dr. Skoly and his counsel had advanced in urging that Dr. Skoly be allowed to practice while unvaccinated. First, the Proposed Permanent Vaccine Mandate applied only to "health care workers," not "health care providers" who worked in a private practice, such as Dr. Skoly. By excluding private dental practices from the vaccine mandate, Defendants implicitly acknowledged, as Dr. Skoly and counsel had argued, that a vaccine mandate was not necessary for private dental practices because of the already extreme safety precautions in place at such practices. Second, the Proposed Permanent Vaccine Mandate permitted the health care worker to choose to be vaccinated or N95 masked. The proposed language was "health care workers [are] to be up to date with a SARS-CoV-2 vaccine OR wear a medical grade N95 mask when the [COVID-19] prevalence rate is high" (emphasis added). "High" prevalence was defined as "greater than fifty (50) cases per one hundred thousand (100,000) people per week, "as reported by the Department." No vaccination or masking

would be required when the COVID-19 prevalence rate was low—less than fifty cases per one hundred thousand people per week.

That patient safety would be maintained by allowing workers to be either vaccinated or N95 masked is the premise of the Equal Protection argument advanced by Dr. Skoly to this Court: Since patients are protected by N95 masking, it was a denial of equal protection to allow some unvaccinated, N95 masked workers to be employed (the medically exempt) as well as COVID positive workers, while denying employment to the unvaccinated, N95 masked Dr. Skoly.

In promoting the "vaccination or N95 masking" rule, Defendants McDonald and McKee again used legal language that Dr. Skoly had advanced to this Court. Defendants' cost benefit analysis in support of the "vaccination or N95 masking" rule explained that "Individuals' beliefs must be respected and thus vaccination mandates must not be imposed capriciously. Thus, a reasonable alternative to being up to date [with vaccines] is to wear a medical grade N95 mask …" JA 52, 61

Arbitrary and capricious is how the Complaint described the Defendants' continued suspension of a Dr. Skoly willing to be N95 masked. Based on Defendants' admission that the continued suspension of Dr. Skoly constituted "capricious" action on their part, on March 3, 2022, Dr. Skoly moved for a TRO to resume practice immediately. Defendants McDonald and McKee opposed the motion. They claimed that when talking about acting "capriciously," they were speaking prospectively only, and they had no intent to describe a present reality.

Defendant McKee's and McDonald's opposition to Dr. Skoly's immediate reinstatement continued the deprivation of Dr. Skoly's rights. Defendants' opposition was at odds with their written acknowledgement of the arbitrariness of denying the ability to practice to unvaccinated but N95 masked health care workers, like Dr. Skoly. The only logical explanation of Defendants' opposition was a continuation of their desire to punish Dr. Skoly for publicly opposing the vaccine mandate.

The Court merged consideration of the TRO motion into the pending March 15th Preliminary Injunction Hearing. At the March 15th hearing, Dr.

Skoly planned to introduce testimony about natural immunity from two experts, an Emergency Room doctor who had treated hundreds of COVID-19 patients, and a renowned researcher and CDC-award recipient. These experts would have testified that, based on the unequivocal science as currently understood, COVID-recovered immunity is more long-lasting, and more effective against more variants, than vaccination immunity, so there was no scientific basis to require that Dr. Skoly be vaccinated. They would have testified further that Dr. Skoly always presented a lower risk of infecting his patients than a vaccinated healthcare worker who was not COVID-recovered, than an unvaccinated not naturally immune healthcare worker, or than a COVID-19 infected healthcare worker permitted (while N95 masked) to work in close physical proximity to patients. JA 26-27

On March 11, 2022, four days prior to the scheduled hearing, Defendants replaced the Extended Temporary Emergency Order with the New Temporary Emergency Rule, "Requirement for Protection Against COVID-19 for Health Care Workers in Licensed Health Care Facilities." JA 91

The New Temporary Emergency Rule adopted the language of the Proposed Permanent Rule. As applied to practitioners such as Dr. Skoly, the vaccine mandate had been rescinded.

On March 11, 2022, Dr. Skoly and Defendants ended the state administrative proceeding that was determining the validity of the Notice of Violation and Compliance Order. Per a stipulation, Defendants withdrew the Compliance Order ("The Compliance Order is withdrawn by RIDOH"), and Dr. Skoly withdrew his request for an administrative hearing.

The proposed Compliance Order had not, and would never, become "effective" per the governing Rhode Island statute. Dr. Skoly began the laborious process of re-assembling a staff to resume practice. Dr. Skoly withdrew his motion for a preliminary injunction.

In April 2022, Dr. Skoly moved to file a Second Amended Complaint to, among other things, bring to the Court's attention the terms of what was thought to be the final vaccine mandate (the March 2022 New Temporary Emergency Rule). The Court approved the motion on June 2, 2022.

In the interim, however, on May 25, 2022, Rhode Island promulgated its permanent COVID vaccine mandate ("Permanent Vaccine Mandate"), effective June 15, 2022. 216-RICR-20-15-7: "Immunization, Testing, and Health Screening for Health Care Workers". JA 95-107 As did the New Temporary Emergency Rule and the Proposed Permanent Vaccine Regulation, the June 2022 Permanent Vaccine Mandate applied to "health care workers" only, not "health care providers" such as Dr. Skoly. 216-RICR-20-15-7.6.1(B). And, as far as Dr. Skoly may ever be considered a "health care worker" if he works physically at the premises of the "health care facilities" Eleanor Slater or ACI, the Permanent Vaccine Regulation required either vaccination or, during high COVID prevalence, N95 masking. 216-RICR-20-15-7.6.1(B)(1) and (2).

However, the Permanent Vaccine Regulation added a newly formulated, not-publicly-discussed third section: "In accordance with the [Centers for Medicare and Medicaid Services] (CMS) 86 FR 61555, all Medicare and Medicaid certified providers, suppliers, and healthcare workers are required to receive the primary series (e.g., two (2) doses of

Pfizer or Moderna, or one (1) dose of Johnson & Johnson) of a COVID-19 vaccine." 216-RICR-20-15-7.6.1(B)(3). The CMS interim final rule, 86 FR 61555, allowed for limited medical exemptions, not including Bell's Palsy.

Thus, for CMS facilities, the Permanent Vaccine Regulation's new third section, 7.6.1(B)(3), rescinded the "vaccination or N95 masking" rule and reimposed the arbitrary discrimination that violates Equal Protection. This rule prevented Dr. Skoly from resuming his practice at the physical premises of the "Health Care Facilities" Eleanor Slater and ACI.

As did the previous Rhode Island mandate, the new third section of the Permanent Vaccine Mandate irrationally discriminated between different types of unvaccinated health care workers—the preferred unvaccinated (those with accepted medical exemptions) were allowed to wear N95 masks and work, and the unpreferred (those with a not accepted medical condition, or natural immunity, or a religious belief) were compelled to suffer loss of livelihood however willing to be N95 masked.

When the parties agreed that the proposed Order would never become "effective", Dr. Skoly stipulated to withdraw his request for a

hearing in exchange for Defendants' agreement to withdraw the proposed Order. To Dr. Skoly's detriment, Defendants did not honor the agreement. The "licensing" section of Defendants' RIDOH website continued to contain a page entitled "Find Disciplinary Actions and Orders." The website page identifies Rhode Island professionals who have been the subject of final disciplinary action. *Proposed* actions are not included on this website: "Actions/orders that are under investigation are not posted." Nonetheless, up until the eve of the hearing on the Motion to Dismiss on July 20, 2023, the website posted the October 1, 2021 Notice of Violation and Compliance Order as a final disciplinary action against Dr. Skoly.

Defendants' posting was false. The Compliance Order against Dr. Skoly was proposed, never final or (in the statute's words) "effective"; and the proposed order was, per the stipulation ending the administrative hearing, withdrawn. Defendants' false posting has caused financial and reputational harm to Dr. Skoly. The Defendants identify Dr. Skoly as a practitioner who has been subject to professional discipline. Patients seeking professional assistance visit this website to learn about

practitioners. The false information about Dr. Skoly caused the viewer to think that Dr. Skoly is not a reputable practitioner and deterred that viewer from choosing Dr. Skoly as his dental surgeon. Insurance carriers have visited the website and informed Dr. Skoly that the adverse information listed there requires that they not reimburse him for services he has performed.

Prior to the hearing on Defendants' Motion to Dismiss, various matters became moot or were withdrawn by Dr. Skoly. Count IV alleging violations Due Process related to Dr. Skoly's claims for unemployment benefits was voluntarily dismissed. JA 118-119 Since the State rescinded its Regulation restricting Dr. Skoly's practice, and he has been allowed to work unfettered by his vaccine status, the injunctive relief issue became moot.

6. The District Court Decision

At the conclusion of the hearing of Defendants' Motion to Dismiss, the trial court issued a bench decision. JA 121-177 She addressed each of the remaining three counts which sought damages against State officials in

their personal capacity, noting that monetary damages are unavailable against the State Defendants in their official capacity. See *Will v. Michigan*, 491 U.S. 58 (1989). JA 169

With regard to each Count, the Court found that the Defendants enjoyed either absolute or qualified immunity, citing *Goldstein v. Galvin*, 719 F.3d 16 (1st Cir. 2013). She found that since the State officials relied upon CDC guidelines regarding vaccination, there was no clearly established constitutional right which Defendants could have violated. JA 171 As for the retaliation claim, the Court found that the claim was not clearly made in the Third Amended Complaint, but even if it had, again qualified immunity governed. JA 174 The Court found that the posting of the Notice of Violation was government speech and protected. She dismissed any argument that the Notice was false or misleading, or done in bad faith with malicious intent. JA 174-76 As for the post-March 11, 2022, failure to remove the posting, the Court stated:

> Although it is true that the notice remained on the website for some six months after withdrawal of the violation, Dr. Skoly points to no legal authority that requires the charging documents for an

> enforcement action must be removed from an agency's website within a certain period of time. JA 176

SUMMARY OF THE ARGUMENT

This case started as an effort by Dr. Skoly to be allowed to return to the practice of oral surgery without the threat of adverse action by the RIDOH. The State Defendants backed off twice on the eve of a District Court hearing: On March 11, 2022, RIDOH rescinded its COVID-19 regulation and dismissed the Notice of Violation against Dr. Skoly. This mooted the need for a hearing on the preliminary injunction which was to occur on March 15. However, RIDOH kept the Notice of Violation on its website for over 6 months after dismissing the Compliance Order. Then, RIDOH issued a new regulation which still had some restrictions on unvaccinated health care providers entering health care facilities; these restrictions continued to impact Dr. Skoly's ability to practice in State facilities. Worse, RIDOH refused to remove the Notice of Violation from its website, which had the effect of Dr. Skoly losing both patients and insurance reimbursements. Again, on the eve of the July 20, 2023, hearing

on the Motion to Dismiss, RIDOH rescinded the latest regulation and permitted Dr. Skoly to practice unfettered in health care facilities.

This leaves the claims for damages under Counts, I, II and III of the amended complaint. Simply put, Dr. Skoly suffered significant economic harm because of the constitutional violations of various Defendants.

Under Count I, Dr. Skoly alleges that the Rhode Island's COVID vaccine mandate in effect from October 1, 2021 to March 11, 2022 violated equal protection by allowing the unvaccinated, N95 masked, medically exempt workers to keep their jobs while forcing unemployment on the N95 masked, unvaccinated Dr. Skoly.

Count II alleges that RIDOH's actions to summarily bar him from practicing his profession, in violation of its own laws, deprived him of his constitutionally protected liberty. It is well established that a physician enjoys a protected property interest in a license to practice medicine, and that the revocation of the license of a practicing physician must comport with the requirements of procedural due process including notice of the charges and an opportunity to be heard. Dr. Skoly received neither notice

nor an opportunity to be heard before being summarily ordered to cease his practice of dentistry. And while Plaintiff recognizes that in cases where there exists a threat that requires "immediate action to protect the health, welfare, or safety of the public or any member of the public," R.I. Gen. Laws § 23-1-21, the State can order an immediate cessation of practice with a hearing to occur later, here, Rhode Island expressly declined to make a finding that Dr. Skoly's practice constituted such a threat. See JA 108-9 Consequently, prior to suspending Dr. Skoly from the practice of dentistry, Rhode Island was obliged to provide him with sufficient notice and an opportunity to be heard. Because it failed to do so, it violated Dr. Skoly's constitutional right to due process of law.

Finally, Count III alleges that various State Defendants retaliated against Dr. Skoly because he spoke publicly about the COVID-19 vaccination. Specifically, Dr. Skoly pointed out the illogical of the vaccine mandate; that it made no exceptions for the risk of harm to people like him who have suffered from Bell's Palsy, and that it did not recognize natural immunity. For failing to tow the party line, Dr. Skoly was targeted with an

economic death sentence. The tactic worked, no one else dared to speak publicly against the vaccine mandate for fear of retaliation. Until science and facts caught up to the State, and they rescinded the mandate.

