No. 10-2167 (consolidated with No. 10-2172)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, M.D.

Plaintiff-Appellant,

v.

G.T.S. KHALSA, ESQ;
LIVINGSTON PARSONS, M.D.; and
THE STATE OF NEW MEXICO,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Mexico,
The Honorable M. Christina Armijo, United States District Judge

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ANSWER BRIEF

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STATEMENT OF PRIOR OR RELATED APPEALS

Dr. Guttman's case has been before this court in two prior appeals: *Guttman v. Khalsa,* 401 F. 3d 1170 (10th Cir.), *vacated and remanded,* 546 U.S. 801 (2005); *modified on remand,* 446 F. 3d 1027 (10th Cir. 2006); and *Guttman v. State of New Mexico,* 325 Fed. Appx. 687 (10th Cir. 2009).

ISSUES PRESENTED ON APPEAL

Whether the district court correctly concluded that, as applied to alleged procedural due process violations in the revocation of Dr. Guttman's medical license, the abrogation of Eleventh Amendment immunity in Title II of the Americans With Disabilities Act (the "ADA"), 42 U.S.C. §§ 12131 *et seq.*, was invalid?

Whether collateral estoppel forecloses Dr. Guttman's ADA claim, in light of Board of Medical Examiner determinations that he was unable to practice medicine with reasonable skill or safety to patients by reason of his mental illness and had been dishonest in Board proceedings, where the Board's conclusions were affirmed by a judgment of a state district court?

Whether the district court correctly determined that, following dismissal of Dr. Guttman's ADA claim, no other viable claims remained?

STATEMENT OF PROCEEDINGS

A. Nature Of The Case.

Dr. Guttman sued the State of New Mexico, Dr. Livingston Parsons, and Mr. Khalsa, alleging violations of 42 U.S.C. § 1983 and Title II of the ADA in relation for the revocation of Dr. Guttman's medical license. The United States intervened in support of the validity of 42 U.S.C. § 12202, the statute abrogating Eleventh Amendment immunity in Title II of the ADA.

B. Course Of Proceedings.

After the most recent remand from this Court, the State moved for dismissal of the ADA claim based on Eleventh Amendment immunity and collateral estoppel. (App. 140-57.) The district court granted the State's motion, to the extent it rested on Eleventh Amendment immunity. (App. 341-69.) The court declined to rely on collateral estoppel as grounds for the dismissal, determining that the issue would be more appropriately considered in a summary judgment motion. (App. 369-73.)

After the district court partially granted the State's motion, the defendants moved for dismissal of Dr. Guttman's second amended complaint. (Doc. 144.) The district court granted the motion, concluding that all of Dr. Guttman's claims had been dismissed, waived, or were otherwise not viable. (App. 384.) Dr. Guttman and the United States appealed. (App. 386-89.)

STATEMENT OF FACTS

A. Stipulated License, Removal Of Stipulations.

The history of Dr. Guttman's licensure in New Mexico evidences the effects of his mental illness on his ability to practice medicine. (App. 341-42.) For a time, Dr. Guttman practiced under a Stipulation of Licensure issued on May 20, 1993. (App. 176, 196.) The conditions of the stipulated license included continuation of Dr. Guttman's psychiatric therapy, quarterly reports from his psychiatrist to the Board of Medical Examiners, evaluation by an independent psychiatrist upon the Board's request, quarterly declarations under penalty of perjury of his compliance with the conditions of his stipulated license, and summary suspension of his license upon his breach of any term of the stipulation. (App. 293-95.) The Board removed the stipulated conditions on Dr. Guttman's license in 1995. (App. 196.)

B. Impaired Physician Committee.

In 1999, conflict over Dr. Guttman's licensure resumed. The Board directed Dr. Guttman to meet with an Impaired Physician Committee (the "IPC") following a large number of complaints concerning Dr. Guttman. (App. 329, ¶ 5.) The three members of the IPC were Dr. Layman, an anesthesiologist, and two psychiatrists, Dr. Levon Tashjian and Dr. Al Vogel. (App. 329, ¶ 6.) In preparation for their work on the IPC, the members reviewed materials concerning Dr. Guttman's

history and complaints concerning his conduct while practicing in Truth or Consequences. (*See, e.g.,* App. 275.) These materials showed that Dr. Guttman was having problems interrelating with others, and that these problems were causing a great deal of consternation among staff, administration, nurses, and other health care givers in Truth or Consequences. (*Id.*)

On January 10, 2000, the IPC members met for ten or fifteen minutes to discuss "the ground rules" and then called Dr. Guttman into the conference room. (App. 277-76.) Dr. Tashjian, the Chairman of the IPC, began with a general discussion of the purpose of the meeting. (App. 276.) Dr. Layman recalled that Dr. Guttman said he had a cold and was not feeling well, but that Dr. Guttman functioned fairly well. (App. 277-78.) Dr. Guttman declined to have the meeting tape-recorded. (App. 277.) Dr. Layman perceived his role as trying to determine if "there was detrimental behavior" which reflected on the relationships affecting Dr. Guttman's practice. (App. at 281.)

C. IPC Report, Recommendations.

Immediately after its meeting with Dr. Guttman, the IPC prepared a report to the Board. (App. 208-09.) The report described the complaints about Dr. Guttman's behavior in 1998-1999 at Sierra Vista Hospital in Truth or Consequences. (App. 208.) It recounted that Dr. Guttman had practiced in Mississippi, followed by a six-month period of *locum tenens* work in Gallup, then

a two-year period working at a hospital in Lubbock, followed by his work in Truth or Consequences. (App. 208.) The report also conveyed Dr. Guttman's statement at the interview that "he had no complaints filed against him either in Gallup or Lubbock." (App. 209.) The report recommended further investigation to determine Dr. Guttman's behavior patterns in Gallup and Lubbock. (*Id.*)

Dr. Layman believed that information about Dr. Guttman's behavior in Gallup was important because Dr. Guttman had told the IPC that he had not had problems there, and that he had left on good terms when his contract ran out. (App. 282-83.) Dr. Layman believed the question about whether Dr. Guttman had experienced problems in Gallup had been asked in a way that "it would be pretty hard to misinterpret it." (App. 283.)

Within two weeks of the January 10 meeting and report, the IPC received materials from Gallup. (App. 285.) Dr. Layman recalled a letter indicating that a hospital in Gallup had denied Dr. Guttman staff privileges and that Dr. Guttman had been sued for malpractice. (App. 286.) Dr. Layman was "a little bit mortified" that Dr. Guttman would have lied to the IPC. (App. 287.)

The IPC prepared an addendum to its initial report. (App. 217.) Information received from Gallup reflected numerous complaints against Dr. Guttman by patients, family, and staff for "negative interpersonal behavior." (*Id.*) The IPC determined that Dr. Guttman's interpersonal problems were "serious" and

"certainly [had] a deleterious influence on his ability to diagnose and manage patients." (*Id.*) The information from Gallup indicated that Dr. Guttman's negative interpersonal behavior was not "situation nor place related," representing instead deeply ingrained patterns of interaction. (*Id.*)

Dr. Layman initially supported allowing Dr. Guttman to hold a restricted license, similar to the licensure Texas had granted. (App. 290.) After concluding that Dr. Guttman had lied in his meeting with the IPC, Dr. Layman supported revocation of Dr. Guttman's license. (App. 290-92.)

The Board's counsel, Mr. Khalsa, wrote a letter to Dr. Guttman's counsel, Paul Kennedy, inquiring about seemingly inaccurate statements Dr. Guttman made to the IPC about malpractice claims against him in New Mexico and interpersonal conflicts that occurred in Gallup. (App. 219.) Dr. Guttman wrote in response, stating that he did not recall making the inaccurate statements. (*Id.*) He "hasten[ed] to provide [Mr. Khalsa and the IPC] with accurate information …" and offered to provide further information. (*Id.*)

D. Summary Suspension, Notice Of Contemplated Action.

On March 7, 2000, the Board summarily suspended Dr. Guttman's license because Dr. Guttman could not practice medicine safely due to his history of mental illness. (App. 303, 306.) The Order of Summary Suspension recited that the suspension was temporary and that the Board had found clear and convincing

evidence that "Dr. Guttman's continuation in practice would constitute an imminent danger to public safety." (App. 303.) The Board simultaneously issued a "Notice of Contemplated Action," which recited the allegations underlying the suspension and possible revocation of Dr. Guttman's license. (App. 299-300.)

E. Board Hearing.

The Board conducted an administrative hearing on October 23 through 25, 2000. (App. 251-72, 311-27; Doc. 9, Ex. 1, 2.) Herbert Silverberg, Esq., represented Dr. Guttman before and during the hearing. (*Id.*) At the hearing, Mr. Silverberg proposed restrictions on Dr. Guttman's license more stringent than those that governed his stipulated license. (Doc. 9, Ex. 1 at 32-33.) The proposed conditions would permit Dr. Guttman to practice only in a solo practice, outpatient clinical setting. (*Id.* at 33-34.) Mr. Silverberg explained that the proposed restrictions were aimed at addressing concerns about Dr. Guttman raised in Dr. Tashjian's deposition. (*Id.* at 34.) Dr. Tashjian, one of the psychiatrists on the IPC, testified at the Board hearing that the restrictions proposed by Mr. Silverberg on behalf of Dr. Guttman did not address Dr. Guttman's problems, which had to do with "the whole interpersonal aspect of being a clinician." (*Id.* at 144.) Dr. Tashjian testified that he had "a problem coming up with" a level of control imposed through license restrictions which would permit Dr. Guttman to practice.

