

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF TEXAS
 MCALLEN DIVISION

EUGENIO G. GALINDO, M.D.,
Plaintiff,

v.

THE TEXAS MEDICAL BOARD,
 SCOTT M. FRESHOUR, SHARON J.
 BARNES AND MANUEL “MANNY”
 QUINONES, JR., M.D.,
Defendants.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 7:19-CV-102
 JURY

DEFENDANTS’ RESPONSE TO PLAINTIFF’S MOTION FOR TEMPORARY RESTRAINING ORDER

We have previously considered en banc the pre-suspension process due a physician where patient safety was considered to be at risk. . . . *Caine* makes clear that “[n]ot even an informal hearing . . . must precede a deprivation undertaken to protect the public safety.”

Patel v. Midland Mem. Hosp., 298 F.3d 333, 339-341 (5th Cir. 2002), quoting *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (en banc).

In December 2018, two female patients separately complained to the Texas Medical Board (“TMB”) that Dr. Galindo had sexually assaulted them or attempted to do so. The same month, TMB learned law enforcement authorities had arrested Dr. Galindo based on probable cause. In March, Dr. Galindo and his attorney received notice of and appeared at a temporary suspension hearing. At the hearing, through his chosen counsel, Dr. Galindo cross-examined two female witnesses testifying against him; he also was permitted to provide testimony on his own behalf. Following the hearing, the Texas Medical Board temporarily restricted Dr. Galindo from seeing female patients, effective immediately. Dr. Galindo has been indicted by a Hidalgo County grand jury on one count of attempted sexual assault and two counts of sexual assault, each involving a different woman. He sues in federal court, asking this Court for extraordinary relief: require TMB to let him treat female patients.

The Court should reject Plaintiffs' motion for a temporary restraining order. First, Plaintiff is unlikely to succeed with his due process challenge. The Fifth Circuit has repeatedly held that due process does not require any pre-suspension process where patient safety is at risk. *Patel*, 298 F.3d at 341; *Caine*, 943 F.2d at 1412. The TMB has a robust hearing procedure in which he can participate, as well as statutory avenues to judicial review upon exhaustion of those administrative remedies. *See* TEX. OCC. CODE § 164.009 (“A person whose license to practice medicine has been revoked . . . may appeal to a Travis County district court not later than the 30th day after the date the board decision is final.”). Moreover, prior to restricting his license, TMB gave Plaintiff notice, an opportunity to be heard, a right to counsel, the right to present evidence on his own behalf, and even the right to cross-examine witnesses against him. TMB's provision of these safeguards more than sufficed to meet the demands of due process.

Further, Plaintiff ignores the State's “powerful interest in protecting patient safety,” an interest explicitly emphasized by the Fifth Circuit. *Caine*, 943 F.2d at 1413. To the extent Dr. Galindo's real contention is that the TMB reached the wrong result, he has adequate remedies through the post-deprivation administrative process and state law. In the meanwhile, credible evidence suggests Dr. Galindo is a threat to the safety of female patients. *See Patel*, 298 F.3d at 341 (“[T]he key question is not whether Dr. [Galindo] was *actually* a danger, but whether the [Board] had reasonable grounds for suspending him as a danger.”). The equitable factors thus tilt strongly against the issuance of a temporary restraining order. Plaintiff's motion for a temporary restraining order should be denied.

Argument

“Temporary restraining orders, preliminary injunctions, and permanent injunctions are extraordinary forms of relief. Although this observation rises frequently from courts considering requests for such orders, the enormity of the relief is difficult to overstate.” *Trinity USA Operating, LLC v. Barker*, 844 F. Supp. 2d 781, 785 (S.D. Miss. 2011). This is particularly true when a party seeks

an order directing state officials to perform or discontinue certain conduct. *Morrow v. Harwell*, 768 F.2d 619, 627 (5th Cir. 1985).