STANDARD OF REVIEW

When reviewing a motion to dismiss, this Court will look to those facts as alleged in the complaint, "supplemented by certain materials the [D]efendants filed in the district court in support of their motion to dismiss." *Constr. Indus. & Laborers Joint Pension Tr. v. Carbonite, Inc.*, 22 F.4th 1, 4 (1st Cir. 2021) (quoting *Mehta v. Ocular Therapeutix, Inc.*, 955 F.3d 194, 198 (1st Cir. 2020)). This includes: "facts alleged in the complaint and exhibits attached thereto," *Freeman v. Town of Hudson*, 714 F.3d 29, 35 (1st Cir. 2013), and materials "fairly incorporated" in the complaint or subject to judicial notice. *Rodi v. S. New Eng. Sch. of L.*, 389 F.3d 5, 12 (1st Cir. 2004).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face.'" *Mehta*, 955 F.3d at 205 (qu*oting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

This Court reviews a district court's dismissal of a complaint under Rule 12(b)(6) *de novo*. *Lowe v. Mills*, 68 F.4th 706, 714 (1st Cir. 2023); *see also, Douglas v. Hirshon*, 63 F.4th 49, 54-55 (1st Cir. 2023). The Court should "take the complaint's well-pleaded facts as true, and we draw all reasonable inferences in [the plaintiffs'] favor." *Frese v. Formella*, 53 F.4th 1, 5 (1st Cir. 2022) (*quoting Barchock v. CVS Health Corp.*, 886 F.3d 43, 48 (1st Cir. 2018)).

ARGUMENT

1. Dr. Skoly stated a valid Equal Protection Claim because he was intentionally treated differently from others similarly situated and that there was no rational basis for the difference in treatment

This Court has most recently re-stated the standard for an Equal Protection claim under Fourteenth Amendment to the United States Constitution. In *Back Beach Neighbors Comm. v. Town of Rockport*, 63 F.4th 126 (1st Cir. 2023), thus Court stated:

> As the Supreme Court has recognized, a plaintiff can bring an equal protection claim as a "class of one" even where the plaintiff does "not allege membership in a class or group." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). In a class-of-one claim, the plaintiff must show that "she has been

> intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id*.
>
> To bear their burden of showing that others are "similarly situated," class-of-one plaintiffs must "identify[ ] comparators who are 'similarly situated in all respects relevant to the challenged government action.' " *McCoy v. Town of Pittsfield*, 59 F.4th 497, 507 (1st Cir. 2023) (quoting *Gianfrancesco v. Town of Wrentham*, 712 F.3d 634, 640 (1st Cir. 2013)). "Plaintiffs must show an 'extremely high degree of similarity' between themselves and those comparators." Id. (*quoting Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007)). Although an "[e]xact correlation" is not required, *Cordi-Allen*, 494 F.3d at 251 (alteration in original) (*quoting Tapalian v. Tusino*, 377 F.3d 1, 6 (1st Cir. 2004)), class-of-one plaintiffs must demonstrate that the comparators "have engaged in the same activity vis-à-vis the government entity without such distinguishing or mitigating circumstances as would render the comparison inutile," *id*.
>
> Dr. Skoly has alleged sufficient facts to survive a motion to dismiss.

For years, long before COVID, Dr. Skoly treated prisoners, mental health patients, and people who could not afford to pay. JA 17-18 Dr. Skoly and his staff continued treating patients (including the most vulnerable ones, such as prisoners and mental health patients) even when COVID-19 lockdowns began in March 2020. The treatments were done in person, which, of course, is the only way that dental procedures can be performed. In order to protect his patients, Dr. Skoly and his staff engaged in

scrupulous masking and other hygiene requirements. Not one of Dr. Skoly's patients contracted COVID as a result of visiting his office, nor did any of Dr. Skoly's staff contract the disease from Dr. Skoly or any of the patients. However, in November of 2020, Dr. Skoly came down with COVID-19. After his recovery and appropriate quarantine period, Dr. Skoly returned to work.

The comparator for Dr. Skoly are the over 1,153 healthcare workers who were permitted by RIDOH to work in health care facilities while the Emergency Regulation was in effect. In a Cost Benefit Analysis conducted by RIDOH issued in February 2022, there were 299 medical exemptions issued by RIDOH, and some 854 healthcare workers who were either unvaccinated or whose status was unknown. Specifically, these were individuals, that RIDOH had determined: "**are currently employed at a health care facility and unvaccinated against COVID-19**. (See JA 48-51, *emphasis added*). This is important because the trial judge seemed to be under the impression that these unvaccinated workers were exempt from

the regulation since they worked remotely and had no contact with patients.

> Because if somebody has, say, a nursing license and they're doing telehealth, that was one of the things that was exempted, right? Because you can do telehealth without stepping foot in a facility.

JA 149-150

The State made no effort to explain why none of these unvaccinated workers received a Notice of Violation, and why only Dr. Skoly did. The State provided no rational basis for permitting unvaccinated workers to work directly with patients on the basis of certain medical exemptions, but not on the basis of the medical exemption sought by Dr. Skoly.

Another glaring irrationality on the basis of the State's actions was the decision by the Governor and RIDOH to permit COVID positive healthcare workers to work directly with patients at the same time Dr. Skoly was prohibited from doing so. (JA 148-151; Third Amended Complaint, JA 35) Again, the State provided no rational explanation for distinguishing between currently COVID infected healthcare workers being permitted direct access to patients in a healthcare facility, but

denying a naturally immune Dr. Skoly to be prohibited from doing the same or even working in his private practice which was deemed a healthcare facility.

The trial judge attempted to make a distinction between allowing based upon urgency.

> You're comparing apples and oranges. Because I believe, and I've been through over the last three years, like we all have, that the issue was it had to be a facility that was at crisis staffing levels and providing care -- necessary care. So, for example, I don't think that under that sort of analysis they would have allowed a cosmetic surgeon to practice but perhaps a heart surgeon. Do you know what I'm saying?

JA 166. Dr. Skoly is anything but a "cosmetic surgeon"; he performs urgent surgical procedures that affect patients critical and sometimes life-saving interventions. These procedures include maxillofacial trauma (broken jaws), gunshot wounds to the head and neck, infections, cancer surgery and jaw reconstruction. Additionally, he consults with the state of Rhode Island medical examiner's office as a forensic consultant. He was the only oral surgeon in the State to service some of the most vulnerable populations, including those in the State mental health hospital and state

prison. Dentists were declared essential workers by the State. The Governor and RIDOH officials consciously and purposefully permitted these patients to suffer while they pursued their vendetta against Dr. Skoly. There is no rational basis for that conduct.

2. <u>Dr. Skoly was denied his Due Process Rights when he was deprived of his right to practice medicine without notice and an opportunity to be heard.</u>

Dr. Skoly has made sufficient allegations that Rhode Island's actions to summarily bar him from practicing his profession, in violation of its own laws, deprived him of his constitutionally protected liberty. It is well established that "a physician enjoys a protected property interest in a license to practice medicine," *Lowe v. Scott*, 959 F.2d 323, 334 (1st Cir. 1992), and that "the revocation of the license of a practicing physician must comport with the requirements of procedural due process … [including] notice of the charges and an opportunity to be heard," *id*. at 335.

Dr. Skoly' due process rights were violated first when he received neither notice nor an opportunity to be heard before being summarily ordered to cease his practice of dentistry. And while Dr. Skoly recognizes

that in cases where there exists a threat that requires "immediate action to protect the health, welfare, or safety of the public or any member of the public," R.I. Gen. Laws § 23-1-21, the State can order an immediate cessation of practice with a hearing to occur later; here, Rhode Island expressly declined to make a finding that Dr. Skoly's practice constituted such a threat. Consequently, prior to suspending Dr. Skoly from the practice of dentistry, Rhode Island was obliged to provide him with sufficient notice and an opportunity to be heard. *Lowe*, 959 F. 2d at 335. Because it failed to do so, it violated Dr. Skoly's constitutional right to due process of law.

Which leads to the second manner in which Dr. Skoly was deprived of his due process rights; Director Alexander-Scott's refusal to refer the hearing on the Notice of Violation and Compliance Order to the State's Board of Examiners in Dentistry ("Dental Board")

The Decision of the Administrative Hearing Officer bears this out. In refusing to permit Dr. Skoly to return to work, the hearing officer stated:

> The Compliance Order found that Respondent was in violation of the Regulation and subject to disciplinary action pursuant to 216-RICR-

> 40-05-2.15.1(A)(24) which is the professional licensing regulation for dentists.

JA 80. But the matter was never referred to the Dental Board as required by law R.I. Gen. Laws § 5-31.1-11. Instead, the Department took the position that it had the power to make the Notice of Violation effective and restrict Dr. Skoly's right to practice even before a hearing took place, and even before it became final. By citing to 216-RICR-40-05-2.15.1 (A) (24) as the basis for which Dr. Skoly was subject to disciplinary action by the RIDOH for the Notice of Violation and Compliance Order issued, RIDOH circumvented proper due process procedure by never referring Dr. Skoly's matter directly to the Board of Examiners in Dentistry. This is the only regulatory body that retains jurisdiction over Dr. Skoly's ability to practice dentistry in the State and has the authority to investigate and substantiate claims of unprofessional conduct. R.I. Gen. Laws § 5-31.1-4

Glaringly absent from the Hearing Officer's decision is the State law which governs Dr. Skoly's license to practice dentistry in Rhode Island is governed by the jurisdiction of the Board of Examiners in Dentistry. The Dental Board is made up of a combination of other Rhode Island licensed

dental practitioners and public members who are charged with the oversight of all licensed dental professionals in that State. In accordance with R.I. Gen. Laws § 5-31.1-4(2), the board of examiners in dentistry has the following duties and powers:

> To investigate all complaints and charges of unprofessional conduct against any licensed dentist, dental hygienist, DAANCE-certified maxillofacial surgery assistant, or limited registrant and to hold hearings to determine whether those charges are substantiated or unsubstantiated;

Rhode Island law purposefully sets forth a clear and concise process and procedure regarding the investigation of claims of unprofessional conduct by a licensed dentist, just like it does for all other licensees, to ensure that the fundamental rights of due process of the licensee are not violated. Ignoring the law and Dr. Skoly's Due Process rights, the DOH never referred this claim of unprofessional conduct to the Dental Board and made up an arbitrary process as it went along. The DOH further maintained that although Dr. Skoly was prohibited from returning to practice, his license was at all times in good standing. Without limiting, suspending or revoking his license, the DOH had no right to arbitrarily prevent Dr. Skoly

from working. The DOH also lacked authority to rely on 216-RICR-40-05-2.15.1(A)(24) for disciplinary action against Dr. Skoly when this authority was granted solely to the Board under the Dental Practice Act, R.I. Gen. Laws § 5-31.1-4(5) which unequivocally states:

> The board of examiners in dentistry has the following duties and powers: *to direct the director* to revoke, suspend, or impose other disciplinary action as to persons licensed or registered under this chapter. Conversely, the Director has the duty and power to deny licenses and registrations, to revoke, suspend, or discipline licensees when done so in accordance with the provisions of the Dental Practice Act, R.I. Gen. Laws § 5-31.1-5(6).

Analogous to telling a driver charged with DUI they are prohibited from driving, in order to do so the State must revoke their license to maintain that jurisdiction. Similarly, telling a night club it can no longer serve alcohol, the Department of Business Regulation must suspend or revoke the liquor license to enforce such sanction. Not only was Dr. Skoly denied the right to an investigation before the licensing Board governing his right to practice but he was prohibited from working while having a valid license to do so. Multiple attempts to seek clarification from the DOH on the administrative process being followed were ignored.

The trial judge found that there was no due process violation. She acknowledged that the terms of the Notice of Violation specifically state the director may give notice of the alleged violation to the person responsible for it, and that the notice does not mature into a compliance order until after a hearing, or if no hearing is requested, after ten days. JA 175 Since Dr. Skoly asked for a hearing, the Compliance Order did not become final. The only other way to enforce a compliance order without a hearing is under the immediate compliance order under R.I. Gen. Laws § 23-1-21. The State conceded it did not proceed against Dr. Skoly under that statute. Presumably, if RIDOH believed Dr. Skoly to be such an imminent risk of harm to the public health, they would have proceeded under that statute, and immediately revoked his license to practice but they did not. The State also ignored procedure set forth in R.I. Gen. Laws § 5-31.1-12 which effectively states that if the accused requests a hearing on allegations of unprofessional conduct, a specification of charges of unprofessional conduct against the licensee or limited-registration holder shall be *prepared by* the investigating committee of the Dental Board and a copy served upon

the accused, together with notice of the hearing, as provided in R.I. Gen. Laws § 5-31.1-13. A hearing on the charges will then be scheduled for a hearing before the hearing committee of the board.

Had this matter been appropriately referred to the correct regulatory board, here the Dental Board, all notices should have been prepared and sent to Dr. Skoly by and through the Dental Board. The Court dismissed these concerns but focusing on whether there was any dispute that Dr. Skoly was out of compliance with the Emergency Regulation.