(*Id.* at 147-48.) Dr. Layman also testified that he could envision no circumstance under which Dr. Guttman could be permitted to practice. (*Id.* at 542.)

Dr. Layman testified at the Board hearing about the IPC's investigation and his change of heart regarding Dr. Guttman's ability to practice. (App. 251-271.) He testified that the IPC asked Dr. Guttman about whether he had experienced any difficulties in Gallup when he practiced there and that Dr. Guttman had answered "No." (App. 255.) Dr. Guttman also said that no reports were filed against him in Lubbock. (App. 256.) Dr. Layman wanted to verify whether the pattern of problems Dr. Guttman had experienced in Truth or Consequences and Mississippi extended to his time in Gallup and Lubbock. (App. 256-57.) After receiving additional documents, Dr. Layman believed that what Dr. Guttman had told the IPC was "totally dishonest." (App. 257.) He also believed that the behavior evidenced by deposition transcripts received from Truth or Consequences constituted conduct unbecoming a person licensed to practice in New Mexico. (App. 258-261.)

With respect to the ability of a physician licensed to practice medicine in New Mexico, Dr. Layman testified that "honesty is number one in any quality of the professional, and it is almost integral to a good practice of medicine." (App. 261.) Honesty is foremost for the safe practice of medicine. (App. 261.) "I've

always believed [honesty]'s number one." (App. 272.) At the hearing, Dr. Layman recommended that the Board revoke Dr. Guttman's license. (App. 262.)

F. Board's Findings, Conclusions And Revocation Order.

On February 28, 2001, the Board issued its Order. (App. 328-36.) The Board concluded that Dr. Guttman's license should be revoked in part because Dr. Guttman has an underlying mixed personality disorder and his anger was out of control. (App. 333, ¶ 43.) The record confirmed an extensive pattern of abusive and disruptive behavior by Dr. Guttman in his dealings with colleagues, nurses, administrative staff, and patients. (*Id.* at 331-33, ¶¶ 26-42.) The Board found that Dr. Guttman had a history of major depression and post traumatic stress disorder, prior therapeutic treatment had not been effective in changing his behavior, and further treatment would not likely be effective. (*Id.* at 333, ¶¶ 44-45.) Past interventions by employers and associates had not changed his behavior and further interventions were unlikely to succeed. (*Id.* at ¶ 46.) The Board found that Dr. Guttman could not be effectively monitored to control his aberrant behavior. (*Id.* at ¶ 47.) It also found that Dr. Guttman's inability to interact in a responsible, non-disruptive manner with other health professionals presented a danger to his and other patients, i.e. the public. (*Id.* at ¶ 48.) Dr. Guttman, the Board found, was unable to practice medicine with reasonable skill and safety to patients by reason of his mental illness. (*Id.* at ¶ 49.) The Board revoked Dr. Guttman's license on

the additional ground that he had been untruthful in his statements to the IPC and in his testimony before the Board. (App. 329-31, ¶¶ 8-25.)

G. Dr. Guttman's Appeal, Petitions For Review.

Dr. Guttman challenged the Board's findings in an appeal to the state district court. (Doc. 5, Ex. E.) In his appeal, Dr. Guttman specifically contested the findings concerning his mental illness, Dr. Tashjian's statement that Dr. Guttman would not benefit from treatment, that Dr. Guttman could not be effectively monitored, that further intervention would not likely change his behavior, and that Dr. Guttman presented a danger to his patients. (*Id.* at 14-15) (unnumbered, challenging Board Findings Nos. 43, 45, 46, 47, and 49.) Dr. Guttman also questioned the findings of dishonesty as lacking support in substantial evidence. (Doc. 5, Ex. D at 4-6, 7, 8-10) (unnumbered.)

Dr. Guttman's appeal also attacked the Board's revocation order as a violation of Title II of the ADA. (*Id.* at 18-20) (unnumbered.) Dr. Guttman argued that the Board had not attempted to devise a plan to accommodate Dr. Guttman's disability. (*Id.* at 19) (unnumbered.) The appellate argument, however, omitted any discussion of testimony from Drs. Tashjian and Layman that they could envision no circumstances under which Dr. Guttman could be permitted to practice.

The district court affirmed the revocation of Dr. Guttman's license. (App. 338.) Judge Kevin Sweazea found that the revocation was based upon substantial evidence. (*Id.*) He also found that Dr. Guttman had not raised the issue of ADA compliance before the Board and therefore failed to preserve the issue for appeal. (*Id.*)

Dr. Guttman unsuccessfully petitioned the New Mexico Court of Appeals for review of the district court's decision. (App. 339.) Dr. Guttman also petitioned the New Mexico Supreme Court for a writ of certiorari, without success. (App. 340.)

SUMMARY OF ARGUMENTS

Prudence demands that the State address each of the issues raised by Dr. Guttman's lengthy, complicated Brief-in-Chief. The issues at the heart of this case, however, are few and straight-forward. As the district court recognized, Congress did not validly abrogate the State's immunity, as applied in this case. Also, Dr. Guttman fully and fairly litigated his fitness to practice medicine, and his ADA claim is collaterally estopped. The district court correctly dismissed Dr. Guttman's ADA claim.

The balance of Dr. Guttman's claims, based on *Ex Parte Young*, First Amendment retaliation and stigma plus defamation, are deficient as a matter of

law. The district court correctly prevented Dr. Guttman from using a variety of federal theories to attack the lawful revocation of his medical license.

ARGUMENT

A. The District Court Correctly Concluded That The Abrogation Of Eleventh Amendment Immunity In Title II Of The ADA Was Invalid, As Applied To Dr. Guttman's Case, Under The Test Imposed By *Tennessee v. Lane,* 541 U.S. 509 (2004).

STANDARD OF REVIEW: A *de novo* standard governs review of the district court's application of Eleventh Amendment immunity principles. *See, e.g., Steadfast Ins. Co. v. Agricultural Ins. Co.,* 507 F.3d 1250, 1253 (10th Cir. 2007).

The district court's application of *Lane* should be affirmed. The district court and the litigants agree that Congress unequivocally expressed its intent to abrogate Eleventh Amendment immunity in 42 U.S.C. § 12202, and that Dr. Guttman has stated a claim for violation of Title II of the ADA. (App. 347-48, 350.) The parties dispute whether the State has waived Eleventh Amendment immunity, whether Dr. Guttman has alleged independent constitutional violations, and whether the abrogation of Eleventh Amendment immunity passes the congruence and proportionality test. Dr. Guttman did not raise the waiver argument in the district court, and therefore failed to preserve it for appeal. The district court correctly resolved the Eleventh Amendment issues actually litigated below against Dr. Guttman.

1. Dr. Guttman Failed To Preserve His Waiver Argument, And No Waiver Occurred.

Dr. Guttman asserts that the State has waived its Eleventh Amendment immunity by stipulating to the jurisdiction of the district court in a Provisional Discovery Plan and Joint Status Report. (*App. Br.* 10-11.) This issue never arose in the district court and Dr. Guttman may not raise it for the first time on appeal. *See, e.g.*, *Power v. Summers,* 226 F.3d 815, 819 (7th Cir. 2000) (holding that plaintiff who had not argued waiver of Eleventh Amendment immunity in district court had waived issue); *Becker v. University of Nebraska*, 191 F.3d 904, 909, n.4 (8th Cir. 1999) (declining to address argument claiming waiver of Eleventh Amendment immunity because appellant failed to preserve it).

In any event, the facts Dr. Guttman relies upon do not suffice to demonstrate a waiver of Eleventh Amendment immunity. The test for determining a waiver of immunity is strict: there must be an "unequivocal intent to waive the immunity." *McLaughlin v. Board of Trs. of State Colleges of Colo.*, 215 F.3d 1168, 1170 (10th Cir. 2000). Such an intent is clear when, for example, a state facing suit in its own courts purposefully seeks a federal forum by removing a case to federal court. *Id.*

The record in this case evidences no such intent. The state has asserted and vigorously litigated Eleventh Amendment immunity from the inception of the case. (Doc. 4.) The district court granted summary judgment on Eleventh Amendment immunity grounds on September 16, 2003. (Doc. 19.) That result did not stand.

(Doc. 26.) Nonetheless, the State continued to assert Eleventh Amendment immunity, even in the Joint Status Report and Provisional Discovery Plan Dr. Guttman relies on in claiming a waiver. (Doc. 49 at 3.) ("Defendants contend they are entitled to Eleventh Amendment immunity.") The State moved again for dismissal on Eleventh Amendment immunity grounds, following the analysis prescribed by this Court in *Guttman v. Khalsa*, 446 F.3d 1027 (10th Cir. 2006), and *Guttman v. State of New Mexico*, 325 Fed. Appx. 687 (10th Cir. 2009) (unpublished). (App. 140-149.) This history does not reflect an unequivocal intent to waive immunity.