The same factors govern temporary restraining orders and preliminary injunctions. *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987); *Barker*, 844 F. Supp. 2d at 785. A party seeking a temporary restraining order or a preliminary injunction must show: “(1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.” *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005). An injunction should not be granted unless the movant “has clearly carried the burden of persuasion on all four requirements.” *Planned Parenthood Ass’n of Hidalgo Cty., Tex., Inc. v. Suebs*, 692 F.3d 343, 348 (5th Cir. 2012); *Prichard*, 812 F.2d at 993. Even then, the decision whether to grant or deny such relief remains within the discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

I. Dr. Galindo received due process.

Dr. Galindo complains that TMB denied two requests for continuance [*Plaintiff’s Original Complaint and Application for Temporary Restraining Order and Temporary Injunction* (“Complaint”) at ¶¶ 13, 16], that a live court reporter did not transcribe the hearing (*id.* at ¶ 17), that witnesses were “not properly and appropriately administered an oath” (*id.* at ¶ 18), that the Board members adjudicating the hearing (the “TMB Panel”) consulted a staff attorney (*id.* at ¶ 19), and that a TMB attorney attended an executive session from which Plaintiff and his counsel were excluded (*id.* at ¶ 21). None of these complaints indicates any due process infirmity.

The TMB’s litigation manager, Chris Palazola, provides further context for Plaintiff’s allegations. *See* Declaration of Chris Palazola, **attached as Exhibit 1**. Dr. Galindo received 10 days’ advance notice of the hearing date; though the requested continuance was denied, both Dr. Galindo

and his counsel attended the hearing in person. *Id.* The retained Court Reporter called in sick, and TMB could not timely find a replacement—but the hearing was recorded electronically. *Id.* The oath was administered by a TMB employee rather than the court reporter—but the witness was placed under oath. *Id.* Dr. Galindo and his counsel were excluded from the executive session while a TMB attorney attended—but the litigation manager, who presented the allegations against Dr. Galindo, was likewise excluded. *Id.* The TMB staff attorney who remained in the room during executive session is a neutral resource designated to advise the TMB Panel about applicable rules, regulations and legal issues that may arise during the hearing.

Dr. Galindo received notice, an opportunity to be heard, a right to counsel, the right to present evidence on his own behalf, and even the opportunity to cross-examine witnesses against him. These safeguards more than satisfy due process.¹

II. The Fifth Circuit holds that patient safety is paramount.

Procedural due process is a flexible concept whose contours are shaped by the nature of the individual's and the state's interests in a particular deprivation. The necessary amount and kind of process depends upon an analysis of three factors: the private and public interests involved, the risk of an erroneous deprivation inherent in the procedures employed by the state, and the likely benefit that might accrue from additional procedural protections. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Here, with a physician credibly accused of assaulting more than one woman, the balance of the private and public interests involved favors immediate action.

¹ The Constitution guarantees due process, not perfect decision-making: “The state has no constitutional duty to provide a procedural regimen that guarantees faultless decisionmaking; the state’s interests in safety and efficiency find expression in the tolerable level of risk. When that balance has been fairly struck, a person states no claim by asserting that such risk was visited upon him.” *Caine*, 943 F.2d 1413.

In this case, the tri-factor balancing test does not present the Court a novel challenge. At least twice the Fifth Circuit has considered the summary suspension of a physician where patient safety was considered to be a risk. *See Patel v. Midland Mem. Hosp.*, 298 F.3d 333 (5th Cir. 2002); *Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991) (en banc). If it is reasonable to conclude that prompt action is necessary to protect patient safety, patient safety trumps a physician's interest in his uninterrupted license: "[W]here the safety of the public is at risk, an adequate post-suspension remedy satisfies the requirements of due process." *Patel* 298 F.3d at 340, citing *Caine*, 943 F.2d at 1412.