> Here, Dr. Skoly requested a hearing, so he claims there was never an operative compliance order. But the notice does indicate that he has a right to request a hearing and that it could become a final compliance order.
> The DOH does not dispute that the October 1, 2021 compliance order was not final, because Dr. Skoly did seek to appeal it through a hearing. This isn't accurate either, as Dr. Skoly admitted he was not vaccinated pursuant to the emergency regulation.

JA 175. But this logic puts the cart before the horse; State law and regulations provide that an accused health care worker has the right to contest a compliance order, and that the order does not become effective until a final hearing, unless it is an emergency order. There is no third way.

If there were, the procedural safeguard built into State law would be meaningless. Otherwise, the State could issue a compliance order, and effectively prohibit a doctor from practicing for an indeterminate amount of time, all without a hearing.

3. Dr. Skoly was retaliated against for exercising his First Amendment Rights.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). As the Supreme Court has recognized, "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017), and the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content," *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002).

The First Amendment not only protects citizens from Government's direct attempts at suppressing speech, *see, e.g., First Nat'l Bank of Bos. v.*

Bellotti, 435 U.S. 765, 785 (1978), but also proscribes retaliatory actions against individuals whose speech has displeased the Government, see *Crawford–El v. Britton*, 523 U.S. 574, 588, n.10 (1998). As the Supreme Court held over 15 years ago, "official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,' and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (alterations in original; emphasis added) (quoting *Crawford–El*, 523 U.S. at 588, n.10).

Plaintiff does not dispute that "the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380, n.11 (1982)). The discretion, however, is not unfettered and is subject to constitutional constraints. *United States v. Batchelder*, 442 U.S. 114, 125 (1979). Specifically, the "decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary

classification,' including the exercise of protected statutory and constitutional rights." *Wayte v. US*, 470 U.S. 598, 608 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

Because retaliatory prosecution for exercising one's First Amendment rights is unequivocally prohibited, courts have denied qualified immunity to officials who have brought such prosecutions. Thus, in *Lacey v. Maricopa County*, 693 F.3d 896, 917 (9th Cir. 2012) (*en banc*), the Ninth Circuit rejected the qualified immunity claim of a special prosecutor who allegedly instituted proceedings in retaliation for a newspaper publishing articles critical of the then-Maricopa County Sheriff. The court explained that because the prosecutor "intended to punish [newspaper publishers] for their First Amendment activities and deter them from future activities," and because the illegality of such conduct had long been established, the prosecutor was not entitled to any immunity. *Id*. at 917. Similarly, in *Klen v. City of Loveland*, 661 F.3d 498, 506 (10th Cir. 2011) the Tenth Circuit rejected the qualified immunity defense in the face of an allegation that the City issued criminal citations to the plaintiffs in retaliation for their concededly

"vituperative and abusive comments to and concerning City employees." *Id*. at 501, 511. The Tenth Circuit held that clearly established constitutional law prohibits the government from taking an "adverse action [against a plaintiff that is] substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Id*. at 508 (quoting *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000)). Thus, the City's officers could find no shelter in the qualified immunity doctrine.

It is true that, in order to overcome the qualified immunity defense, a plaintiff must show that the "right allegedly violated [was] established, 'not as a broad general proposition,' but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). This test is easily met here. As the First Circuit explained, in determining whether the "the 'contours' of the right are clear to a reasonable official," *id*., "the salient question is whether the state of the law at the time of the alleged violation gave the defendant fair warning that his particular conduct was unconstitutional," *Maldonado v. Fontanes*, 568

F.3d 263, 269 (1st Cir. 2009). At the same time, "a plaintiff need not show that the conduct of which he complains is an exact replica of conduct that previously has been held unlawful." *Bergeron v. Cabral*, 560 F.3d 1, 12 (1st Cir. 2009), abrogated on other grounds by *Maldonado*, 568 F.3d 263.

Here, Defendants—per their own admission—prohibited Dr. Skoly from practicing dentistry in retaliation for his public opposition to the state's vaccine mandate. Dr. Alexander-Scott explicitly stated that only those who publicly stated they would not comply would be punished in this manner. Noncompliance itself was not the basis for this penalty, according to Dr. Alexander-Scott. In other words, the State exercised discretion and penalized individuals—including Dr. Skoly—for exercising their First Amendment rights.

The First Circuit has addressed the question of whether a denial of a medical license in retaliation for the exercise of First Amendment freedoms is permissible, and unambiguously held that it is not, because "Government actors offend the First Amendment when they retaliate

against an individual for constitutionally protected speech." See *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 16 (1st Cir. 2011).

Defendants argue that they are absolutely immune from malicious prosecution claims that arise under 42 U.S.C. § 1983. In support of this contention, Defendants cite *Goldstein v. Galvin*, 719 F.3d 16, 21 (1st Cir. 2013). In that case, a securities trader sued the Massachusetts Secretary of the Commonwealth, allegedly for instituting a securities investigation in retaliation for the trader's exercise of First Amendment rights. The First Circuit affirmed dismissal of the complaint, reasoning that the Secretary acted in a prosecutorial capacity and therefore was absolutely immune from suit. *Id*. at 29. However, the Court's rationale rested on the fact that the relevant Massachusetts statute reposed in the Secretary the authority to both initiate administrative prosecutions and adjudicate any administrative violations under the Act. See *id*. at 24 ("By statute, the Secretary is responsible for both adjudicatory and prosecutorial functions with respect to the Act."). Thus, only Dr. Alexander-Scott is even arguably similarly situated to the *Goldstein* defendant, because the relevant Rhode Island

statute empowered her, in her capacity as Director of the Rhode Island Department of Health, "[t]o deny, revoke, or suspend licenses and registrations or discipline licensees *in accordance with* the provisions of" the Act governing the practice of dentistry in the State of Rhode Island. R.I. Gen. Laws § 5-37-1.4(6). However, she must do so in following all other provisions of the Act. Here the Director did not even look to the Act in taking her action.

By contrast, the Governor of the State (though ultimately the head of Rhode Island's Executive Branch, see R. I. Const. art. IX, § 1), has no prosecutorial or judicial power. Yet, it was the Governor (or his subordinates) who indicated that Dr. Skoly was being targeted because he "opened his big mouth." JA 24, ¶77 Governor McKee, however, was a "stranger[] to the prosecutorial process and, therefore, d[oes] not enjoy prosecutorial immunity." *Goldstein*, 719 F.3d at 26.

With respect to the Governor, this case is more akin to *Hartman v. Moore,* 547 U.S. 250 (2006) than to Goldstein. In *Hartman*, the plaintiff alleged that postal service inspectors cajoled an Assistant United States

Attorney into bringing charges against him in retaliation for plaintiff's vocal opposition to the Postal Service's adoption of certain technology. *Id*. at 252-54. The Court explained that an

> action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a nonprosecutor, an official … who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute.

Id. at 261-62. Likewise, in this case, the Governor is a "non-prosecutor" who "influenced the prosecutorial decision but did not himself make it," and the "cause of action" against him is "for successful retaliatory inducement to prosecute."

Furthermore, even prosecutors are not entitled to absolute immunity when they engage in non-prosecutorial functions. "The [Supreme] Court made clear that absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976)). In

other words, absolute immunity attaches not to the office (or officeholder) but to the function performed by the officeholder at any given time. See *Auriemma v. Montgomery*, 860 F.2d 273, 277 (7th Cir. 1988) ("Absolute immunity is designed to protect the functions that particular government officials perform, not the government officials themselves."); *Burns v. Reed*, 500 U.S. 478, 486 (1991) (collecting cases applying "functional approach" to immunity).

Dr. Skoly concedes that "a state official who performs prosecutorial functions, including the initiation of administrative proceedings that may result in legal sanctions, is absolutely immune from damages actions." *Goldstein*, 719 F.3d at 26. Thus, while Dr. Alexander-Scott's decision to levy administrative charges against Dr. Skoly may well be immune from judicial challenge, other retaliatory actions she took are not similarly immune.

Specifically, Dr. Alexander-Scott decided to post on the Department of Health's website the Notice of Violation and the Compliance Order issued to Dr. Skoly, thus conveying to the general public the impression that Dr. Skoly has either already been disciplined or is an imminent threat

to public health, even though neither was ever true. Under Rhode Island law, "[w]henever the director [of the Department of Health] determines that there are reasonable grounds to believe that there is a violation of any law … the director may give notice of the alleged violation to the person responsible for it." R.I. Gen. Laws § 23-1-20. The statute further provides that the notice does not mature into a "compliance order" until after a hearing on the violation alleged in the notice, or in the absence of such request for a hearing, 10 days after the service of the notice. *Id*. R.I. Gen. Laws § 23-1-22. Rhode Island law also authorizes the Director to issue an "immediate compliance order," but only where "the director determines that there exists a violation of any law, rule, or regulation within the jurisdiction of the director which requires immediate action to protect the health, welfare, or safety of the public or any member of the public R.I. Gen. Laws § 23-1-21. If the Director issues an "immediate compliance order," "[n]o request for a hearing … may be made." *Id*.

Dr. Skoly did not receive an "immediate compliance order" under R.I. Gen. Laws § 23-1-21. In fact, he received a notice of violation that

explicitly cited § 23-1-20 as its basis. The notice also explicitly referenced Dr. Skoly's right to a hearing. See Exh. I. It follows then that until after a hearing there was no operative "compliance order" and Dr. Skoly had not been subject to any discipline. See R.I. Gen. Laws §§ 23-1-20, 23-1-22. Despite this fact, not only did Rhode Island (contrary to its own regulations) order Dr. Skoly "to cease professional conduct as a health care provider," but it posted the "Compliance Order" (even though as a legal matter, see R.I. Gen. L. §§ 23-1-20, 23-1-22, there was never an effective "Order") on the Department's website, thus intimating that Dr. Skoly had already been disciplined. This premature action, in turn, caused Dr. Skoly both reputational and financial harm, because various insurance companies and third-party payors would not deal with Dr. Skoly so long as he had a disciplinary matter against him.

Furthermore, Dr. Alexander-Scott's successors maintained the record of the "Order of Compliance" on the Department of Health's official website for months after the Department and Dr. Skoly stipulated to dismissal of the charges. Neither the initial web posting decision nor the

decision to retain the posting was a prosecutorial decision. The administration of the State's database is a purely administrative and not a prosecutorial function because proper maintenance of the database is not an "act[] undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur[s] in the course of his role as an advocate for the State." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); see also *Goldstein*, 719 F.3d at 29 (agreeing that "the use of the plaintiff's name in the public announcement of the enforcement proceeding on the Secretary's website" is an "act that is not within the scope of either judicial or prosecutorial immunity," and addressing this portion of the complaint on the merits.) Indeed, in the present case, once Dr. Skoly and the Department of Health entered into a stipulation of dismissal, all prosecutorial and judicial functions of the Secretary were done. Because the decision to maintain the record of discipline on the website was "not relate[d] to [the DOH Director's] preparation for the initiation of a prosecution or for judicial proceedings," the director is "not entitled to absolute immunity." *Buckley*, 509 U.S. at 273.

The inclusion and continued maintenance of Dr. Skoly's name on the list of individuals subjected to discipline is crucially different from *Goldstein*, where the First Circuit did not find a constitutional violation in the Secretary's publication of charges against the plaintiff. In *Goldstein*, the "plaintiff d[id] not contend that the website announcement was false or misleading" and instead merely alleged that Secretary's publication of the allegations and identification of plaintiff by name "departed from the Secretary's 'custom and usual practice when issuing a public announcement of the filing of an administrative complaint' under which he does not normally 'identify any individual respondent by name.'" 719 F.3d at 30. By contrast, because Rhode Island never had a valid "Compliance Order" against Dr. Skoly, identification of him on the Department's website as someone who has been disciplined was both "false [and] misleading" and amounted to "adverse conduct or speech." *Id*. at 31 (quoting *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 419 (4th Cir. 2006)) (emphasis omitted). Even if the Court were to disagree as to the initial existence of a valid Compliance Order, certainly once Rhode Island and Dr. Skoly entered into a stipulation

dismissing the Notice of Violation and Compliance Order, continued identification of him on the Department's website as someone who has been disciplined was both "false [and] misleading" and amounted to "adverse conduct or speech." *Id*. And because Dr. Skoly plausibly alleges that this "adverse conduct or speech" was taken in retaliation for his exercising First Amendment rights, individuals responsible for this conduct are not entitled to either absolute or qualified immunity.

Dr. Alexander Scott further retaliated against Dr. Skoly when she usurped her prosecutorial power by blatantly ignoring the proper procedures set forth in R.I. Gen. Laws § 5-31.1-11 for issuing sanctions for unprofessional conduct against a licensed dentist.

In sum, actions taken by Defendants that were not in preparation for the initiation of judicial proceedings or for trial do not enjoy absolute immunity, and therefore, neither Governor McKee, who never had any prosecutorial functions, nor the Directors of the Rhode Island Department of Health, can seek shelter in the doctrine (at the very least with respect to

actions taken after the March 11, 2022 Stipulation to Dismiss the Notice of Violation).