2. Dr. Guttman's Case Presents No Viable Claims For Independent Violations Of The Fourteenth Amendment.

The district court correctly concluded that Dr. Guttman's case presents no independent constitutional violations. In challenging this holding, Dr. Guttman focuses entirely on his procedural due process claims. The district court's determination that Dr. Guttman failed to present a viable claim for procedural due process violations, however, was plainly correct.

a.) The Board's Suspension Of Dr. Guttman's License Satisfied Federal Due Process Standards.

Dr. Guttman asserts that the Board violated his right to procedural due process by summarily suspending his medical license without a pre-deprivation

hearing, and without complying with various procedures required by state law. Dr. Guttman's challenges to the district court's rulings are mistaken.

i.) Dr. Guttman Was Not Entitled To A Pre-Deprivation Hearing.

Dr. Guttman cites *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), for the familiar proposition that the Due Process Clause demands that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." But the Supreme Court has repeatedly clarified that *Loudermill* did not announce a bright-line rule. *See, e.g.*, *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (quoting *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895 (1961) (internal quotation marks omitted)). As the district court noted, "[d]ue process is flexible and calls for such procedural protections as the situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The State agrees with the district court's analysis of the due process issue and offers the following in response to Dr. Guttman's arguments and as additional grounds for affirmance.

Initially, Dr. Guttman is incorrect that he did not receive adequate pre-deprivation process. The record demonstrates that *before* the Board suspended his license, Dr. Guttman (1) received notice that the Board had reason to believe that he was "impaired," (2) appeared before the IPC, and (3) had the opportunity to

"present his side of the story" regarding the numerous complaints against him from patients, family members, office employees, hospital staff, and other physicians. (App. 119, 208-09, 219.) Under these circumstances, no further process was due. *See Loudermill*, 470 U.S. at 546 ("The essential requirements of due process [are] … oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.").

Even assuming that Dr. Guttman did not receive adequate pre-deprivation process, the Supreme Court has identified two scenarios where pre-deprivation proceedings are unnecessary. The first arises "where it would be impractical to provide predeprivation process." *Gilbert*, 520 U.S. at 930. This occurs when a state actor deprives an individual of a protected interest through conduct that is "random and unauthorized." *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that intentional destruction of inmate's property by prison guard during search did not violate due process because the conduct was random and unauthorized). In such a scenario, "the state cannot predict when the loss will occur," thus rendering a pre-deprivation hearing "not only impracticable, but impossible." *Id.* at 532 (quoting *Parratt v. Taylor*, 451 U.S. 527, 541 (1981)). This Circuit has further held that conduct is not random and unauthorized when carried out pursuant to established state procedures. *See, e.g.*, *Gilliham v. Shillinger*, 872 F.2d 935, 940 (10th Cir. 1989).

The other circumstance that negates the requirement of pre-deprivation proceedings arises where a state must act quickly to protect an important governmental interest. *See Gilbert*, 520 U.S. at 930-31. In that situation, a post-deprivation opportunity to challenge the government's action satisfies due process because the government's need to act quickly outweighs the private interest at stake and the risk of erroneous deprivation. *See Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1220 (10th Cir. 2006). Significantly, this Circuit has held that, in matters of public health and safety, "[q]uick action may turn out to be wrongful action, but due process requires only a postdeprivation opportunity to establish the error." *Id.* (holding that defendant did not violate due process when, in interest of public health and safety, it suspended plaintiff's restaurant permit without a hearing).

Dr. Guttman argues that pre-deprivation proceedings were "*required*" because his license was suspended through established state procedures. (*App. Br.* 13-14.) He relies in part on *DiBlasio v. Novello*, 344 F.3d 292 (2d Cir. 2003), a Second Circuit case involving similar claims and holding that the suspension of the plaintiff–physician's medical license without a pre-deprivation hearing violated due process. However, *DiBlasio* focused on whether the defendant's conduct was random and unauthorized, *see id.* at 303, and did not reach the question of whether

pre-deprivation proceedings were unnecessary because of the need for prompt action by the state.[1]

Here, pre-deprivation proceedings were not necessary to suspend Dr. Guttman's license because the Board concluded that it needed to take quick action in the interest of public safety. After interviewing Dr. Guttman and reviewing documentation related to his professional conduct, (App. 208–09), the IPC concluded that Dr. Guttman's history of "rude, abusive, arrogant, *etc.*, behavior . . . [had] a deleterious influence on his ability to diagnose and manage patients," and recommended that the Board "consider either restricting or revoking his license." (App. 217.) The Board reviewed the IPC's report and concluded that, based upon clear and convincing evidence, Dr. Guttman's continued practice of medicine "would constitute an imminent danger to public safety." (App. 303.) As a result, the Board temporarily suspended his license and instituted proceedings against him

[1] The Second Circuit has recognized that *DiBlasio* is distinguishable from cases like Dr. Guttman's involving revocation, instead of suspension, of a medical license. *Applewhite v. Briber*, 506 F.3d 181, 182 (2nd Cir. 2007) (contrasting procedures involved in suspension and revocation, citing *Guttman v. Khalsa*, 446 F.3d 1027, 1032-34 (10th Cir. 2006)).

in accordance with state law.[2] (*Id.*)

The Board's determination that Dr. Guttman posed "an imminent danger to public safety" obviated the need for a pre-deprivation hearing. *See Camuglia*, 448 F.3d at 1220 ("In matters of public health and safety, the Supreme Court has long recognized that the government must act quickly."); *Ferraro v. Board of Trustees of Labette County Med. Ctr.*, 106 F. Supp. 2d 1195, 1201-02 (D. Kan. 2000) (holding that the seriousness of the allegations against a nurse anesthetist implicating patients' safety justified a quick suspension without a hearing). The government has a strong interest in acting quickly to protect the public from an imminent danger to public safety. (App. 222.) (stating that the IPC's duty is to "protect the Public."). *Cf. FDIC v. Mallen*, 486 U.S. 230, 240-41 (1988) (holding that government's interest in protecting depositors' interests and public confidence in banking institutions negated requirement for pre-deprivation proceedings to summarily suspend bank president); *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (holding that preserving integrity of sport of horse racing and protecting public

[2] The New Mexico Legislature specifically vested the Board with the authority to temporarily suspend a physician's license when necessary to ensure public safety, deferring review of that action to a later time. *See* NMSA 1978, § 61-7-8(D) (providing that Board may temporarily suspend license without hearing upon finding supported by clear and convincing evidence "that the health care provider's continuation in practice would constitute an imminent danger to public health and safety"). Dr. Guttman does not challenge the validity of that authority.

from harm justified suspension of a horse trainer's license without a hearing); *see also Tanasse v. City of St. George*, 1999 U.S. App. LEXIS 2389, at *12 (10th Cir. Feb. 17, 1999) (unpublished) ("The city's interest here in maintaining public confidence in its business institutions and protecting consumers' interests, . . . is at least as great as the State of New York's interest in 'preserving the integrity' of horse racing, an interest the Supreme Court deemed sufficiently compelling to justify suspension of a horse trainer without a hearing in *Barry v. Barchi*.").

Further, the need for pre-deprivation proceedings is especially low where, as here, the risk of erroneous deprivation is tempered by "a substantial assurance that the deprivation is not baseless or unwarranted." *Gilbert*, 520 U.S. at 930-31. The Board suspended Dr. Guttman's license after convening the IPC to investigate the complaints against him and based upon a finding of clear and convincing evidence that he was an "imminent danger to public safety." These safeguards were adequate to ensure that the Board's decision to suspend Dr. Guttman's license was supported by credible evidence. Taken together, the government's interest in guaranteeing public safety and the Board's pre-suspension investigation outweigh Dr. Guttman's interest in his medical license. *Cf., e.g.*, *Mallen*, 486 U.S. at 241 (holding that government's interest in depositors' interests and public confidence in banking system, together with finding of probable cause by grand jury that plaintiff made false statements to FDIC, outweighed plaintiff's right to continue to

serve as president of bank and to participate in conduct of bank's affairs). Thus, the Board's suspension of Dr. Guttman's license did not violate his right to due process.

ii.) Dr. Guttman's Right To Appeal The Board's Revocation Of His License Cured His Remaining Allegations Of Due Process Violations.

Dr. Guttman's remaining due process claims uniformly involve the Board's alleged failure to comply with state law requirements throughout the license suspension and revocation proceedings. However, Dr. Guttman has had ample opportunity to challenge the Board's conduct through established state procedures. The State provided Dr. Guttman with (1) a three-day, post-suspension hearing where he was represented by counsel and where the rules of civil procedure and evidence applied; (2) an automatic right to appeal the Board's decision to revoke his license to the district court; and (3) two opportunities for discretionary review by state appellate courts. Each of these provided Dr. Guttman with the chance to raise the very due process objections he is making here. Dr. Guttman took full advantage of the availability of these proceedings, and the fact that he was unsuccessful does not create a due process violation. As the district court noted, "What more could the State—Defendant—have done?" (App. 360.)

Dr. Guttman seems to argue that these post-deprivation opportunities for review were inadequate because the Board's conduct was not "random and

unauthorized," as found by the district court. This argument misses the point. Regardless of whether the district court's analysis is correct, the circumstances surrounding the suspension of Dr. Guttman's license guaranteed that his ability to challenge the Board's conduct would be limited to post-deprivation review. Logically, where the Board is authorized to act without a pre-deprivation hearing and does so, post-deprivation review is the only avenue available to challenge the Board's conduct. This Court's analysis in *Camuglia* is instructive.