In this case, TMB had ample reason to believe that Dr. Galindo posed a danger to patient safety. Two separate complaints from female patients accused Dr. Galindo of sexual assault or attempted sexual assault. Two witnesses appeared at the hearing to provide testimony under oath, subjecting themselves to professional cross-examination. Whether or not Dr. Galindo may prevail is not the inquiry for this Court. As the Fifth Circuit noted in *Patel*, "the key question is not whether [the doctor] was *actually* a danger, but whether the [decision-maker] had reasonable grounds for suspending him as a danger." *Patel* at 341 (citation omitted). In light of the evidence against Dr. Galindo, the TMB properly acted to ensure patient safety. The Court should not grant extraordinary relief to overturn TMB's decision.

III. The State has a strong interest in enforcing its laws.

Plaintiff contends that he "seeks a temporary restraining order to maintain the very recent status quo." Complaint at ¶ 32. What Plaintiff asks is not for a continuation of the status quo but a swift and unwarranted departure from it. As discussed above, Plaintiff cannot meet the burden of obtaining the requested "extraordinary" relief.

Further, the equities weigh against such relief. As discussed above, the Fifth Circuit has acknowledged the State's "powerful interest in protecting patient safety" on more than one occasion. The State has a fundamental interest in enforcement of its laws. *E.g., True the Vote v. Hosemann*, 43 F.

Supp. 3d 693, 742 (S.D. Miss. 2014) (“The State . . . has a significant interest in enforcing its enacted laws.”). When the State is prevented from enforcing those laws, it suffers irreparable injury. *E.g.*, *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (“[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (citations omitted)); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (recognizing that, if enforcement of duly enacted State law is enjoined, “the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws[.]”). The balance of hardships therefore militates against an injunction, not for it. *See Hosemann*, 43 F. Supp. 3d at 742 (concluding that the balance of hardships weighed in the State’s favor given the State’s interest in enforcing its laws).

The balance of equities particularly favors upholding the State’s decision in this case, where the Texas legislature explicitly specifies administrative remedies and a state court avenue of post-deprivation relief. *See, e.g.*, TEX. OCC. CODE § 164.009 (“A person whose license to practice medicine has been revoked . . . may appeal to a *Travis County district court* not later than the 30th day after the date the board decision is final.”); TEX. OCC. CODE § 164.011 (“The board’s decision on a disciplinary matter may not be enjoined or stayed except on application *to the appropriate court* after notice to the board.”). Texas statutes provide constitutional due process, and, assuming it has jurisdiction, the federal court should defer to Texas state courts to protect those rights: “Whatever the dictates of the rules of preclusion, it may at times better advance the overall interests of the parties and the legal system for finality to be achieved in state courts.” *Harris v. N.Y. State Dep’t of Health*, 202 F. Supp. 2d 143, 161 (S.D.N.Y. 2002) (finding that federal court lacked jurisdiction pursuant to *Rooker-Feldman* doctrine over physician’s suit based on license revocation).

CONCLUSION

Plaintiff has not shown a substantial likelihood of success on the merits or that the equities tilt in favor of issuing a temporary restraining order. Plaintiff's motion for a temporary restraining order should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

AMANDA J. COCHRAN-MCCALL
Chief for General Litigation Division

/s/ Carl.
H. CARL MYERS
Attorney-in-Charge
Texas Bar No. 24046502
Southern District No. 852368
Assistant Attorney General
Office of the Attorney General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 | FAX: (512) 320-0667
carl.myers@oag.texas.gov

COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2019 a true and correct copy of the foregoing document was served via the Court's CM/ECF system to all counsel of record.

Ronald G. Hole
HOLE & ALVAREZ, L.L.P.
P.O. Box 720547
McAllen, Texas 78504
Attorney for Plaintiff

/s/ Carl. _____
H. CARL MYERS
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

EUGENIO G. GALINDO, M.D.,
Plaintiff,

v.