"In order to prevail on a § 1983 claim of retaliation for First Amendment activity under the legal standard enunciated in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1976), a plaintiff must first show that his conduct was constitutionally protected, and that this conduct was a substantial factor or a motivating factor for the defendant's retaliatory decision." *Powell v. Alexander*, 391 F.3d 1, 17 (1st Cir. 2004) (cleaned up). A defendant may then rebut that showing by convincing the court "that it would have reached the same decision absent the protected speech." *Gonzalez-Droz*, 660 F.3d at 17.

Dr. Skoly made a sufficient initial showing that his vocal opposition to Rhode Island's vaccine mandates "was a substantial factor or a motivating factor" for the Notice of Violation and Compliance Order. First, Dr. Skoly alleged that Rhode Island officials explicitly stated that he was being pursued because he "opened his big mouth." Second, the Court can take judicial notice that Dr. Skoly was the only medical professionals to

have received a similar Notice of Violation, despite the fact that dozens if not hundreds of other Rhode Island healthcare providers also remained unvaccinated.

Any contention that Rhode Island would have reached the same decision to issue the Notice of Violation and Compliance Order absent the protected speech is belied by the record. It should not be surprising that both *Gonzalez-Droz* itself and all cases it cited were resolved on summary judgment rather than as a motion to dismiss. As the First Circuit explained,

> [t]o succeed in making out [the Mt. Healthy] defense to the degree necessary to win on summary judgment, [a defendant] would need to show that the record would compel a reasonable jury to conclude by a preponderance of the evidence that the [State] would have taken the same adverse action against [the plaintiff] even if [he] had not engaged in protected conduct.

McCue v. Bradstreet, 807 F.3d 334, 345 (1st Cir. 2015). In contrast, ruling on a motion to dismiss, the trial court must "assume the truth of all well-pleaded facts and indulge all reasonable inferences that fit the plaintiff's stated theory of liability." *In re Colonial Mortg.*, 324 F.3d 12, 15 (1st Cir. 2003). The operative complaint alleges that Dr. Skoly was targeted "because he had 'opened his big mouth' by speaking to the press." Dr. Skoly's affidavit

attached to the present pleading, as well as public reporting on Dr. Alexander-Scott's statements, further bolster this allegation. The fact that no other licensed health professionals appear to have been similarly disciplined provides additional support to Dr. Skoly's "stated theory of liability." Because the Court is required to "indulge all reasonable inferences that fit the plaintiff's stated theory of liability," *In re Colonial Mortg.*, 324 F.3d at 15, at this early stage it must infer that Dr. Skoly's "constitutionally protected activity was a substantial or motivating factor in" Rhode Island taking its enforcement action, *Maloy v. Ballori-Lage*, 744 F.3d 250, 252 (1st Cir. 2014). The Court should further infer that the State never had any intention to bring administrative charges against anyone "absent [that person's] protected speech," *Gonzalez-Droz*, 660 F.3d at 17.

Dr. Skoly has made a showing that in important respects is analogous to the showing made by the plaintiff in *Maloy*. There, the plaintiff "testified publicly about alleged government corruption." *Id*. She submitted that the relevant State official was aware of these accusations because that official explicitly and publicly labeled them "false." *Id*. Thereafter, the State denied

the plaintiff's application for a real estate license. The First Circuit held that the plaintiff's allegations that she engaged in protected speech, that there was a "plausible motive" for the retaliation by the State, and that her application for a real estate license was rejected despite "complying with all lawful requirements," "would normally be enough to carry a complaint across the starting line in the face of a Rule 12(b)(6) motion." *Id*. at 253.

Dr. Skoly has made similar showings. First, he explicitly alleged that he engaged in protected speech when he vocally opposed Rhode Island's vaccine mandate. Second, Dr. Skoly's complaint permits a reasonable inference that at least some of the Rhode Island officials had become aware of" his speech questioning the scientific basis for the mandates. This awareness provided a plausible motive for Rhode Island's actions against Dr. Skoly. That these actions were taken exclusively against him provides further evidence that, much like the plaintiff in *Maloy*, he was treated differently from other similarly situated individuals. The adverse actions include both the issuance of Notice of Violation and the Order of Compliance and the refusal to remove these documents from the

Department of Health's website even after the parties stipulated to the dismissal of that matter.

In fact, Dr. Skoly's allegations require less reliance on "judicial experience and common sense," *Iqbal*, 556 U.S. at 679, than the allegations in *Maloy* because, unlike the plaintiff in *Maloy*, who merely alleged that State officials were aware of her accusations of corruption, Dr. Skoly explicitly alleges that Rhode Island officials were not just aware of his opposition to the vaccine mandate, but also that they explicitly stated that he was being targeted "because he had 'opened his big mouth' by speaking to the press."

The temporal proximity between Dr. Skoly's voicing his opposition to the vaccine mandate and the adverse actions taken against him further buttress his retaliation claim. Under First Circuit precedent, "[t]emporal proximity alone may, in certain circumstances, support an inference of retaliation." *Gonzalez-Droz*, 660 F.3d at 16; *see also Philip v. Cronin*, 537 F.3d 26, 33 (1st Cir. 2008). In *Philip*, the court held, where the Office of the Chief Medical Examiner of Massachusetts fired the plaintiff after "he made

critical comments to persons outside of" that agency, that "[a] jury could have concluded that it was this going outside the agency with his criticisms that was at least a motivating factor in [the] firing," 537 F.3d at 33. The same analysis applies to this case. A reasonable jury could conclude that Dr. Skoly's public rejection of the vaccine mandate was at least a motivating factor in Dr. Alexander-Scott's issuance of the Notice of Violation and the Order of Compliance and her successors' later refusal to remove it from its website for months after they were legally obligated to do so.

CONCLUSION:

For all of the foregoing reasons, Dr. Skoly prays that his Court reverse the decision of the trial court and remand the matter for discovery and trial.

Respectfully submitted,
Plaintiffs,
By their Attorney,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 12,384 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Palatino Linotype.

/s/Gregory P. Piccirilli
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that, on January 10, 2024, this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/Gregory P. Piccirilli
Attorney for Plaintiff-Appellant

No. 23-1687

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

DR. STEPHEN T. SKOLY, Jr.,
Plaintiff-Appellant
v.
DANIEL J. McKEE, in his official and individual capacities as the Governor of the State of Rhode Island; NICOLE ALEXANDER-SCOTT, in her official and individual capacities as the former Director of the Rhode Island Department of Health; JAMES McDONALD, in his official and individual capacities as the former Interim Director of the Rhode Island Department of Health; UTPALA BANDY, in her official and individual capacities as the current Interim Director of the Rhode Island Department of Health; MATTHEW D. WELDON, in his official and individual capacities as the Director of the Rhode Island Department of Labor and Training; the STATE OF RHODE ISLAND; the RHODE ISLAND DEPARTMENT OF HEALTH; and the RHODE ISLAND DEPARTMENT OF LABOR AND TRAINING.
Defendants-Appellees

APPELLANT'S ADDENDUM

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ADDENDUM TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

Dr. Stephen T. Skoly, Jr Plaintiff, v. Daniel J. McKee, et al Defendants.	)	No. 1:22-cv-00058-MSM-LDA

JUDGMENT

IT IS ORDERED AND ADJUDGED:

Judgment hereby enters in accordance with the Oral Order of 7/20/2023

Enter:

/s/ Carrie L. Potter
Deputy Clerk

Dated: 7/20/2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Dr. Stephen T. Skoly, Jr.

Plaintiff

v.

Case No. 1-22-00058

Daniel J. McKee, et al.

Defendant

NOTICE OF APPEAL

Notice is hereby given that Dr. Stephen T. Skoly, Jr. (Name), the Plaintiff (Party Type) in the above-referenced matter, hereby appeals to the United States Court of Appeals for the First Circuit from the:

☑ Final judgment entered on July 20, 2023 (Date of Judgment).

and/or

☐ The order _____ (Description of Order) entered on _____ (Date of Order).

Respectfully submitted,

Gregory P. Piccirilli
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APPEAL00002

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

* * * * * * * * * * * * * * * *	C.A. No. 1:22-CV-00058-MSM
Dr. Stephen T. Skoly, Jr. *	
VS. *	July 20, 2023
Daniel J. McKee, et al. *	2:00 p.m.
* * * * * * * * * * * * * * * *	Courtroom 2

BEFORE THE HONORABLE MARY S. McELROY

MOTION TO DISMISS, ARGUMENT AND OPINION OF THE COURT

APPEARANCES:

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21 JULY 2023

2:00 P.M.

THE COURT: Good afternoon. We're on the record in Civil Action 22-58, Skoly versus McKee, and we're here on the defendant's Motion to Dismiss, which is ECF number 42. Can I ask counsel to identify themselves for the record, please.

MR. FIELD: Michael Field for the defendants, your Honor.

MS. WYRZYKOWSKI: Chrisanne Wyrzykowski for the defendants.

MR. DOLIN: Gregory Dolin for the plaintiff.

MR. PICCIRILLI: Gregory Piccirilli for the plaintiff.

MS. DURANT: Christy Durant for the plaintiff.

MR. SAMP: Richard Samp for the plaintiff.

THE COURT: A couple of things: Just keep the microphones close to you so that we can hear you up here. For some reason we have vents above my head. It's nice and cool in here, but it does create some noise. So, welcome. Is everybody ready to proceed?

MR. FIELD: Yes, your Honor.

MR. DOLIN: Yes, your Honor.

THE COURT: Okay. Mr. Field, are you arguing for the defendants?

MR. FIELD: I am.

THE COURT: Okay. So whenever you're ready, just go to the podium, and we'll hear you on the Motion to Dismiss, which I said is ECF42.

MR. FIELD: Thank you, your Honor. Good afternoon. I know there's been a lot of papers that have already been filed in this case. I'm not going to rehash all of that.

I really want to give the Court a path to where I think this case -- where the defendants think how -- the defendants think this case should be resolved or this motion.

Count IV has already been dismissed by agreement of the parties. That's been filed. So we're left with Counts I, II and III in the official and individual capacities. The official claims, the monetary damages claimed against the official capacity of the defendants should be dismissed by -- pursuant to Will versus Michigan. The plaintiffs take no issue with that in their memos.

THE COURT: So the plaintiffs are agreeing to dismissal pursuant to Will versus Michigan for official capacity defendants?

MR. FIELD: As I read their papers -- we haven't talked about it separately, but as I read their papers, they don't take issue with Will versus Michigan. And I think it's pretty clear law that Will versus Michigan bars the

damages claims.

THE COURT: They can address that. I didn't mean to put you on the spot.

MR. FIELD: And then as far as the official capacity defendants with respect to injunctive relief, they don't allege any ongoing violation of federal law. So to the extent that they're seeking injunctive relief against any official capacity defendants, that would be barred by the Eleventh Amendment.

Whether it's official capacity or individual, I just want to kind of address now the injunctive relief with respect to all defendants. I think the plaintiff's papers acknowledge, and we certainly agree, that a lot has happened since these papers were originally filed I think in October of 2022.

The posting that they seek injunctive relief to have removed from the Department of Health website has been removed. Again, in their papers, they acknowledge that.

The CMS requirement that they complain about that's in the DOH regulation, we filed a supplemental a couple of weeks ago; and it's our understanding, based on what the United States has filed in the Federal Register, that the CMS requirement is going to be repealed effective August 4th; and, currently, in the time period between the publication, which I think was June 5th, on or about

June 5th to August 4th, the United States has indicated in the Federal Register that it will not be seeking to enforce the vaccine mandate in the CMS with the CMS requirement.

And DOH has obviously taken that to note and has indicated, as I noted in my supplemental, that it will not be enforcing the CMS requirement because by extension the Federal government is not enforcing that. So that is either moot now based on the representations that have been made by the United States or soon will become moot and nonjusticiable on August 4th.

And, then, the last claim that they seek injunctive relief with respect to is an injunction barring First Amendment retaliation. Again, they don't point to anything that they're seeking to enjoin, and the relief that they seek doesn't meet the standard for injunctive relief, which is that the plaintiff has to show that they're immediately in danger of sustaining some direct injury as a result of the challenged official conduct, and the injury or threat of it must be both real and immediate, not conjecture or hypothetical. And that's exactly what we have here.

So the injunctive relief with respect to individual and official capacity claims must all be denied as nonjusticiable and/or moot and at least with the official capacity claims also barred by the Eleventh Amendment.

What that leaves the Court with are the three counts.

I'm going to address first the first two counts, equal protection and due process against the individuals only. And there's several reasons why these must be dismissed at the motion to dismiss stage.

With respect to equal protection, both Dr. Skoly makes what I would suggest are sort of policy arguments that he should have been granted medical exemption or that he should have been granted the same access as those who were working either medically exempt or working with COVID.