> The process one is due is not dependent on whether the government was right or wrong in the particular case but on whether, in general, constitutional norms require particular procedures to balance private and public interests. Postponing the hearing may, as [the plaintiff] contends happened here, cause harm. The Supreme Court, however, has recognized that possibility and ruled that *the public interest in prompt action permits that action to precede a hearing* in public-health matters.

Camuglia, 448 F.3d at 1222 (emphasis added).

Although *Camuglia* dealt with a public health issue, the Board's authority to act to protect the public under § 61-7-8(D) is not in dispute. As a result, the suspension and revocation of Dr. Guttman's license was limited to the post-deprivation review provided for by statute and elsewhere in New Mexico law for

the review of administrative decisions in general.[3]

The State provided Dr. Guttman with the opportunity to challenge the suspension and revocation of his license as required by law and by the Constitution. Dr. Guttman should not be permitted to relitigate the revocation of his license here to achieve a different result.

iii.) Dr. Guttman's Reliance On *Lopez* Is Misplaced.

Dr. Guttman's due process positions rest significantly on *Lopez v. New Mexico Bd. of Med. Exam'rs,* 754 P. 2d 522 (N.M. 1988). Based on *Lopez,* Dr. Guttman argues that the Board's alleged violations of the Uniform Licensing Act and other procedural improprieties were "jurisdictional" and therefore "void" the outcome of the process that led to revocation of Dr. Guttman's license. These arguments, however, fail to account for the differences between this case and *Lopez.*

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[3] Moreover, some courts have recognized that unlawful bias in a state administrative process amounts to "random and unauthorized" conduct, which triggers the *Parrat*/*Hudson* inquiry into the sufficiency of post-deprivation process. *See, e.g., Chielinski v. Commonwealth of Massachusetts Office of the Comm'r of Prob.,* 513 F.3d 309, n.6 (1st Cir. 2008) (collecting cases). Dr. Guttman's allegations of bias in the administrative process leading to the loss of his license makes this reasoning applicable to his due process challenges and confirms the correctness of the district court's reliance on *Hudson* and *Parrat*. *See also Harris v. Mills*, 572 F.3d 66, 76 (2nd Cir. 2009) (holding that the opportunity to pursue an appeal in state court to challenge medical license revocation was a constitutionally sufficient post-deprivation remedy); *Levy v. Cohen*, ___ F.Supp.2d ___, 2010 U.S. Dist. LEXIS 109914 (E.D.N.Y., Oct. 14, 2010) (same).

First, the *Lopez* holdings did not occur in a "collateral attack" on the rulings of the Board and the courts reviewing the Board's rulings on appeal. The New Mexico Supreme Court addressed the issues in the *Lopez* case following direct appeal to the district court, which held that Dr. Lopez had not waived the third of three failures of the Board to meet the 90-day deadline on decisions. The Supreme Court affirmed the district court's ruling. The *Lopez* opinion was the culmination of the process contemplated by the Uniform Licensing Act for Board decisions and appellate review by the district court and (at that time) the New Mexico Supreme Court.

Dr. Guttman's case, by contrast, is a classic "collateral attack" on the judgment that resulted from the Board process and its review in the district court. *See, e.g., Lewis v. City of Santa Fe,* 108 P.3d 558, 561 (N.M. Ct. App. 2005) ("A collateral attack is an attempt to avoid, defeat, or evade a judgment, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking the judgment.") (punctuation omitted). Dr. Guttman properly invoked the appellate authority of the district court, and sought additional review of the district court judgment by petitioning the Court of Appeals and the New Mexico Supreme Court. His federal case, however, is an incidental proceeding, not created for the purpose of challenging the Board's decisions, but undertaken to defeat the outcome of the revocation process.

Dr. Guttman may not avoid the prohibition against collateral attacks by couching his due process arguments in the language of jurisdiction.[4] He had the opportunity to present these challenges in the Board proceedings and the related appeal. A collateral attack on jurisdictional grounds is precluded in a subsequent proceeding where the jurisdictional issue was "fully and fairly litigated and finally decided" in the prior proceeding. *Durfee v. Duke,* 375 U.S. 106, 111 (1963); *United States v. Bigford,* 365 F.3d 859, 865 (10th Cir. 2004). Also, as long as a party had an opportunity to litigate the jurisdictional issue, it is not subject to

[4] Although the State has not focused on Dr. Guttman's alleged violations of the Uniform Licensing Act or other procedural deficiencies that Dr. Guttman relies upon, the Court should not conclude that they are real. For example, the "*de facto* officer" doctrine resolves Dr. Guttman's complaints about Dr. Layman's licensure. (*App. Br.* at 14-15; App. 241-245.) The Board did not violate the limitations provision in the ULA by basing its actions on conduct which predated Board action by more than two years. (*App. Br.* 15.) The IPC and the Board considered material relating to Dr. Guttman's practice in Gallup in 1993-1994 to determine whether he had been dishonest in his statements to the IPC and the Board and whether the pattern of disruptive, abusive behavior evident in Truth or Consequences extended throughout Dr. Guttman's professional history. (App. 209, 282-83, 217, 257, 330-31.) Dr. Guttman specifically challenged Dr. Parson's impartiality on appeal (App. 358-59), but his appeal failed. (App. 338.) The IPC and the Board had a duty to consider Dr. Guttman's conduct in Gallup, to determine whether his behavior was an "isolated incident" or part of a "repeating pattern." (App. 222.) Dr. Guttman's honesty bore upon his ability to practice medicine with reasonable skill or safety to patients. (App. 271-72.) In all of his hyper-technical attacks on the procedure leading to license revocation, Dr. Guttman overlooks the principle that federal law defines the constitutional sufficiency of the process he was accorded, and that violations of state procedural rules do not by themselves signify denial of federal due process. (App. 359) (citing *Loudermill*, 470 U.S. 532, 538, 540-41 (1985)).

collateral attack on that basis. *Id.* Dr. Guttman presented, or had the opportunity to present, all of the due process arguments he now arrays in his collateral attack on the final judgment revoking his license. For this reason, his case cannot be fairly likened to *Lopez.*

Second, Dr. Guttman's case does not involve the only feature of the Uniform Licensing Act which the *Lopez* opinion characterized as "fundamentally jurisdictional," the 90 day deadline on a ruling. Dr. Guttman does not cite any case supporting the conclusion that the procedural deficiencies he alleges have been comparably treated as jurisdictional by New Mexico's courts. Instead, the trend in New Mexico administrative law has been toward narrowing the grounds upon which an error in an administrative process can have the effect of "voiding" the outcome of the process. *See, e.g., VanderVossen v. City of Espanola*, 24 P.3d 319 (N.M. Ct. App. 2001) (discussing cases reflecting "a trend in modern New Mexico jurisprudence that discourages the indiscriminate use of terms such as jurisdictional error and voidness to describe what amounts to little more than an agency acting contrary to statute, an error that must be challenged in a timely manner"). Notably, the author of the *VanderVossen* opinion was then-Judge Bosson, who had earlier represented Dr. Lopez in the *Lopez* appeal.

New Mexico courts regard invocations of "voidness" in administrative processes with great caution. *See, e.g., Alvarez v. County of Bernalillo,* 850 P. 2d

1031 (N.M. Ct. App 1993) ("Few words in the legal lexicon are as mischievous as the word 'void.' The absolute victory that it promises often proves illusory."). Dr. Guttman's insistence that the procedural errors he alleges make the revocation of his license void cannot be reconciled with New Mexico law, particularly because none of the errors he alleges involve the 90 day deadline addressed in *Lopez.*

Finally, Dr. Guttman's case differs from *Lopez* because Dr. Guttman has waived, or unsuccessfully litigated, all of the violations of the Uniform Licensing Act his case may present. The *Lopez* opinion illustrates the "waivability" of procedural errors, even where the New Mexico Supreme court has labeled them as "fundamentally jurisdictional." The holding in *Lopez* was that the district court correctly concluded that Dr. Lopez had only waived two of the three failures of the Board to meet the 90 day deadline on ruling because Dr. Lopez's lawyer had agreed to two extensions of the limit. He did not agree to a third extension, however, and the Supreme Court rejected the Board's "once waived, forever waived" argument.

The *Lopez* opinion therefore demonstrates that even the one procedural error under the Uniform Licensing Act recognized in New Mexico law as "fundamentally jurisdictional" can be waived. Dr. Guttman suggests no basis for

concluding, in the circumstances of this case, that he has not waived any procedural errors he failed to raise in the Board proceedings or on appeal.

b.) Dr. Guttman Has Abandoned His Claim Of Independent Equal Protection Violations.

Dr. Guttman presents no substantive challenge to the district court's decision that he failed to state an independent claim for violation of his equal protection rights. His brief refers in passing to equal protection concepts, with a few citations, in the course of advancing due process arguments. (*App. Br*. 8, 12, 15, 54.) He offers no developed argument challenging the district court's dismissal of his equal protection claims on the ground that the State had a rational basis for considering Dr. Guttman's mental health disability in deciding whether to revoke his license. (App. 356.) The issue is therefore waived. *See, e.g., Native American Distribution v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292, n.1 (10th Cir. 2008).

3. As Applied In This Case, The Abrogation Of Eleventh Amendment Immunity In Title II Of The ADA Fails The Congruence And Proportionality Test.