THE TEXAS MEDICAL BOARD,
SCOTT M. FRESHOUR, SHARON J.
BARNES AND MANUEL "MANNY"
QUINONES, JR., M.D.,
Defendants.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 7:19-CV-102
JURY

DECLARATION OF CHRISTOPHER PALAZOLA

1. I make the following declaration in accordance with 28 U.S.C. § 1746:

2. My name is Christopher Palazola. I am over 18 years of age, of sound mind, and capable of making this declaration. The facts stated in this declaration are within my personal knowledge and are true and correct.

3. I am employed by the Texas Medical Board ("TMB") as the litigation manager, a position I have held since February 1, 2013. My responsibilities include managing the agency's administrative litigation. Our team of 14 attorneys prosecute violations of the various practice acts that apply to our licensees in both confidential proceedings before our agency and in formal proceedings at the Texas State Office of Administrative Hearings ("SOAH"). I also work with the medical director and executive director in assessing cases where there may be a risk of imminent danger to patients or the public that may warrant an immediate suspension or restriction of a licensee's license to practice.

4. I presented the case in favor of suspending the license of Eugenio G. Galindo, M.D. to a panel of three board members of the TMB (the "TMB Panel"). This proceeding is ancillary

to the investigative process and by definition temporary, remaining in place only until superseded by further action of the Board. It is not a revocation proceeding. The Board may only enter an Order of Revocation of a license after a full, contested case hearing at the SOAH. These are emergency proceedings and the Board is authorized to take such actions *ex parte*, without providing any notice to a licensee. *See* Tex. Occ. Code § 164.059(c). However, in cases where the outcome is likely to rely heavily on testimony from both sides, we normally set the matter with notice. This gives Respondents an opportunity to be present and to cross examine witnesses and allows the Disciplinary Panel an opportunity to weigh the credibility of all witnesses. In December 2018, TMB received two separate complaints about Dr. Galindo. Texas statutes require TMB to investigate all complaints against licensed physicians pursuant to statutory requirements and TMB may not dismiss a complaint without appropriate consideration. *See* Tex. Occ. Code § 154.056(2). That month, December 2018, the TMB also received notice of his arrest, indicating that local law enforcement had found probable cause to take him into custody and present criminal charges against him. The arrest records were produced to TMB, but pseudonyms were used by the police department which required legal and investigative staff to compare the information provided in the reports to information provided separately to TMB to insure TMB had an accurate list of patients and employees and that the allegations were consistent.

5. On Friday, March 8, 2019, the TMB provided notice that a temporary suspension hearing would take place on March 20, 2019. The following Monday, March 11, 2019, Mr. Galindo's chosen counsel, Mr. Ronald Hole, presented a request for continuance of the scheduled hearing, as he was scheduled to be out of town during the hearing. TMB's general counsel, Scott Freshour, denied the request for continuance on March 12, 2019. Based on my eight years of

experience with TMB, continuances of temporary suspension hearings are rare, given that such hearings are based on potential immediate threats to Texas patients.

6. On March 19, 2019, the day before the scheduled hearing, Dr. Galindo's attorney presented a second motion for continuance, this time based on an allegation that Plaintiff had only received 10 days to prepare while the TMB was aware of the allegations as early as December 2018. TMB's Panel considered and denied this second requested continuance.

7. I am familiar with Plaintiff's allegation that TMB "had the advantage of three months to prepare for the hearing." *Plaintiff's Original Complaint* at ¶ 14. In my opinion, based on my experience with TMB and my personal familiarity with the process in this instance, TMB scheduled a hearing as soon as practicable given the scheduling needs of prospective TMB panel members, witnesses, and staff. Board Staff provided notice 10 days in advance to Galindo, through his retained counsel. Ten days' notice is the period required prior to convening a temporary suspension proceeding as set out in Tex. Gov. Code § 2001.051.

8. On March 20, 2019, I presented the case in favor of suspending Galindo's license to remain in place until superseded by further Order of the Board to the TMB Panel. Plaintiff's counsel, Mr. Ronald Hole, appeared at that hearing to represent Galindo.