He's made no allegation and has put no facts in the complaint that he's similarly situated. He's actually put facts in his complaint and his argument that he's not similarly situated to those who had a medical exemption. The medical exceptions, as this Court noted in Dr. T, were very narrow. He was not in one of those categories.

Whether he should have been or shouldn't have been, those are policy arguments not within the purview of this Court, respectfully. And then whether he should have been granted a similar exception for those that were working with COVID, that was an exception that was granted to persons who were working at hospitals or skilled nursing facilities that were designated to be in a crisis mode.

Whatever might be said about that decision, and that decision was based on CDC guidance, but whatever might be said about that decision, Dr. Skoly doesn't allege any facts

that he fell within those categories.

We have submitted, and the plaintiffs seem to acknowledge in their papers, that rational basis certainly applies. And with all due respect, following the CDC guidance on what the medical exemption should be, that they were narrow, they followed CDC guidance, and with respect to the persons who were working at hospitals or skilled nursing facilities, whatever may be said of those decisions following the CDC guidance was clearly rational; and Rhode Island was allowed to base its decisions on that.

They bring a substantive due process claim. I'm not going to harp on this for long. Literally, as this Court observed in Dr. T, substantive due process claims for mandatory vaccination claims had been rejected for literally a century. Literally a century. This Court made that exact observation in Dr. T. There's just nothing that they have brought forth that suggests otherwise.

As I read the complaint, I don't read the complaint to have a procedural due process claim, but I do see it in the papers a little bit, so I would like to address that to the extent the Court thinks it should be addressed.

One of the overarching problems I have with what's before the Court today is that there's no facts. There's no facts that tie any of the defendants to any of the actions. The one exception I think I would make is with respect to

the issuance of the Notice of Violation and Compliance Order.

That was signed -- it was issued on October 1st, it was signed by Dr. Alexander-Scott. The other defendants who were sort of grouped into this part of the allegation obviously had nothing to do with it. They don't allege, more importantly, that any of the other defendants, the Governor, Dr. Bandy, Dr. McDonald had anything to do with the issuance of the October 1st order, Notice of Violation and Compliance Order.

So I'm going to address it mostly with respect to Dr. Alexander-Scott, because that seems to be the only facts not so much alleged but at least that can be gleaned from the record.

The papers seem to indicate in a conclusionary manner that Dr. Skoly was not given a hearing or an opportunity for a hearing. The compliance order expressly states otherwise. The compliance order expressly states that he was entitled to a hearing within ten days. We know from public records that the plaintiffs don't seem to contest that Dr. Skoly had a hearing. He had a hearing on November 8th. I might be mixing my years, but I think it was 2021. And the hearing -- what the hearing was on was, I term it a motion to stay the compliance order, but the plaintiff terms it as a motion to continue practicing until a final decision on

the compliance order, and that was denied. It was denied by the hearing officer.

And the process that he was availed in this case far exceeds the process that was in Gonzalez-Droz, D-R-O-Z. It's at 660 Federal 3d at page 13, and that's a First Circuit decision.

The process in that case, just to refresh your Honor's recollection, that was a case where the plaintiff was -- Puerto Rico decided to issue a regulation that cosmetic surgery required a certain type of license, the plaintiff refused to get a license, and Puerto Rico suspended the license that this plaintiff had. The license in Gonzalez-Droz, the license was suspended on December 12, 2006 with a hearing about six months later on May 15, 2007.

Here, the compliance order was issued October 1st, 2021, and he had a hearing on October 8th. It was denied by the hearing officer -- I'm sorry. I might have misspoke. He was given the hearing on November 8th, 2021, and the hearing officer denied his motion to continue practicing on November 10th, 2021.

So on the undisputed record, public records entitled to be -- and I think fairly incorporated within the complaint but certainly public records, this Court is entitled to take that into consideration for this motion.

I would also note, and I didn't include this case in my

papers, Gonzalez-Droz gets to this point, but Codd versus Velger, V-E-L-G-E-R, 429 U.S. at 627, it's a 1977 Supreme Court decision, quote, (Reading) If the hearing mandated by the due process is to serve any useful purpose, there must be some factual dispute. And Judge Selya gets to the same point in Gonzalez-Droz.

Any assertion or thought that there should have been a predeprivation hearing, there was no dispute as to the facts here. Dr. Skoly acknowledged, and he acknowledges in his papers, that the regulation applied to him. He very publicly and, frankly, proudly indicated that he was not going to comply with it and was still going to practice.

So in the words of Judge Selya, quote, (reading) It is difficult to imagine what value there would have been in a predeprivation hearing, end quote.

I also want to point out, your Honor, to the extent -- it seems like the equal protection and the due process claims are really intertwined with the October 1st order. And what I mean by that is Dr. Skoly doesn't seem to be challenging the regulation itself.

The regulation itself was published in August, and as your Honor will remember, the Dr. T plaintiffs brought suit, not immediately but at least before the October 1st effective date. The injury that Dr. Skoly seems to be claiming really emanates from the notice of compliance

and -- the Notice of Violation and Compliance Order; not the regulation.

And I say that because as, again, I think the plaintiffs acknowledge in their papers, Dr. Alexander-Scott is entitled to absolute immunity for issuing and maintaining the Notice of Violation and Compliance Order. And that would also apply to the extent that the Compliance Order was extended or continued after Dr. Alexander-Scott left, and it would extend obviously to the other named defendants.

What that leaves us with, your Honor -- and I think there are qualified immunity issues also, but I'm going to put those to the side for a second. What that leaves us with is the First Amendment retaliation claim.

There's two adverse actions that Dr. Skoly appears to complain about. One is the order that was issued on October 1st; and, again, that gets swallowed up by absolute immunity. To the extent it wouldn't be swallowed up by absolute immunity, I know they allege that Dr. Alexander-Scott acted with a retaliatory purpose. That was the same issue that was addressed in the First Circuit in Goldstein; First Amendment retaliation in that case also, and the First Circuit said absolute immunity means absolute.

To the extent that it wouldn't be swallowed by absolute immunity, Gonzalez-Droz also addresses this. Gonzalez-Droz, at the very end of the opinion on page 17, notes that

(reading) A defendant may have waived liability in any retaliation case by showing that it would have reached the same decision absent the protected speech. Gonzalez-Droz continues, (reading) Much like Dr. Skoly here, the plaintiff does not dispute that his actions contravene the regulation. The board's decision was based on the actions. It's, therefore, clear beyond hope of contradiction that the board would have reached the same conclusion regardless of the plaintiff's testimony.

I know the plaintiffs sort of say, well, that was a summary judgment case, and this is a motion to dismiss case. But they put those facts in the motion to dismiss. Where those facts are present on a motion to dismiss, you're dealing with the same set of facts as you would be on the motion for summary judgment.

The other alleged retaliatory action that they bring up is that the Department of Health continued the posting of the Notice of Violation on its website after the new regulation was passed, after the enforcement action -- after the Notice of Violation was dismissed. And there's a bunch of problems with this.

The first is what I alluded to earlier, which is they don't point to any of the individual defendants. They're trying to impose individual monetary liability on individual defendants without indicating who is responsible; who has

done that.

THE COURT: Is that something that should be flushed out in discovery, whose responsible, or are you saying that they have to at least allege that one of the named defendants in their individual capacity is responsible?

MR. FIELD: It's the latter, your Honor. And I don't remember which decision this was from, your Honor. It was awhile back. But your Honor has stated, and I'm sure it was a motion to dismiss case, that the complaint -- and I think Iqbal says this too, the complaint has to state the who, the what, the when, the how. And they've indicated a what. You know, this was left on the Department of Health's website. They don't allege who. I think more importantly, quite frankly, they don't allege what protected activity was asserted by Dr. Skoly that was used by -- forgetting about who the who is, but the protected activity has to cause the retaliation. They don't even allege that.

Quite frankly, and, again, I alluded to this, the complaint really doesn't have any protected activity in here. He alludes very generally about making statements, and there's a comment about opening his big mouth, which is unattributed to anybody; but there's no dates as to protected activity, there's no content as to protected activity. The complaint is completely devoid of that. And

that's not irrelevant, because one of the things, and they try to harp on this, is the temporal proximity; but when these alleged protected activities occurred, that's important.

The First Circuit in Pena versus Honeywell International 923 F.3d at page 32 has noted that the temporal proximity has to be, quote, very close between the protected activity and the alleged retaliation. In that exact case, Pena talks about, quote, (reading) The gap of four months on its own is not very close for establishing causality.

With respect to what we're talking about right now, continuing the publication or continuing the notice on the website after March 2022, the events that took place in this case were October 1st. Even aside from the lack of -- I would call it the lack of an Iqbal Twombly pleading, I think it was the Goldstein case that talks about how courts have not been receptive to retaliation arising out of Government speech. That was an Internet publication also in Goldstein.

The other part that sort of strikes me as a bit, I'm not sure what the right word is, maybe ironic is that Dr. Skoly complains about monetary damages for a posting that occurred after March 13, 2022 on the DOH website.

THE COURT: That was continued or that it occurred?

MR. FIELD: Continued to occur, yes.

THE COURT: Okay.

MR. FIELD: That it wasn't removed. And I think there's two points. Number one, I think we all need to distinguish between -- I know they're going to say it was a false posing, all that stuff. Whether it was false or not for retaliation purposes isn't the issue. They need to connect it to protected speech, and that hasn't happened. So that's the first point.

The second is -- well, I'm now extending three points. The second is the information that was published was accurate. Remember, there was the hearing in November of 2021 where the hearing officer said that Dr. Skoly couldn't practice.

The third point is, and this was sort of the ironic point, you know, Dr. Skoly complains that the continued posting after March has injured him; it was for retaliatory purposes. The Notice of Violation and Compliance Order, which is obviously the heart of what the publication issue is, that is well public. That has been public since October. That was filed -- ironically, when Dr. Skoly filed his lawsuit, it was an exhibit attached to the lawsuit that was filed in February of 2022.

I mean, to state the obvious point, documents filed with this court are public records. He's argued publicly about the Compliance Order. He went to the hearing officer

about the Compliance Order trying to get it stayed. Those facts about the publication of that order or the facts of that order are well within the public realm.

Two last points, your Honor. I'm not really sure where this fits in, but in the papers, the plaintiffs make a big issue or at least some issue about this comment that Dr. Alexander-Scott allegedly said during a press conference that was posted on a website by somebody who heard it from Matt Allen. Putting aside the three levels of hearsay that I can at least identify, I want to direct the Court to a case. I didn't put it my papers. The plaintiffs actually cited it in their papers.

The case is Wayte, W-A-Y-T-E, United States 470 U.S. 598. It's a 1985 decision. Wayte concerned a case where there was a requirement to register for selected service. And a young man decided that he was going to not register pursuant to federal law. He wrote letters to the United States affirming his intent not to register, and the United States ended up taking enforcement actions. The United States only took enforcement actions against those that had publicly wrote and indicated that they were not going to register.

There was another category where people -- where if the United States had also received actual knowledge from somebody that they were not going to register, they were

included in that group. It was called passive enforcement by the Supreme Court. In other words, it was enforcement only if somebody had done something to bring them to the attention of the United States.

There was the First Amendment claim that was brought on that when the plaintiff was prosecuted. The U.S. Supreme Court called it self-reporting, and the Supreme Court dismissed or upheld the dismissal of the First Amendment allegation that it was done for retaliatory purposes. And the Court noted, at least in part, that relying on this passive enforcement was not unlawful because the Government was able to identify and prosecute violators without delay, the passive enforcement program also promoted efficiency, and, third, prosecuting visible nonregistrants was thought to be an effective way to promote general deterrence, especially since failing to proceed against publicly known offenders would encourage others to violate the law.

Whatever is alleged through the triple hearsay assertion that's in -- it's not even in the complaint; it's in the memo and I think this First Circuit case that says this Court on a motion to dismiss should follow what's in the complaint, not in the memo. But putting that aside, even taking the triple hearsay at face value, those actions have been upheld by the Supreme Court in 1985.

The last point I want to make is the qualified immunity

point. I think that that runs through all of the individual defendants for all of the claims. I'm not going to harp on it too much. I know I talked about it in my memo, and I cited case law that has found a rational basis and/or qualified immunity where a state or a university relies on state or federal guidance, particularly during the COVID period.

To state the obvious, Rhode Island and the United States was dealing with a novel pandemic that killed, I forget what the count was, but I know it was well over a million in the United States.

What I really want to point to is this Court's decisions in Dr. T. This Court, ironically, on September 30th denied the plaintiff's motion for a temporary restraining order in Dr. T. What was issued -- what was at issue in this case -- I'm sorry. What was at issue in Dr. T was the same regulation that was at issue in this case, albeit Dr. T concerned a religious exemption entitled to generally strick scrutiny, whereas this case concerns an expanded medical exemption, not entitled to strict scrutiny, not a protected class.

The defendants were entitled to rely on this Court's decision for qualified immunity purposes. It was issued one day before the notice of violation of compliance order was issued.