Having correctly determined that Dr. Guttman's case presents no misconduct which actually violates the Fourteenth Amendment, the district court turned to the third prong of the test for valid abrogation of Eleventh Amendment immunity, which required the court to:

(1) identify the constitutional right or rights Congress sought to enforce when it enacted Title II;

(2) determine whether Congress identified a history and pattern of unconstitutional conduct by the States, and, if so;

(3) whether the abrogation constitutes a proportionate response to the constitutional violations.

(App. 363); *Guttman v. State of New Mexico*, 325 Fed. Appx. 687, 692 (10th Cir. 2009) (unpublished); *Lane*, 541 U.S. at 522-33.

The "congruence and proportionality" test determines whether Congress has crossed an important line separating remedial legislation from substantive redefinitions of Fourteenth Amendment rights. Section 5 of the Fourteenth Amendment authorizes Congress to enact "appropriate legislation" to enforce the substantive rights it confers. *See* U.S. Const. amend. XIV, § 5. Congress has a "wide berth in devising appropriate remedial and preventative measures for unconstitutional actions" that violate the Fourteenth Amendment. *Lane*, 541 U.S. at 520; *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). Thus, Congress may enact prophylactic legislation prohibiting conduct that is itself unconstitutional. *Id.* The "prophylactic" authority also includes the power to proscribe conduct which is facially constitutional, in order to prevent and deter unconstitutional conduct. *Lane,* 541 U.S at 518.

Congress, however, may not substantively redefine Fourteenth Amendment rights. *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 81 (2000); *City of Boerne*,

521 U.S. at 519. Congress' enforcement power under § 5 of the Fourteenth Amendment is not an authorization to determine what conduct violates the Constitution or to change the rights the Constitution grants. *Id.* To ensure that Congress does not violate this limit on its enforcement power under § 5, our courts require "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

An abrogation of Eleventh Amendment immunity is valid if Congress has acted within the limits of its authority under § 5 of the Fourteenth Amendment. *Lane*, 541 U.S. at 518. Dr. Guttman's case therefore presents the difficult and important task of distinguishing between valid and invalid legislation under § 5. *Id*. at 520 ("the distinction … exists and must be observed").

Two features of this case confirm that the district court was correct in holding that the abrogation in 42 U.S.C. § 12202 fails the "congruence and proportionality" test. First, Dr. Guttman's ADA claim involves no fundamental right or suspect classification. Second, no record supports the conclusion that Congress enacted Title II to address a history or pattern of state violations of constitutional rights in the area of professional licensing. These aspects of Dr. Guttman's case essentially guarantee that, as applied to the claims at issue here, the abrogation cannot satisfy the "congruence and proportionality" test.

a.) Dr. Guttman's ADA Claim Involves No Fundamental Right Or Suspect Classification.

The district court correctly focused on the absence of a fundamental right or suspect classification underlying Dr. Guttman's ADA case. (App. 367.) An important distinction between *Lane* and *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), the district court recognized, was the magnitude of the constitutional right at stake in each case, and the corresponding latitude afforded States. (*Id.*). "[I]n *Lane,* the right at stake was fundamental and the state was required to provide significant justification before denying disabled citizens access to the judicial system." (*Id.*) The district court properly emphasized the "rational basis" standard applicable to Dr. Guttman's case in concluding that no valid abrogation had occurred. (App. 367-368.)

Dr. Guttman's ADA claim alleges discrimination based on his disability, which resulted in the loss of his medical license. Significantly, discrimination based on disability does not implicate strict scrutiny. *See, e.g., Garrett*, 531 U.S. at 366-67 (stating that the Fourteenth Amendment does not require states to make special accommodations for the disabled as long as their actions toward them are rational); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (persons with disabilities are not suspect class); *Press v. State Univ. of N.Y. at Stony Brook*, 388 F. Supp. 2d 127, 134 (E.D.N.Y. 2005) ("Unlike classifications involving race, alienage, and national origin, which mandate strict scrutiny review,

or a gender based classification, which is subject to heightened scrutiny, the classification at issue here, namely disability, is only subject to rational basis review."); *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1267 (4th Cir. 1995) (classifications based on disabilities are subject only to rational basis scrutiny).

Also, the right to practice in a profession is not a fundamental constitutional right. *See Collins v. Texas*, 223 U.S. 288 (1912) (holding that the right to practice medicine is not a fundamental right); *Laird v. Board of Trs. of Insts. of Higher Learning of Miss.*, 721 F.2d 529, 532 (5th Cir. 1983) (noting that parties agreed that practice of medicine does not constitute fundamental right); *Gross v. Univ. of Tenn.*, 620 F.2d 109, 110 (6th Cir. 1980) ("Neither public employment nor the unfettered practice of medicine is a fundamental right."); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1173 n.16 (5th Cir. 1979) ("Regulation of the practice of medicine does not involve a fundamental right or suspect class."). *See, also, Simmang v. Texas Bd. Of Law Examiners*, 346 F. Supp. 2d 874, 882 (W.D. Tex. 2004) (law). Correspondingly, courts have long recognized the important interest the States have in regulating professional licensing, particularly in the field of medicine. *See Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1164 (10th Cir. 1999) ("[T]here is no question that the licensing and discipline of physicians involves important state interests."); *Brinkley v. Hassig*, 83 F.2d 351,

354 (10th Cir. 1936) ("The power of the state to protect its citizens against imposition by those purporting to practice the learned professions has been sustained without dissent for many generations.").

The fact that Dr. Guttman's ADA claim does not implicate a fundamental right or a suspect classification significantly affected the outcome of the Eleventh Amendment analysis in this case. "For Title II of the ADA to increase the level of scrutiny for disabled persons in the …context of professional licensing would be to exceed the legislative power 'to enforce' Section 5's guarantees." (App. 368.) The comparatively low standard of scrutiny applicable to Dr. Guttman's rights means that the ADA requires substantially more of the State than the Constitution would demand in the area of professional licensing, and therefore amounts to a Congressional redefinition of the relevant constitutional duty. (App. 368) ("Title II's remedy in the context of professional licensing far exceeds what is constitutionally required.")

Other courts have similarly concluded that, where a Title II ADA claim does not implicate a fundamental right or a suspect classification, Congress' purported abrogation of Eleventh Amendment immunity in relation to such a claim was invalid because the ADA imposes burdens greater than those imposed by the constitution. *See, e.g., Hale v. King,* ___ F. 3d ___, 2010 U.S. App. LEXIS 21463, ** 11-15 (5th Cir. Oct. 14, 2010) (reasoning that disabled persons are not suspect

class under the Equal Protection Clause, that rational basis standard would govern claims for disability discrimination, and that accommodation duty imposed by ADA limits state activity far more than does rational basis review); *Brewer v. Wisconsin Bd. of Bar Exam'rs,* 270 Fed. Appx. 418, 421 (7th Cir. 2008) (unpublished) (distinguishing ADA suit brought by applicant for law license from *Lane* on ground that *Lane* involved fundamental right of access to courts); *Simmang*, 346 F. Supp. 2d at 882-83 (noting that holding in *Lane* was "founded squarely on the *source* of the plaintiff's encroached rights" and contrasting alleged deprivation of right to practice law as result of disability discrimination, which presented no fundamental right or suspect classification), *Press,* 388 F. Supp. 2d at 133-35 (concluding that application of Title II to case involving state's alleged denial of access to post-secondary education on basis of disability was abuse of § 5 power and that Eleventh Amendment immunity had not been abrogated, because right to education is not a fundamental right and discrimination at issue, disability, was subject to rational basis review); *Doe v. Board of Trs. of the Univ. of Ill.*, 429 F. Supp. 2d 930, 939 (N.D. Ill. 2006) (concluding that Title II, as applied to post-graduate medical student's claim of disability discrimination, exceeded Congress' power under § 5 because education, despite its importance, is not considered fundamental constitutional right).

The arguments of Dr. Guttman and the United States fail to account for the fact that the *Lane* holding is expressly limited to the fundamental right of access to the courts. The Court specifically classified the historical backdrop it outlined as "a pattern of unconstitutional treatment *in the administration of justice*." *Id.* at 525 (emphasis added). It expressly limited its holding to "cases implicating the accessibility of judicial services." *Id.* at 531. *Lane* concluded only "that Title II, *as it applies to the class of cases implicating the fundamental right of access to the courts*, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 533-34 (emphasis added). The Court's repeated limitation of its holding forecloses broad readings which disregard the Court's focus on a fundamental right. *See e.g.*, *id.* at 531 ("Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.").