9. Plaintiff's counsel had requested a court reporter for the hearing. It is the customary practice of TMB to have a court reporter transcribe suspension hearings before the Texas Medical Board. The scheduled court reporter called in sick and did not appear. Despite efforts to obtain a replacement, the hearing proceeded without a live court reporter. Instead, the proceedings were recorded electronically. I informed Plaintiff's counsel that the hearing was being recorded electronically and that a transcript could be obtained.

10. Two witnesses against Galindo, the two complainants appeared before the TMB Panel to provide their sworn testimony. One of the complainants testified in person while the other appeared by phone. Both were placed under oath. They were asked to swear to tell the truth by the assistant general counsel assigned to the matter, Amy Swanholm. It is customary for our hearings counsels to swear in witnesses in the absence of a court reporter. Both witnesses were cross-examined by Dr. Galindo's attorney, Mr. Ronald Hole. Patient 1 testified that Respondent, in spite of her verbal communication to stop and her physically resisting him, and in the guise of a physical examination, penetrated her vagina with his finger. Patient 2 testified by phone that Respondent forcefully kissed her in an intimate manner, using his tongue, at the end of a scheduled medical examination. Dr. Galindo also testified to the panel, denying the allegations.

11. Following the presentation of evidence, the three members of the TMB panel participated in an executive session. During the executive session, the TMB Panel had access to a TMB attorney. As the attorney presenting the evidence in favor of suspending Dr. Galindo's license, I was excluded from the executive session, as was Dr. Galindo's counsel, Mr. Ronald Hole.

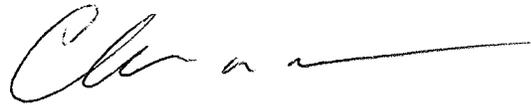
12. I am familiar with Plaintiff's allegations that "[d]uring the entire hearing, and during executive sessions, the Texas Medical Board staff had an attorney in the room with the Board members...." *Plaintiff's Original Complaint* at ¶ 19. In my experience, this procedure is customary and does not indicate any bias on the part of TMB or the TMB Panel; a neutral TMB attorney advises the TMB Panel and attends executive session to serve as a resource to panel members regarding the statutes and rules applicable to disciplinary proceedings. This is expressly permitted by Board Rule 187.58(c) which mandates a Board attorney shall be present both during the hearing and during deliberations to advise the Panel.

13. At the conclusion of the hearing, the three members of the TMB Panel voted unanimously to temporarily restrict Dr. Galindo's license, effective immediately. I did not prevail entirely at the hearing, as I had filed an Application to temporarily suspend Dr. Galindo's license. Instead, the TMB Panel decided only to restrict Dr. Galindo from seeing female patients.

14. After the hearing, on or about April 1, 2019, I learned that Dr. Galindo had been indicted on March 19, 2019 based on allegations of sexually assaulting two women and attempting to sexually assault a third.

15. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

16. Executed: April 2, 2019



CHRISTOPHER PALAZOLA
Litigation Manager
Texas Medical Board

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

EUGENIO G. GALINDO, M.D.,
Plaintiff,

v.

THE TEXAS MEDICAL BOARD,
SCOTT M. FRESHOUR, SHARON J.
BARNES AND MANUEL "MANNY"
QUINONES, JR., M.D.,
Defendants.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 7:19-CV-102
JURY

ORDER DENYING TEMPORARY RESTRAINING ORDER

On this day came on to be considered Plaintiff's Application for Temporary Restraining Order and Temporary Injunction. Upon review of the pleadings, testimony and applicable law, it is determined that said Plaintiff's Application should be DENIED.

IT IS THEREFORE ORDERED, that Plaintiff's Application for Temporary Restraining Order and Temporary Injunction is DENIED.

SIGNED this ____ day of _____, 2019.

THE HONORABLE RICARDO H. HINOJOSA
UNITED STATES DISTRICT JUDGE