And even more so, your Honor's decision on January 7th, 2022 denying the plaintiff's motion for a preliminary injunction, what your Honor wrote in that case could apply to this case directly. Your Honor wrote in denying the motion for a preliminary injunction, quote, (reading) Additional exemptions, including a broader medical exemption, would, as Dr. Alexander-Scott puts it, defeat Rhode Island's purpose in promulgating the regulation which is to ensure as best as possible the continued health and well-being of healthcare workers and healthcare providers, as well as those treated by healthcare workers and healthcare providers as the COVID-19 pandemic continues. The defendants were entitled for qualified immunity purposes to rely on that statement.

The last point I would note, just because we're in a different place than we were when this regulation was issued, when the notice of violation was issued, the world has changed, treatments have changed, remedies have changed. Everything -- well, I think the best way to say this is the facts on the ground have changed. And Dr. Skoly's motion or our motion to dismiss the complaint should and must be judged as the facts were at the time that the defendants made the decisions. Thank you, your Honor.

THE COURT: Thank you, Mr. Field. Who is going to argue for the plaintiff? Okay. Take your time. Just pull

the microphone up close to you. And just before you start, can I ask you about whether anything has changed with respect to the injunctive relief sought?

MR. DOLIN: Yes. Good afternoon, your Honor. Gregory Dolin for Dr. Skoly. Thank you for that question. I was planning to begin there anyway. I think on that point, we are by large in agreement with the defense. At least as of last Friday, we take the defendants at their word, that they will not enforce what I'll refer to as a CMS mandate, either of course as a federal mandate or as a state rule.

And so I take the defendant's point that between the time the complaint and the motion to dismiss papers were filed and last Friday when they filed a supplemental, facts have changed; and so it does appear, that at least taking the defendants at their word, that all of the things that Dr. Skoly has asked for in terms of injunctive relief he has received. And so at least on injunctive relief, there's nothing left.

THE COURT: So the injunctive relief claims at this point are moot?

MR. DOLIN: Correct. And assuming --

THE COURT: Assuming that what happens between now and August 4th is what the Government represents it will be.

MR. DOLIN: Right. And, of course, we would

certainly -- we would certainly wish that, you know, the representation defendants made to be more -- or at least an extension in whatever rulings your Honor issues on, which are -- that's the reason why it's moot, because the defendants have said they have no intention of enforcing or continuing with that CMS mandate.

So on injunctive relief, I think we're in agreement; however, I think we can we have a sharp disagreement on monetary damages. And I'll just run through some of, you know, some of the points that defendants have made, and then to the extent necessary, I'll make some points that I prepared as well.

So on -- obviously, all of these claims are proceeding in an individual capacity as opposed to sovereign capacity or an official capacity, because defendants are indeed correct when it comes to monetary claims. Sovereign immunity does prevent the plaintiffs from recovering either from the state or its officials acting basically for the state in their official capacity.

However, in their individual capacity, that's not always the case. Let me begin -- and I'll circle back to some of the comments the defendants made about equal protection, et cetera.

Let me begin with I think the easiest point. It's the First Amendment retaliation claim. As we've said in our

papers, Goldstein suggests that Dr. Alexander-Scott has absolute immunity when it comes to choosing to bring a complaint, so when she's acting in a prosecutorial capacity. However, not everything that a prosecutor does is necessarily acting in a prosecutorial capacity. For example, holding press conferences, putting on a hat of the investigator is not necessarily prosecutorial capacity, as the Court knows in the Supreme Court --

THE COURT: Absolute immunity wouldn't exempt her from liability for a First Amendment retaliation.

MR. DOLIN: Correct. Correct.

THE COURT: Okay. What about the temporal issue?

MR. DOLIN: So the temporal issue -- there's several issues. One, of course, the compliance order was issued on October 1st, the very first day that it was available for Dr. Alexander-Scott to issue, as well as it was put on the website that very same date.

In fact, it appears that Dr. Alexander-Scott or the Department of Health notified Dr. Skoly's insurers simultaneously that that order was issued, because on the very next business day, on Monday, Dr. Skoly got a number of certified letters from his payors saying they will be unable to pay him because of this order. So that allegation is made at paragraph 151 of our complaint.

Secondly, putting up a posting on a website and then

after maintaining it is not a prosecutorial function. Now, I understand that defendants have relied on Goldstein, but Goldstein, at least on that point, is inapposite. In Goldstein, it was simply, I would say, kind of a report to the public that so and so has been charged, here's what we as officers of the state are doing; the public, FYI, we're going to prosecute Mr. Goldstein for his various violations.

Here, under Rhode Island's own rules, a matter before the licensing board who met before investigation -- before the licensing board and for that matter the Department of Health must remain confidential until a final decision is made, unless there's an imminent threat to public health, in which case the state proceeds under subsection 22 as opposed to subsection 20, which is -- I'm sorry -- subsection 21 as opposed to subsection 20, which is how they chose to proceed against Dr. Skoly.

And, in fact, a look at the state's website, Dr. Skoly appears to be the only person in at least the last ten-year span, whether it's as a dentist or dental hygienist, was the only person whose compliance order was listed on the website. There are people with immediate compliance orders, which is section 21, that were listed. But Dr. Skoly was the only one ever to have been put on there. And so --

THE COURT: The Notice of Compliance, you're arguing that in ten years, nobody's Notice of Compliance has

been on the website?

MR. DOLIN: Correct. At least until it was adjudicated.

THE COURT: Okay. And do you have any evidence of how many notices of compliance weren't put on the -- notices prior to adjudication notices?

MR. DOLIN: No, of course not. Precisely because they're meant to be confidential. We probably might be able to get it in discovery, but it does say something that Dr. -- like, there's no other Notice of Compliance or compliance -- not an immediate compliance order was ever placed on a website; and that, in some sense, also goes back to our equal protection argument as well.

But temporal proximity of course is not the only consideration. Temporal proximity is a good evidence that it's actually taken in retaliation, but it's the fact that also people are being treated differently, which Dr. Skoly was, is also an inference that the action was taken in retaliation. Of course, on a motion to dismiss, all inference should be drawn in favor of the plaintiff.

Now, with respect to keeping the notice on the website, it is true that we haven't sort of alleged who specifically ordered that, but, again, there's no way we would know what e-mails were exchanged, who said that to whom and why the notice was up there. But we have alleged that this was a

consorted action by the officials and the Department of Health going -- including the person who was leading it at that time.

And, again, because after Dr. Skoly had settled this portion of the dispute with DOH, that notice, that main specific notice of about six months or so was what made it different from Goldstein. It makes it false.

THE COURT: But there's a couple of things. How does it make it false?

MR. DOLIN: It is, because at that point, there was not -- certainly there was never an immediate compliance order. But at that point, there was no compliance order either. Right? So it wasn't listed as, you know, Dr. Skoly prevailed. It continued to post on the website which --

THE COURT: Let me just back up. So there's a difference between false and incomplete. Are you arguing that that notice then after, you know, Dr. Skoly went through the process with the state became an incomplete factual recitation? Because you're not arguing that they didn't produce that notice appropriately under the statute at the time. Whether he agreed with it or not, the notice that was in there was factually accurate, correct? They didn't make up a noncompliance order and put it on the website.

MR. DOLIN: Well, let me put it this way. It's not

just a website that simply says, here's a bunch of actions the state took, considered, or here's a bunch of things that happened in the last year or so; it's a disciplinary website. Here are the persons that are subject to discipline, and it lists what kind of discipline.

So, for example, if you would go on it, it would say, you know, Dr. Smith was reprimanded, and Dr. Jones was suspended and whatever else. And so it continues saying that Dr. Skoly was subject to the compliance order, and that's just at that point was not true.

THE COURT: Well, how about the fact that when he -- when he filed his complaint before this Court, he attached it to his complaint, didn't he?

MR. DOLIN: He did.

THE COURT: So how does that impact your argument? I mean, if it was false, it's false, right? I mean, if he's putting it out there, how does it sort of -- how does the state bear liability for doing it?

MR. DOLIN: So it's false insofar as it suggests -- was and continues to be subject to discipline.

THE COURT: So it's incomplete because he was subject to discipline.

MR. DOLIN: Well -- so that's -- we can get back to that. But he actually -- again, he was not. Because under Rhode Island's own statutes, merely issuance of a compliance

order, which is why, again, he's the only person to ever have this not immediate compliance order listed on a website, actually is not disciplinary. It's kind of somebody saying, we have what we think is a violation. You have a right to a hearing --

THE COURT: But in Dr. Skoly's case, he acknowledged the facts. In fact, there's some evidence that he pre -- prior to this he said, I'm not going to comply, isn't there?

MR. DOLIN: Yes.

THE COURT: So it's not factually inaccurate that he was refusing to comply, correct?

MR. DOLIN: Correct.

THE COURT: And the state, under its statute, has the authority to put notices of, you know, action, whatever it is, on their website preadjudication, correct? The statute allows it, doesn't it?

MR. DOLIN: Actually, so -- again, matters of investigation are meant to be confidential until a final decision.

THE COURT: Where are you citing that from?

MR. DOLIN: I would have to turn to my local counsel for that. It's within local rules, I believe.

MS. DURANT: It's right on the Department of Health's website under the disciplinary proceedings. It

states right in the descriptive paragraph as to the actions that are listed. It says, (reading) Actions remaining under investigation or pending will not be listed on this website.

THE COURT: Okay. Thank you. That's their policy; that's not a specific statute. But, also, the question is, is it still under investigation at that point?

MR. DOLIN: Yes. Because there was never actually an order issued against -- so it was a notice -- it was a notice of violation --

MR. PICCIRILLI: But he had a hearing. It wasn't that they just didn't issue a notice. This went on for a period of time, and there was some negotiation in the state. And I don't remember the specifics of it, but it came into play at some point. So it wasn't just that they put this up there and never did anything and it was just retaliation for his free speech.

MR. DOLIN: Well, I think the state misdescribes the hearing. I think the hearing was Dr. Skoly was trying to clarify how is it he can't go back to work, because his license was never at issue. He was not brought before the dental board. And his facility, his office is not subject to -- you know, it's not part of DOH -- it's not a facility within sort of the meaning of DOH regulation.

THE COURT: But he was under investigation because he publically said, I refuse to comply with the regulation.

So they weren't investigating whether he was complying with the regulation or not. He had conceded that, correct?

MR. DOLIN: He conceded that he was not going to get vaccinated and --

THE COURT: Which is compliance with the regulation, right? Let's not mince words. He said, I'm not going to do this. Whether that was protected or not is a whole other issue. The question is, he said, I'm not going to do this, so there was no investigation as to whether he was vaccinated or going to get vaccinated or complying with whatever the protocols were that the state had in place, correct?

MR. DOLIN: Again, I would take some issue with that, your Honor, mostly because, you know, the regulation didn't comply to every holder of a medical or dental license; it applied to people working in particular facilities.

THE COURT: Working with the public, correct?

MR. DOLIN: No. Working in medical-designated facilities, and his office is not that facility. And so it was not a blanket regulation that anybody who holds an M.D. license or a DDS license or a nursing license must do it.

THE COURT: Right. Because if somebody has, say, a nursing license and they're doing telehealth, that was one of the things that was exempted, right? Because you can do

telehealth without stepping foot in a facility.

I don't want to get into a philosophical argument or a back-and-forth argument about it. But let's be clear that Dr. Skoly acknowledged, I fall under this regulation, I don't agree with it, and I'm not going to comply with it, correct?

MR. DOLIN: I would agree with the second two points. I'm not quite sure he necessarily falls under regulation with respect to his own office. With respect to his practice in a mental health facility and in prison, yes, he does, but not necessarily with respect to his own office. Because his own office, in my understanding of Rhode Island law, it is not a facility in the same way as a hospital or as a prison or as a mental health facility is a facility.

I mean, you know, I'm happy to be stand corrected on that, but that is our understanding of what counts as a facility.

But, again, it is true that -- but even assuming that he was subject to regulation throughout all of his practice and he declined to comply, nevertheless, the notice of violation was not -- was never final. There was never any hearing on de novo violation. There was a hearing on his request to go back to work which was not granted. But there was never a hearing on the Notice of Violation until eventually the state and Dr. Skoly settled. And, yet,

despite a settlement, the notice continued to be on the website.

THE COURT: Your argument is that that hearing wasn't about the Notice of Violation?

MR. DOLIN: It was not a final adjudication Notice of Violation. Because if it were, there would be no reason to settle this case later on anyway and allow him to go back to work. And there's reason for Rhode Island, for example, to say, look, Dr. Skoly -- because of deposition right now, Dr. Skoly has never been disciplined. If there were a hearing Notice of Violation and there was some sort of final decision reached --

THE COURT: They settled.

MR. DOLIN: I'm sorry?

THE COURT: They settled, didn't they?

MR. DOLIN: But my point is that if there was a hearing, right, if there was a hearing and there was some final decision reached, there would be nothing left to settle. The hearing on the Notice of Violation remained pending.