In the closing paragraph of the opinion, the Court clarified that "[b]ecause this case implicates the right of access to the courts, we need not consider whether Title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne's* prohibition on irrational discrimination." *Lane,* 541 U.S. at 533, n. 20 (citing *Garret,* 531 U.S. at 372). The *Lane* majority took care to prevent any confusion about the applicability of its reasoning to cases,

like Dr. Guttman's, presenting constitutional rights governed by rational basis standards.[5]

The *Lane* analysis reflects another important consequence that the level of constitutional scrutiny which governs the rights implicated by a particular ADA claim has on the congruence and proportionality test. The majority opinion in *Lane* explained that, where legislation is aimed at classifications triggering a higher level of constitutional scrutiny, it is easier for Congress to show a pattern of constitutional violations, and therefore to pass the congruence and proportionality test. 524 U.S. at 528-29 (contrasting *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721 (2003), which involved sex-based classifications subject to heightened scrutiny, with *Kimel* and *Garrett,* which concerned legislation concerned with classifications judged by the rational basis test). Justice Rehnquist's dissent agreed with this distinction. 524 U.S. at 548, n.9 (Rehnquist, J., dissenting)

Dr. Guttman improperly attempts to equate the rights at stake in his ADA case with the right of access to the courts at issue in *Lane* by characterizing his

[5] For this reason, the suggestion that *Lane* can be appropriately applied to Dr. Guttman's cases because "Jones' claims implicated only her rights under the Equal Protection clause" is unpersuasive. (*U.S. Br.* 25.) The majority in *Lane* repeatedly emphasized the limits of its holding, its source in a fundamental right, and its inapplicability to cases involving rational basis standards to foreclose such suggestions.

claim as involving a denial of access to "justice" or the "justice system." (*App. Br.* 24, 25.) *See, e.g., Kline v. Hall,* 135 Fed. Appx. 144, 145 (10th Cir. 2005) (unpublished) (rejecting argument by disabled litigant claiming that she was denied access to judicial system because of her disability and attempting to liken her case to *Lane*). Dr. Guttman's case only presents a property interest (the right to practice medicine) routinely treated as a non-fundamental right, and a classification (disability discrimination) judged by the rational basis standard. No matter how unjust Dr. Guttman believes the State's treatment of his right to practice medicine has been, this case cannot be mistaken for an instance of denial of access to the judicial system. No one disputes that Dr. Guttman was afforded full access to the courts to appeal the Board's suspension and revocation of his license. His case cannot be sensibly equated with *Lane*, where the plaintiffs were denied physical access to the courts.

The arguments of the United States highlight the impact on the congruence and proportionality test of the fact that Dr. Guttman's case does not involve rights calling for a more exacting standard of constitutional scrutiny than rational basis review. The United States candidly differentiates licensing cases involving restrictions affecting fundamental rights or imposing suspect classifications from those affecting rights "subject to the basic protections of the Due Process and Equal Protection Clauses." (*U.S. Br.* at 14-16.) The United States never explains,

however, why this difference has no meaning in relation to analyzing the scope of Congress' authority under § 5 of the Fourteenth Amendment.

The arguments aimed at downplaying the absence of any fundamental right or suspect classification in Dr. Guttman's case lack a crucial foundation. The United States can cite no precedent upholding 42 U.S.C. § 12202 in cases involving professional licensing, "public licensing," or other state conduct constrained only by rational basis. The cases involving education are distinguishable, as the United States recognizes, because the right to education enjoys a heightened status among rights subject to rational basis review. (*U.S. Br.* 38-39.) In any event, Dr. Guttman's case does not involve a comparably special right. Neither Dr. Guttman nor the United States have provided any sound reasons for treating disability discrimination as a suspect classification, or for regarding the right to practice medicine as fundamental. They ignore without justification the effect that the undemanding constitutional standard applicable to Dr. Guttman's case has on the validity of Congress' abrogation of Eleventh Amendment immunity, as applied in this case.

b.) No Record Of State Violations Of Constitutional Rights In The Professional Licensing Area Supports Abrogation Of The State's Eleventh Amendment Immunity.

The absence of legislative findings establishing a pattern of unconstitutional discrimination against disabled persons in connection with the grant of medical

licenses reinforces the conclusion that the State is entitled to Eleventh Amendment immunity. A comparison between G*arret* and *Lane* demonstrates that the absence of such a record is decisive in this case.

In *Garrett*, the Supreme Court held that Congress had not validly exercised its § 5 power in enacting Title I of the ADA. 531 U.S. at 374. This conclusion resulted, in part, from the lack of a Congressional record showing that states had engaged in a pattern of unconstitutional discrimination against persons with disabilities in connection with employment by the states. *Id.* at 370. In *Lane*, the Court recognized that Congress had developed an extensive legislative record documenting a pattern of discrimination against persons with disabilities in the administration of public programs and services, including specific evidence about their exclusion from court facilities and proceedings. *Lane*, 541 U.S. at 527 (discussing record relating to "particular services at issue in this case.").

The contrast between *Garrett* and *Lane* indicates that, without Congressional documentation of a pattern of state discrimination against persons with disabilities in the granting of professional licenses, the purported waiver of Eleventh Amendment by Title II of the ADA is invalid in relation to Dr. Guttman's case. The congruence and proportionality analysis is an "as applied" test. *See Lane*, 541 U.S. at 527. Indeed, Justice Rehnquist's dissent criticized the majority opinion for conducting a narrow, as-applied analysis. 541 U.S. at 551-553. (Rehnquist, J.,

dissenting). *Lane* thus confirms that the proper question in relation to Dr. Guttman's case is whether Congress had evidence demonstrating a pattern and history of State disability discrimination in professional licensing.

The legislative record for the ADA does not include any documentation of a pattern of disability discrimination by the states in the granting of licenses to professionals. *See Roe v. Johnson*, 334 F. Supp. 2d 415, 422 (S.D.N.Y. 2004) (citing 42 U.S.C. § 12101); S. Rep. No. 101-116 (1989); H.R. Rep. No. 101-485 pts. 1, 2, 3 and 4 (1990); reprinted in 1990 U.S.C.C.A.N. 267; H.R. Conf. Rep. 101-558 (1990); H.R. Conf. Rep. No. 101-596 (1990), reprinted in 1990 U.S.C.C.A.N. 565). Rather, the Congressional record mentions professional licensing only in connection with the portion of Title III of the ADA addressing the accessibility of test sites and accommodations in relation to testing conditions. *Id.* at 422 (citing H.R. Conf. Rep. No. 101-85 pt. 3 (1990), 1990 U.S.C.C.A.N. at 491). *See also Brewer,* 270 Fed. Appx. at 421 (noting that legislative record of the ADA contains no evidence of state violation of constitutional rights in the administration of attorney licensing). Without a legislative record documenting state discrimination against persons with disabilities in the specific area of licensing for medical professionals, Congress could not validly abrogate Eleventh Amendment immunity for ADA Title claims arising in that setting. *See, e.g., Garrett*, 531 U.S. at 370.

The United States argues that the district court erred in considering whether the Congressional record evidences a pattern of state violations of constitutional rights in the context of professional licensing, instead of in relation to all "public licensing." (*U.S. Br.* 23-31.) Using this approach, the United States relies upon legislative history ostensibly evidencing unconstitutional state conduct in the licensing of marriage, teaching, security guards, and driving. (*U.S. Br.* 19-21.) The Court should decline to adopt the United States' version of the appropriate scope of analysis.

First, the precedents confirm that the abrogation inquiry is an "as applied" test, which entails "identify[ing] *with some precision* the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. By definition, an "as applied" inquiry differs from a "facial" challenge by addressing the effect of the challenged government action in the specific setting of the case. *See, e.g., New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1504 (10th Cir. 1995) (contrasting a facial challenge with an "as applied" challenge, noting that a facial challenge is a strictly legal question; "it does not involve the application of the statute in a specific factual setting.") (quoting *ACORN v. City of Oklahoma*, 835 F.2d 735, 740 (10th Cir. 1987)). The nature of the inquiry weighs against attempts to broaden it.

Second, the most relevant precedents demonstrate that the evaluation of whether Congress identified a history and pattern of unconstitutional discrimination by the States against the disabled requires more precision than the position of the United States would permit. *See Garrett* at 368-74 (reviewing whether Congress identified a history and pattern of *unconstitutional employment discrimination* by the States against the disabled in determining that Title I was not congruent and proportional to the harm being addressed); *Hibbs*, 538 U.S. at 729-35 (in determining whether the FMLA abrogated sovereign immunity, reviewing whether Congress had evidence of a pattern of constitutional violations on the part of the States in the area of gender-based discrimination *in the work place*); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, (1999) (finding no abrogation of sovereign immunity, noting that "Congress identified no *pattern of patent infringement* by the States, let alone a pattern of constitutional violations."); *Roe*, 334 F. Supp. 2d at 422 ("The legislative record for the ADA does not include any findings documenting a pattern of state discrimination in the admission of attorneys to the bar or more generally in the granting of licenses to professionals.").

Third, the argument for aggregating all public licensing overlooks the significant variations in the interests of the states and in the dimensions of affected constitutional rights presented in "licensing" cases. The United States itself proves

this point by citing "public licensing" cases (*U.S. Br.* 14-15) involving constitutional rights ranging from marriage to driving taxis, and then attempting to aggregate them under the logic that "all licensing is similar – it is a decision by a state to grant or deny permission to engage in a desired activity." (*U.S. Br.* 28.) As the cases cited by the United States illustrate, the constitutional stakes vary considerably in "public licensing" settings, depending on what the "desired activity" is, who wants to engage in it, and the kinds of restrictions the state is imposing. Limiting the inquiry to "professional licensing" more appropriately controls the constitutional variables, and better serves the goal of determining whether, as applied to Dr. Guttman's case, Congress validly exercised its enforcement authority under § 5 of the Fourteenth Amendment.

Dr. Guttman's case presents a significant (even if not fundamental) right, constrained by the exercise of the State's police power to insure the safe practice of medicine in New Mexico. It makes little sense to conduct the congruence and proportionality analysis as if Dr. Guttman's rights, and the authority of the State, are comparable to the interests at issue in every other "public licensing" case.