THE COURT: I'm not going to belabor this point. There was a hearing, there was a time frame between the hearing and the settlement during which it was under some type of advisement, and then there was a settlement. I don't think it's accurate to say that there was never --

that because they didn't make a decision right at the hearing, then there was no violation or no hearing with respect to the violation.

MR. DOLIN: All right. But even taking all of that, and, you know, for the purpose of argument, I'm going to take the point that the Notice of Violation was not false but it was incomplete. But completeness or incompleteness does create a false perception. So that's what falsity -- if you say things that are only kind of half true and create a particular perception upon the public, that is just as good as saying things that are false.

It is because of this continued Notice of Violation, for example, that various insurers declined to pay Dr. Skoly, precisely because they viewed this continued notice as if he's still under the discipline. So merely --

THE COURT: You're saying that after his discipline was removed, after he was allowed to -- permitted to reopen his office, that there were insurance companies that refused to cover patient care as a result of the notice being on the website?

MR. DOLIN: Correct.

THE COURT: And they've said, there's a notice on the website?

MR. DOLIN: Yes. In fact, apparently, a number of these companies reached out to Dr. Skoly and said, would you

have DOH contact us to clear this up, that way we can pay you. And so we've got this allegation --

THE COURT: And did he get paid?

MR. DOLIN: Sorry?

THE COURT: And did he clear it up and get paid?

MR. DOLIN: Not on all of those claims, in part, because then there was a delay in submission, et cetera. My understanding is not on all of those claims, no.

And, again, this allegation in paragraph 151, we say that insurance carriers relied upon the false notice or on the information that was incomplete to deny these payments.

Now, with respect to the equal protection argument, I'm happy to concede that the standard of review is a rational basis and that Dr. Skoly was not necessarily situated exactly the same. But rational basis must be rational. There's -- and I understand that Rhode Island, as many other states, was under strain with few providers available to treat lots of people. But it is not rational to say that a person with an ongoing active COVID infection can go into a facility, an inpatient facility where the most vulnerable populations are, as long as he wears a mask, but Dr. Skoly --

THE COURT: On whose standard? I don't want to keep asking you questions, but you're saying that's not rational. Based on what? Weren't they following CDC

guidance?

MR. DOLIN: I don't think CDC guidance ever suggested that people with active ongoing COVID infection are safer than people who don't have an infection but not vaccinated. If that's rational, I'm hard pressed to understand what would not be.

Same thing -- and again, we don't need to relitigate this issue. I think the state is correct. Lots of information has now been publicized. But it is not rational. It flies in the face of a 150 years of medical science to suggest that natural immunity is somehow inferior to vaccination immunity.

THE COURT: I'm not argue --

MR. DOLIN: We already --

THE COURT: We're not going to have this discussion. First of all, we're two plus years beyond what the medical professionals knew at the time. Secondly, everything that we're being shown, still scientifically, that's scientifically backed, not opinion backed, shows there's a difference between natural immunity and vaccinated immunity and that there's a limitation in time on both kinds of immunity.

MR. DOLIN: Correct. But, again, I think, your Honor --

THE COURT: I'm not going to debate science with

you, because I'm not a virologist, and my guess is that neither are you.

MR. DOLIN: I'm not, but I'm fortunate enough to have had medical training. But, again, we don't need to have that argument. But since the state mentioned kind of a hundred years of experience, I thought it was worthwhile mentioning that there's also 150 years of medical science on that claim as well.

Now, I think with respect to the First Amendment -- back to kind of the First Amendment retaliation claim, as I mentioned, there is temporal proximity. There is -- you know, this is as well -- there's as well the fact that Dr. Skoly appears to have been the only person or perhaps one of the two that was actually served with a compliance order despite the fact that the state and what we've attached to our I think motion for preliminary injunction and temporary restraining order, I think it was in Exhibit Z, the state acknowledged there was almost a thousand people who declined to get vaccinations. That's not counting the people with religious exemption. So out of a thousand people, somehow Dr. Skoly is the only one who was served with this compliance order.

THE COURT: Does that -- so there's a thousand people. So my understanding, and your argument is that the facilities -- that he doesn't operate a facility. My

understanding of the regulation or that healthcare workers in facilities have to be vaccinated. But I think the original regulation said that providers also have to be regulated, and they don't make a distinction for facilities. So it's providers and people working in facilities, as I understand it. And I can pull up the regulation if we need to.

MR. DOLIN: Yes, I mean, obviously --

THE COURT: So you're saying there's a thousand people who didn't get vaccinated. How many of them were operating facilities? How many of them were providers with direct patient access who were going to other facilities?

MR. DOLIN: Well, they were all -- these were people whom the state in sort of doing this cost benefit analysis of the new rule, the one that we're working on right now that allowed you to be either masked or vaccinated, that is an estimation by the state itself that these are all people who would fall into that category.

So even if these are only people who are kind of related to a facility, that would only suggest that if we're looking at a broader scope of all providers, that would necessarily mean that would be more than a thousand people. Right? If 800, or whatever, 64 are related to a facility, and if we're looking at broader range, those 864 plus whatever other providers who chose not to get vaccinated.

But whether we're looking at a narrow or broader set, it's still indicative that Dr. Skoly is the only one who was --

THE COURT: I'm looking at Exhibit B, which is attached to document 42-2. I'm not sure which document. That's the motion to dismiss. And that's the regulation on page -- at the bottom of page two, I think, 8.3 Requirement to be vaccinated against COVID-19. Part A says, (reading) In addition to complying with applicable state and federal laws or regulations, including any applicable standards published by the Occupational Safety and Health Administration, OSHA, all healthcare workers in licensed healthcare facilities and healthcare providers who are not vaccinated must comply with the following, and it goes through the compliance.

So there's two different categories there. It's healthcare workers in facilities and healthcare providers. I think that covers everyone, and that's my understanding of the intent.

MR. DOLIN: I don't think that's quite -- I don't think that's quite correct, because --

THE COURT: I'm not reading it correctly or my interpretation is not correct?

MR. DOLIN: I think your interpretation is not quite correct. I think the state in its motion to dismiss that Dr. Skoly is not -- you know, would not be covered

under this sort of vaccination requirement either --

(Interruption by the court reporter)

MR. DOLIN: I think the state admits that Dr. Skoly is not necessarily covered by the requirement of vaccination. I can't satisfy the requirement through the masking in his motion to dismiss under the final rule. So -- which is what he has been doing since he was allowed to go back to work.

Let me turn to qualified immunity. So the state argues that defendants aren't entitled to qualified immunity because Dr. Skoly can't point to any case law putting defendants on notice that the precise conduct, such as posting of this notice as well as kind of his mugshot in the prison, violates the First Amendment.

But, you know, I think that's incorrect. They were on clear notice that retaliation against another base under speech, including by bringing -- including by posting false statements on a website or incomplete statements on a website I suppose, as well as kind of this name and shame picture in a prison even though Dr. Skoly never suggested that he would go in in violation of the rule is a retaliatory act that they cannot take. And we have alleged that.

Same thing, by the way, with triple hearsay. At the motion to dismiss stage, this is not something -- you know,

this is not a question of whether something is admitted into evidence. We have made an allegation that Dr. Scott chose to go after Dr. Skoly because of his statements, and I think that's sufficient. Our allegations ought to be credited at this stage.

THE COURT: How could you respond to the state's argument that this is passive enforcement and it's primitive by the Supreme Court?

MR. DOLIN: Well, I disagree with the state's interpretation of the case that they've cited. I think the -- so two things. One is that it's not -- you know, we're making several allegations, not just of the enforcement but also of posting and maintaining a false or incomplete setting.

Number two, although the Supreme Court said in Wayte, which we cite on page ten of our brief, that of course the state is given broad discretion as to whom and how to prosecute, but that discretion is not boundless, and you cannot bring prosecution based on prohibited conduct. Of course, in Wayte, part of the issue is, there's a -- and, you know, that was also talked about in FAIR v. Rumsfeld (sic). Congress has an independent power to sort of raise army's clause (sic). So there's slightly different rules that apply there.

But here, again, being the only person to have had this

compliance order or one of or two people whose compliance was -- being the only person in at least ten years that a nonfinal compliance order was posted on their website suggested something more than merely a choice of where to spend your resources in terms of what prosecutions to bring was made.

So let me -- just a couple of other points, your Honor. So on the procedural due process, so the state has said, we allege no facts that tied the defendants to the challenged actions. That's just incorrect. In paragraph 76 and 77, we have alleged that the Government officials have said to Dr. Skoly that this was not about safety, science or medicine; this was just because he, quote, opened his big mouth. And he was informed that this was a political decision that it was made --

THE COURT: Who made those -- who informed him?

MR. DOLIN: We've alleged in our complaint that these statements were made by and at the direction -- I would say -- I'll read from paragraph 76. (Reading) Dr. Skoly was told with knowledge and approval of the defendants Alexander-Scott, McDonald and McKee that the issue was not about safety, science or medicine. As well at paragraph 77, (reading) with the knowledge and approval of defendants who could have rescinded the Notice of Violation after Skoly was told that the choice --

(Interruption by the court reporter)

MR. DOLIN: That with the knowledge and approval of defendants, Alexander-Scott, McDonald and McKee could have rescinded the Notice of Violation and Compliance Order. Dr. Skoly was told that his choice was to submit to vaccination or stay suspended. So --

THE COURT: Told by whom?

MR. DOLIN: We don't have it in our complaint, but he was -- again, the allegation -- even if it's not a fully developed allegation at this stage, inference should be drawn in the favor of the nonmoving party of the -- of Dr. Skoly.

THE COURT: Okay. Go ahead.

MR. DOLIN: Although, I would point out that Dr. Skoly had several conversations, including with the Governor himself, you know, where he was attempted to be coaxed into taking --

THE COURT: Is that included --

MR. DOLIN: That is not in the complaint.

THE COURT: Well, then, it's not something I can consider for --

MR. DOLIN: Fair. Fair. I think those are kind of our -- I think those are kind of our main points. And, fundamentally, I think our central point is that Dr. Skoly was the only person against whom the state went after. He

was the only person who's -- would affect to whom a Compliance Order or a Nonfinal Compliance Order was placed on a website, that it was inappropriate and misleading at the very least, whether -- we can debate whether it's false or not -- but certainly misleading to maintain that order on the website, and that he suffered damages because of it.

And cooperative immunity doesn't protect -- certainly absolute immunity doesn't protect the defendants against prosecutorial actions. And qualified immunity doesn't protect him against what they knew or at least should have known given the state of the case law, that retaliatory conduct is not within -- it's not debatable, it's not protected conduct, and it's not a close call. Thank you, unless there's any further questions.

THE COURT: I don't have any further questions at the moment. Mr. Field, I see you -- do you have something you want to add? And am I wrong on the regulation?

MR. FIELD: No. And as a matter of fact, your Honor, that was my first point. Paragraph 44 of their complaint, I know it does -- there were a bunch of regulations, and they did change, so it does get confusing. But the temporary regulation, the first regulation applied to healthcare workers and healthcare providers.

And paragraph 44 of their complaint says, I quote, (reading) The temporary emergency regulation applied to

Dr. Skoly who, under Rhode Island law, is a healthcare provider.

THE COURT: So they've conceded that in their complaint?

MR. FIELD: It's in the complaint. Yeah. Couple of other points. The Court had a colloquy, an extended colloquy, and I'm not going to say much on the procedural due process except for one point that wasn't put into the colloquy that I want to add. With respect to the procedural due process and whether a decision was made, it was the hearing officer's decision. The hearing officer's decision was on November 10th. And the complaint about, you know, there was no Compliance Order, there were no determinations of violations, he was told by the hearing officer on his motion that he could no longer practice until he complied with the regulation. That happened on November 10th.

The CDC -- just to be clear, the CDC never said people with COVID are safer than people who are not infected. What they said was, if you have a hospital or a skilled nursing facility that's in a crisis mode, and crisis is defined to be not providing sufficient patient care or adequate patient care, it's okay to put somebody who has COVID with a mask in there. And what we put in our memo, and I think this is right on point, is faced with the lesser of two evils, not staffing the place or staffing it with somebody with COVID

with a mask, they chose to staff --

THE COURT: It's harm reduction. Is that what you're --

MR. FIELD: I'm sorry?

THE COURT: It's a harm reduction measure. So if you don't have a nurse or a doctor, then you are better off with somebody who's masked with COVID than with no --

MR. FIELD: Yeah. That's exactly right. And there's no allegation in the complaint that Dr. Skoly -- I think he may have acknowledged it but no allegation that he fell within that classification.

The thousand people that declined to be vaccinated and that only Dr. Skoly was singled out, we sort of went through this a little bit in Dr. T. I don't remember the exact number, but there was a large group, around a thousand, that were not vaccinated. But that didn't mean that they were practicing. That meant they were either complying with the regulations through telemedicine or that they just were not practicing medicine.

There were, the complaint says, between 299 and 365 that were determined to be medically exempt by the providers. They fell within a certain classification. There's no allegation in the memo or the complaint that anybody who was not medically exempt, which was Dr. Skoly, practiced -- practiced face-to-face.