B. The District Court's Judgment May Be Properly Affirmed On Collateral Estoppel Grounds.

STANDARD OF REVIEW: A *de novo* standard governs review of the district court's application of collateral estoppel in relation to determinations made by state administrative entities. *See, e.g., Salguero v. City of Clovis*, 366 F.3d 1168,

1172 (10th Cir. 2004); *Gonzalez v. Hernandez,* 175 F.3d 1202, 1204 (10th Cir. 1999).

1. The District Court Could Have Properly Addressed Collateral Estoppel Arguments Raised In A Motion To Dismiss.

The district court declined to dismiss Dr. Guttman's complaint on collateral estoppel grounds. The court concluded that the issue is not yet "ripe" for decision and that preclusion issues would be more appropriately addressed in the context of a summary judgment motion, rather than in response to a motion to dismiss. (App. 372). The court relied upon *Garcia v. Int'l Elevator Co.,* 358 F.3d 777, 782 (10th Cir. 2004) in reaching these conclusions. (App. 372.)

This Court may affirm the judgment of the district court for any reason supported by the record, including reasons the district court declined to address. *See, e.g., Brady v. UBS Financial Services,* 538 F.3d 1319, 1327 (10th Cir. 2008) (considering *res judicata* argument, not considered by district court, under rule that court may affirm for any reason supported by the record). The district court's preference for considering collateral estoppel in a summary judgment setting overlooked the rule that a district court may consider materials referred to in a complaint without converting a motion to dismiss into a summary judgment motion if they are central to the plaintiff's case and the parties do not dispute their authenticity. *Jacobsen v. Deseret Book Co.,* 287 F.3d 936, 941 (10th Cir. 2002). This rule applies where the plaintiff's complaint refers to prior proceedings and the

defendant raises the preclusive effect of those proceedings in a motion to dismiss. *See, e.g., Mavrovich v. Vanderpool,* 427 F. Supp. 2d 1084, 1090 (D. Kan. 2006).

Also, the court may take judicial notice of the decision of a state administrative body in addressing collateral estoppel issues without converting a motion to dismiss into a summary judgment motion. *See, e.g., Crossroads Cogeneration Corp. v. Orange & Rockland Utilities,* 969 F. Supp. 907, 915-916, (D.N.J. 1997), *rev'd on other grounds,* 159 F.3d 129 (3rd Cir. 1998). Accordingly, the State's collateral estoppel position could have been appropriately addressed in the setting of a motion to dismiss.

The *Garcia* opinion does not alter this conclusion. The preclusion arguments considered in *Garcia* had not been raised until the reply brief in the district court. 358 F.3d at 781. Also, the *Garcia* case did not appear to present an instance in which the *Jacobsen* rule could be fairly applied. *Id.* at 781-82. In this case, Dr. Guttman's complaint expressly refers to the Board proceedings that resulted in the revocation of his license, and the records from those proceedings are already part of the district court pleadings.

2. The State Satisfied The Requirements For Collateral Estoppel Based On The Outcome Of The Board Proceedings And Dr. Guttman's Unsuccessful Appeal.

a.) Dr. Guttman's ADA Claim Is Precluded As A Matter Of Law.

Dr. Guttman's ADA claim necessarily entails a demonstration that he is a "qualified individual with a disability," as defined in 42 U.S.C. § 12131(2). A physician whose mental condition poses a risk to the public cannot practice medicine with reasonable skill and safety, and is therefore not a "qualified individual with a disability." *See, e.g., Alexander v. Margolis,* 921 F. Supp. 482, 488-89 (W.D. Mich. 1995), *aff'd* 98 F.3d 1341 (6th Cir. 1996) (holding that physician with bipolar disorder and felony conviction was, as a matter of law, not a qualified individual with a disability under the ADA); *Doe v. Maryland Med. Sys. Corp.,* 50 F.3d 1261, 1266 (4th Cir. 1995) (holding that neurosurgery resident with HIV virus, who had been permanently suspended from surgical practice was not a qualified individual because the health and safety risk he posed to others could not be reasonably accommodated).

The Board's findings, and the decision of the state district court affirming those findings, preclude Dr. Guttman from relitigating the issues of whether he was dishonest and whether his mental illness can be reasonably accommodated. *See, e.g., Shields v. Bell South Adver. & Pub'g Co.,* 254 F. 3d 986, 987 (11th Cir. 2001) (holding that result of prior unemployment benefits proceeding affirmed on appeal

created a collateral estoppel bar to plaintiff's ADA claim); *Jones v. UPS,* 214 F.3d 402, 406 (3rd Cir. 2000) (holding that determination in worker's compensation proceeding that plaintiff had fully recovered from his work injury collateraly estopped relitigation of that fact in plaintiff's ADA case); *Hall v. Wal-Mart,* 373 F. Supp. 2d 1267, 1273 (M.D. Ala. 2005) (giving collateral estoppel effect to determination made in unemployment compensation benefits proceeding, affirmed on appeal, that ADA plaintiff was fired for violating company policy prohibiting dishonesty); *cf. Mason v. Arizona*, 260 F. Supp. 2d 807, 824-26 (D. Ariz. 2003) (holding that chiropractor's ADA claim was barred by *res judicata* where state chiropractic board had revoked plaintiff's license for dishonesty).

Federal and New Mexico law controlling the collateral estoppel effect afforded state administrative processes in federal litigation strongly support dismissal of Dr. Guttman's ADA claim. The preclusive effect given in federal court litigation to final decisions of state administrative agencies depends upon whether the courts of the forum state would give it preclusive effect. *See University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986); *Brockman v. Wyoming Dep't of Family Servs.*, 342 F.3d 1159, 1165 (10th Cir. 2003). The United States Supreme Court "has long favored application of the common-law doctrines of collateral estoppel (as to issues) … to those determinations of administrative

bodies that have attained finality." *Id.* at 1166 (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991)).

b.) The "Traditional" Elements Of Collateral Estoppel Are Present.

The "traditional" elements governing application of collateral estoppel are:

> (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

Shovelin v. Central N.M. Elec. Coop., Inc., 850 P.2d 996, 1000 (N.M. 1993).

The record in the district court confirms that all of the traditional elements of collateral estoppel are present in Dr. Guttman's case. He was a party to the revocation proceeding. His ADA claim is not the same "cause of action" as the question of license revocation addressed in the Board proceeding. The Board necessarily decided the issues of whether Dr. Guttman's mental illness could be accommodated, and whether he had been dishonest in his statements to the IPC and in his testimony to the Board. The Board did so as part of its determination of whether Dr. Guttman had engaged in conduct unbecoming in a person licensed to practice medicine in New Mexico and whether he was unable to practice medicine with reasonable skill or safety to patients. (App. 333, ¶ 49; 334, ¶¶ 3, 6, 01; 335, ¶¶ 11-17.) The issues raised by his behavior, his apparent dishonesty, and the

questions about whether license restrictions might permit him to continue practicing medicine, necessitated the Board's determinations about possible accommodations and Dr. Guttman's fitness to remain licensed. The traditional requirements of collateral estoppel are therefore satisfied.

c.) The State Satisfied The Additional Elements Relating To Administrative Proceedings.

In New Mexico, the findings of an administrative body:

> [M]ay be given preclusive effect if, in addition to meeting the traditional elements of the preclusion doctrine at issue, it is shown that the administrative body: (1) while acting in a judicial or quasi-judicial capacity, (2) resolved disputed questions of fact properly before it, and (3) provided the parties with a full and fair opportunity to litigate the issue at an administrative hearing.

Southworth v. Santa Fe Servs., Inc., 963 P.2d 566, 569 (N.M. Ct. App. 1998).

The additional elements controlling collateral estoppel analysis for administrative proceedings are present in this case. The Board acted in a quasi-judicial capacity, as confirmed by the dismissal of Dr. Parsons and Mr. Khalsa from this case on grounds of absolute quasi-judicial immunity. *See Guttman,* 446 F.3d at 1032-34. The fact issues of whether Dr. Guttman's mental illness could be controlled, such that he could hold a restricted license, and whether he had been dishonest properly arose before the Board as disputes relating to whether Dr. Guttman's license should be revoked. Dr. Guttman had a full and fair opportunity

to present his own evidence, advocate his own proposals for appropriate restrictions on his license, challenge the State's case against him, and pursue appellate review. He did all of these things, but did not prevail. The State afforded Dr. Guttman a full and fair opportunity to make his case against revocation.

Dr. Guttman argues that collateral estoppel does not apply because the Board and the district court which upheld the Board's decision lacked the authority to adjudicate ADA claims, and that he therefore lacked the opportunity to litigate ADA issues. (*App. Br.* 47-48.) The Board had jurisdiction to make the factual determinations that Dr. Guttman's mental illness could not be accommodated through license restrictions and that he had been dishonest, such that he was not qualified to hold a medical license. It does not matter that the Board made these determinations in deciding whether to revoke Dr. Guttman's license, and not in an ADA proceeding. In fact, collateral estoppel requires that the cause of action in the later proceeding be different from the cause of action in the prior case. Dr. Guttman has cited no authority supporting his argument that collateral estoppel requires that the forum in which the first action was litigated had jurisdiction over the kind of proceeding in which collateral estoppel is raised.