THE COURT: And that the state permitted that.

MR. FIELD: And that the state permitted it. And as a matter of fact, in your Honor's I think it was preliminary injunction Dr. T decision, right at the end, there was a reference to another Notice of Violation that was issued by DOH against a facility.

With all due respect, I've got to say something about this opened his big mouth, because it's been quoted in the complaint to this Court, it's been filed in this court, and they can't say who it is.

THE COURT: If it was said to Dr. Skoly, then they can say who said it, but they're not saying.

MR. FIELD: They're not saying who it is. And as a matter of fact, on page 15 of their memo, they write, and I quote, (reading) The Governor (or his subordinates) who indicated that Dr. Skoly was being targeted because he opened his big mouth.

They're trying, again, to impose individual liability on these defendants, and they can't even tell this Court who says what they have quoted to this Court. Thank you, your Honor.

THE COURT: Mr. Dolin, is there anything else?

MR. DOLIN: Thank you, your Honor. I guess one final point on harm reduction. We do not dispute that it might make sense, given that one choice is to have no

healthcare providers at all and the other choice is to have healthcare providers with COVID that option B is better. That's not what this is about. We're saying it's irrational to say if you have no healthcare providers, option B, healthcare providers with COVID; and option C, healthcare providers without COVID but wearing a mask or unvaccinated, that option B is better than option C.

THE COURT: You're comparing apples and oranges. Because I believe, and I've been through over the last three years, like we all have, that the issue was it had to be a facility that was at crisis staffing levels and providing care -- necessary care.

So, for example, I don't think that under that sort of analysis they would have allowed a cosmetic surgeon to practice but perhaps a heart surgeon. Do you know what I'm saying?

MR. DOLIN: Sure. But --

THE COURT: That's rational, isn't it?

MR. DOLIN: Sure. I'll concede but -- sure. On a very differential review, sure. But the problem is the state allowed the facility in which it barred Dr. Skoly, not just his office --

THE COURT: Right.

MR. FIELD: -- because he also provided services in a mental health facility, to allow that facility to continue

to employ people with active ongoing COVID infection, and that I submit is irrational.

THE COURT: Okay. I think you are comparing apples and oranges there, when there were people who are required to be there to provide day-to-day mental health care in a hospital setting versus somebody who comes in to do dental work or to do other sort of non-emergent care, right?

MR. DOLIN: Some care was not emergent; some was emergent. But, again, I think the point is you're having people come in with active ongoing COVID infection or somebody who's coming in without an infection, to say that, A, it's safer and, B, it seems to me to be irrational. I take your point --

THE COURT: Let's flip it. Okay. Let's say tomorrow you and I are both supposed to go to the hospital. We both have COVID. The hospital says, if you have COVID, you can't come in, but we're going to make an exception for Mr. Dolin because he's having emergency bypass surgery. He'll die. We're not going to make an exception for you for your facelift. For me. Isn't is that rational? Aren't those two different things?

MR. DOLIN: Yes, they are two different things. But, you know, Dr. Skoly was not providing facelifts. He was providing --

THE COURT: Dental care.

MR. DOLIN: But not necessarily elective dental care. And, again, your Honor, I think you're -- I don't think your analogy holds. Because you're stressing, like, you and I both have COVID and we're both going to the hospital with different needs, but Dr. Skoly didn't. That's the whole point. It's not as he -- you know, you had a group A, COVID, vaccinated and Dr. Skoly in group B who had COVID not vaccinated. But group A who had COVID ongoing at that time, and Dr. Skoly through group B did not have COVID, and he was barred from the hospital. That's what makes it irrational.

THE COURT: All right. I disagree. Mr. Field, anything further?

MR. FIELD: No, thank you, your Honor.

THE COURT: So before the Court today, obviously, is ECF number 42, which is the Defendant's Motion to Dismiss the Plaintiff's Third Amended Complaint pursuant to Rule 12(b)(6). And as a preliminary matter, the plaintiff has voluntarily dismissed Count IV, a due process claim involving unemployment benefits. And, as such, the Rhode Island Department of Labor and Training, its director Matthew Weldon, and any claims against them are dismissed from the case.

So next we consider the plaintiff's claims for monetary relief under 42 U.S.C. 1983. Regarding the state, any state

agencies and individuals being sued in their official capacities, the Court -- I think the plaintiff has conceded, the Court grants the defendant's Motion to Dismiss under Wills versus Michigan. And that is 491 U.S. 58. Neither the state nor any of its officials acting in their official capacities are persons that can be held liable under section 1983. So those are sort of the things that we all are sort of in agreement on.

Now, turning to the plaintiff's claim for monetary damages against the remaining defendants in their individual capacities; that is, Governor McKee, former and current Rhode Island Department of Health directors Alexander-Scott, McDonald and Bandy, the plaintiff alleges retaliation in violation of his rights of equal protection, due process and freedom of expression.

An aspect of these claims concerns the decision to bring the Department of Health's October 1st, 2021 Notice of Violation and Compliance Order against the plaintiff.

The Court finds that the First Circuit case of Goldstein versus Galvin 719 Fed.3d 24 is analogous and binding on this matter.

Similar to the plaintiffs in that case, Dr. Skoly alleges retaliation as the motivation for the defendants choosing to bring and actually bringing the enforcement action. In Goldstein, the Court applied the doctrine of

absolute immunity, a doctrine applicable to, among others, agency officials within functions similar to judge and/or prosecutors.

As the Court explained, the baseline rule is that a state official who performs prosecutorial functions, including the initiation of administrative proceedings that may result in legal sanction, is absolutely immune from damages -- from damage actions; and the protection afforded by absolute immunity endures even if the official acted maliciously and corruptly in exercising his or her judicial or prosecutorial function.

The director of the Department of Health, no doubt, has prosecutorial authority. She is enabled to, by Rhode Island General Laws Sections 23-1-20 through 23-1-23, to bring notices of violation and enforce compliance orders.

Such prosecutorial authority affords absolute immunity from the plaintiff's claims regarding the bringing of the notice of violation and compliance order.

The, plaintiff, however raises two issues. The first is that the Governor does not have prosecutorial or judicial power to qualify for absolute immunity per the test set forth in Goldstein. And, regardless, the Governor can, and here does, have qualified immunity for those claims.

To overcome qualified immunity, a plaintiff has to make out a violation of a constitutional right and also establish

that the right was clearly established at the time of the defendant's alleged violation. The plaintiff here cannot make out any clearly established right violated by the bringing of the administrative enforcement action against him and for his admitted refusal to comply with the emergency regulation.

At least as early as the United States Supreme Court case of Jacobson versus Massachusetts in 1905, courts in this country have held that mandatory vaccination laws are a valid exercise of a state's police powers, and such laws have withstood constitutional challenges of.

Dr. Skoly cannot argue a fundamental right to practice his chosen profession as the Supreme Court has indicated in Connecticut versus Gabbert that the liberty component of the Fourteenth Amendment due process clause includes some generalized due process rights to choose one's field of private employment, but a right -- that right is nevertheless subject to a reasonable government regulation.

It's also noteworthy that the emergency regulation satisfies the rational basis test implicit in Jacobson; that is, DOH, Department of Health, had a rational basis not to include Dr. Skoly's medical condition in the emergency regulation medical exemption. The CDC specifically advised that people with a history of Bell's Palsy may receive any currently FDA approved or FDA authorized COVID-19 vaccine.

And regarding Dr. Skoly's argument that he was immune by way of prior infection, the CDC advised that the evidence suggests that the risk of COVID-19 reinfection is low in the months after initial infection but may increase with time due to waning immunity.

By relying on CDC guidelines, the state can demonstrate a rational basis for the healthcare provider vaccination. Because there's no clearly established right for a healthcare provider who does not qualify for the medical exemption to avoid vaccination, Dr. Skoly cannot overcome the Governor's qualified immunity.

The plaintiff also argues that the posting of the Notice of Violation and Compliance Order on the Department of Health website, both before and after the Department of Health withdrew the charge on March 11, 2022, is actionable First Amendment retaliation because it was outside of the scope of any prosecutorial duty and, therefore, outside of absolute immunity. But that's not what the plaintiff alleges in his Third Amended Complaint.

The Court's task today is to test the sufficiency of the complaint, and the operative complaint alleges only that the plaintiff is entitled to relief for the website posting after March 11, 2022 and only with respect to the alleged equal protection due process violations, not the First Amendment claim.

The Court, therefore, need not consider a First Amendment claim regarding the website posting or any claim about the posting before March 11th, 2022. But even doing so, the Court finds that the plaintiff's claims fail.

The Court again refers to Goldstein. There the plaintiff, subject of an administrative enforcement action, alleged that the Massachusetts Secretary of Commerce office in a departure from its usual practice disclosed his name on its website related to an enforcement action.

The First Circuit resolved Goldstein's retaliation claim on Government speech grounds. The Court explained that in this instance, the alleged retaliatory act is itself in the form of Government speech, and the secretary's use of the plaintiff's name in a website -- as is the secretary's use of the plaintiff's name in a website announcement.

The Court cautioned that, quote, Courts have not been receptive to retaliation claims arising out of Government speech and explain that this, quote, cautious approach to limiting Government speech is warranted because not only do public officials have free speech rights, but they also have an obligation to speak out on matters of public concern.

Moreover, the Court in Goldstein determined that the website announcement was not false, but even if the defendant chose to include the plaintiff's name in the announcement because he bore him a grudge, that would not be

enough to state a plausible claim of retaliation. And quoting again from Goldstein, quote, A public official's malicious intent taken alone cannot amount to a retaliatory purpose. There must be actual adverse conduct or speech.

Thus, the Court concluded that allowing a plaintiff to weave a First Amendment retaliation claim on something so mundane as a Government official's issuance of a true statement, not couched in inflammatory terms, about a matter of public concern would trivialize the constitution.

So, thus, the mere posting of the enforcement action against Dr. Skoly would be Government speech, and that could not form the basis of a plausible First Amendment retaliation claim.

Dr. Skoly attempts to distinguish Goldstein by arguing that in this case, unlike Goldstein, the information on the DOH website was not accurate. And he argues that the pre-March 11, 2022 posting was inaccurate because the Notice of Violation and Compliance Order was not a final or operative order.

He points to the fact that the notice was issued under Rhode Island General Law Section 23-1-20 which provided that whenever the DOH director has reasonable grounds to believe that there is a violation of law, the director may give notice of the alleged violation to the person responsible for it, and that the notice does not mature into a

compliance order until after a hearing, or if no hearing is requested, after ten days.

An immediate compliance order can be issued, but that's under the separate statute, which is 23-1-21, and that -- which applies when the director determines that there exists a violation of any law, rule or regulation which requires immediate action to protect the health, welfare or safety of the public or any member of the public.

Here, Dr. Skoly requested a hearing, so he claims there was never an operative compliance order. But the notice does indicate that he has a right to request a hearing and that it could become a final compliance order.

The DOH does not dispute that the October 1, 2021 compliance order was not final, because Dr. Skoly did seek to appeal it through a hearing. This isn't accurate either, as Dr. Skoly admitted he was not vaccinated pursuant to the emergency regulation.

He filed a prehearing motion with the DOH to allow him to continue practicing dentistry pending a full hearing on the compliance order, and a hearing was held on the motion on November 8th, 2021. And a written decision was issued two days later that confirmed the DOH's authority to issue the Notice of Violation and Compliance Order pending his full hearing.

The Compliance Order, though not final, required

Dr. Skoly to cease acting as a healthcare provider as defined in the regulation until he complied with the regulation, which the Department of Health had the authority to do subject to a successful appeal.

Importantly, Dr. Skoly has provided no authority prohibiting the publishing of an enforcement action prior to the entry of a final order. Indeed, given that it was Government speech on an issue of public concern, Dr. Skoly has not set forth a plausible First Amendment retaliation claim for the pre-March 11, 2022 website posting.

As to the First Amendment claim regarding the post-March 11, 2022 website posting, which, again, the Court need not consider because it was not raised in the Third Amended Complaint, Dr. Skoly alleges that it supports a claim for retaliation because on the date, the Notice of Violation was withdrawn, and so to it should have been the posting.

Although it is true that the notice remained on the website for some six months after withdrawal of the violation, Dr. Skoly points to no legal authority that requires the charging documents for an enforcement action must be removed from an agency's website within a certain period of time.

Finally, regarding the plaintiff's claims for injunctive relieve, the plaintiff agrees that recent

developments have rendered them moot. For these reasons, the Court grants the defendant's Motion to Dismiss the Plaintiff's Third Amended Complaint. Is there anything further?

MR. FIELD: No, your Honor. Thank you.

MR. DOLIN: No, your Honor.

THE COURT: Then we'll be in recess.

(Adjourned)

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

I, Denise A. Webb, CSR-RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

Dated this 25th day of July, 2023

/s/ Denise A. Webb

Denise A. Webb, CSR-RPR
Federal Official Court Reporter