Furthermore, Dr. Guttman cannot legitimately claim that he was denied a fair opportunity to litigate his honesty and whether his mental illness could be accommodated because of bias or other due process defects in the Board

proceeding. The appellate standards for review of agency determinations under New Mexico law entail consideration of bias and procedural unfairness in the administrative process which would amount to a denial of due process. *See, e.g., City of Albuquerque v. Chavez*, 941 P.2d 509, 514 (N.M. Ct. App. 1997) (recognizing that alleged bias in administrative grievance process, if it existed, would render challenged decision arbitrary or capricious or otherwise illegal); *Las Cruces Prof'l Fire Fighters v. City of Las Cruces,* 938 P.2d 1384, 1390 n.3 (N.M. Ct. App. 1996) (stating that bias which would violate due process would also render resulting decision "arbitrary, capricious or an abuse of discretion"); *Chambers v. Family Health Plan Corp.,* 100 F.3d 818, 826-27 (10th Cir. 1996) (recognizing that the "arbitrary and capricious" standard can take decision maker's bias into account).

Dr. Guttman offers no reason to question the sufficiency of the appellate process afforded by New Mexico law. The district court correctly reasoned that "the doors to New Mexico's appellate courts were open to [Dr. Guttman] with regard to his contentions that the revocation proceedings were constitutionally flawed." (App. 362.) Dr. Guttman has never suggested that Judge Sweazea was biased, or that constitutional challenges were somehow "off-limits" in the reviews conducted by Judge Sweazea, the New Mexico Court of Appeals, and the New Mexico Supreme Court. Dr. Guttman has never explained why all of the new

challenges he raises now were not raised before the Board, or in the appeal to Judge Sweazea. The Board process and the appeal from it conducted under New Mexico law afforded Dr. Guttman the opportunity to demonstrate bias, to challenge any procedural unfairness, to point out alleged constitutional deficiencies, and to litigate fully and fairly the issues of accommodation and honesty.

Dr. Guttman also mistakenly contends that the State has waived its collateral estoppel defense. This position cannot be reconciled with the facts that the district court has never actually ruled on collateral estoppel and that, despite the very long history of this case, no answer has yet been filed. The district court correctly concluded that, in these circumstances, the issue of collateral estoppel has not been waived. (App. 370-372.)

C. The District Court Correctly Concluded That, Following Dismissal Of The ADA Claim, Dr. Guttman Has No Other Viable Claims.

STANDARD OF REVIEW: A *de novo* standard applies to review of a district court's dismissal of a complaint. *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1235 (10th Cir. 2007). A complaint must include facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

1. Dr. Guttman Has No Viable *Ex Parte Young* Claims.

The Court may properly affirm dismissal of Dr. Guttman's non-ADA, *Ex Parte Young* claims for injunctive relief without dissecting the complex procedural history of this case. Assuming that the Court is not inclined to affirm on law of the case or waiver grounds, Dr. Guttman has failed to present any viable claims and is therefore not entitled to injunctive relief. Count II alleges equal protection violations, but Dr. Guttman has not challenged the district court's detailed analysis concluding that his complaint does not state an actionable equal protection claim. (App. 350-356.) Dr. Guttman's opening brief address equal protection only fleetingly, but presents no substantive argument for reversal of the district court's equal protection analysis. Dr. Guttman has therefore waived the issue. *See, e.g.*, *Native American Distributing*, 546 at 1292, n.1 (holding that failure to adequately address an issue which the appellants mentioned without discussion resulted in waiver).

Count III alleges procedural due process violations. Dr. Guttman is not entitled to injunctive relief under this Count because, for the reasons set out by the district court and in this brief, he was accorded constitutionally sufficient process.

Count IV alleges retaliation in violation of the First Amendment. This claim has been relatively overlooked throughout this litigation (App. 350, n.7), but it is deficient on its face. Dr. Guttman alleged that, while he was practicing in Gallup

from December 1993 until March 1994, he spoke out against the over-prescription of narcotics at Reheboth McKinley Hospital and reported a physician who was fondling female patients. (App. 119-120, ¶¶ 14-16.) Dr. Guttman alleged that the actions taken against his license were in retaliation for speaking out. (App. 134-135, ¶¶ 115-116, 121-122.)

Count IV thus presents a First Amendment retaliation claim involving, on the face of the complaint, a gap of approximately six years between the expression at issue and the alleged retaliation. (App. 119, ¶ 12) (stating that the IPC was selected in late December, 1999.) The complaint also states that the Board lifted stipulations on Dr. Guttman's license in May 1995. (*Id.*, ¶ 11.)

To withstand dismissal a complaint must contain enough allegations of fact to state a claim for relief which is "plausible on its face." *Robbins v. Okla ex. rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). The "plausibility" requirement "weed[s] out claims that do not in the absence of additional allegations have a reasonable prospect of success…." *Id.* at 1248. The allegations must move the claim across the line from "conceivable" to "plausible." *Twombly*, 550 U.S. at 570.

The lengthy temporal gap between the expression Dr. Guttman relies upon and the alleged retaliation makes his First Amendment claim implausible under *Twombly*. *See, e.g., Glover v. Mabrey*, 2010 U.S. App. LEXIS 11415, * 25 (10th

Cir., June 4, 2010) (unpublished) (applying *Twombly* in concluding that failure to allege any level of temporal proximity between plaintiff's public speech and retaliatory policy made claim implausible); *Russo v. City of Hartford*, 341 F. Supp. 2d 85, 115 (D. Conn. 2004) (holding that three-year gap between protected conduct and retaliation precluded a finding of causation); *Mulazim v. Corrigan*, 2001 U.S. App. LEXIS 5382, * 9 (6th Cir. 2001) (unpublished) (holding that ten-month gap between unsuccessful petition for a writ of certiorari and allegedly retaliatory move of plaintiff to another prison cell meant plaintiff could not satisfy causal connection requirement). The fact that the Board removed restrictions on Dr. Guttman's license in 1995, a date much closer to the expressions at issue than the time when the suspension and revocation of Dr. Guttman's license began, further emphasizes the implausibility of his retaliation claim. Count IV fails under the plausibility requirement imposed by *Twombly*.

Count V, the stigma plus defamation count, fails for the same reasons Dr. Guttman's other due process claims fail, as explained below. Accordingly, dismissal of all of Dr. Guttman's non-ADA claims may be affirmed because the district court correctly concluded that none of them are viable.

2. The District Court Correctly Dismissed Dr. Guttman's Stigma Plus Defamation Claims.

The correctness of the district court's determination that Dr. Guttman received constitutionally sufficient process obviates consideration of the stigma

plus claim and whether qualified immunity shielded Dr. Parsons and Mr. Khalsa. Stigma plus defamation claims present a "species" of procedural due process violations. *See, e.g., Segal v. City of New York,* 459 F. 3d 207, 213 (2nd Cir. 2006). A successful stigma plus claim requires the plaintiff to show the loss of a protected interest which occurred without due process of law. *Id.* Accordingly, "the availability of adequate process defeats a stigma plus claim." *Id.*

In *Deming v. Jackson-Madison County Gen. Hosp. Dist.,* 553 F. Supp. 2d 914, 934 (D. Tenn. 2008), the court dismissed a physician's stigma plus claims based on the loss of hospital privileges, where the procedure afforded by the defendants passed the balancing test set out in *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976). *Id.* at 932-33. Similarly, the district court's conclusion that the process accorded Dr. Guttman satisfied federal due process standards makes separate consideration of qualified immunity for the stigma plus claim unnecessary. Dr. Guttman's stigma plus claim fails for the same reason he cannot show a due process violation more broadly relating to the revocation of his license: the process afforded by the State of New Mexico was constitutionally sufficient.

In any event, the district court was correct in concluding that, at the time of the reports at issue, Tenth Circuit law was unclear in relation to whether a stigma plus claim required that the allegedly defamatory statement occur in the course of terminating employment. (App. 114-115.) Dismissal of the stigma plus claim

therefore accorded with the recognition that the process afforded Dr. Guttman satisfied federal due process requirements and that the individual defendants were entitled to qualified immunity, in light of *Renaud v. Wyoming Dep't of Family Services,* 203 F. 3d 723, 728 n.1 (10th Cir. 2000).

CONCLUSION

The Court should affirm the dismissal of Dr. Guttman's case.

Respectfully submitted,

KELEHER & McLEOD, P.A.

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STATEMENT REGARDING ORAL ARGUMENT

The Appellees request oral argument, which will assist the Court in understanding the complex and lengthy history of Dr. Guttman's case, and aid the Court in addressing the important Eleventh Amendment immunity issues presented by this appeal.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that to the best of my knowledge and belief the word count feature of the word processing system (Microsoft Word, Version 2003) used to prepare the brief indicates a word count of Thirteen Thousand Sixy [13,060], excluding the cover page, table of contents, table of authorities, statement regarding oral argument, certificate of compliance, certificate of digital submission and certificate of service.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/_____
Thomas C. Bird (Bar No. 228)

Dated: November 23, 2010

CERTIFICATE OF DIGITAL SUBMISSION

I HEREBY CERTIFY that:

(1) no privacy redactions were required to be made and this document and it is an exact copy of the written document filed with the Clerk; and

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Dated: November 23, 2010

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on the following individuals by electronic mail on November 23, 2010 and by first-class mail on November 24, 2010 to:

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