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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Scott A. Mason,
Plaintiff,
vs.
State of Arizona, a body politic, et al.,
Defendant.

No. CIV-01-2439-PHX-ROS
ORDER

This action arose from two patient complaints filed with the Arizona State Board of Chiropractic Examiners ("Board") against Plaintiff. As a result of these complaints, the Board revoked Plaintiff's Arizona license to practice chiropractic medicine. Subsequently, pro se Plaintiff filed this action against the State of Arizona, the Board, the individual members of the Board and their spouses, and his two patients. Plaintiff alleges five claims: (1) violation of 42 U.S.C. § 1983; (2) malicious prosecution; (3) defamation; (4) intentional infliction of emotional distress; and (5) negligent infliction of emotional distress. The various Defendants responded by filing Motions to Dismiss. For the reasons stated below, the Court will grant dismissal for all Defendants on Plaintiff's federal claim and decline to exercise supplemental jurisdiction on the remaining state law claims.

BACKGROUND

Plaintiff filed a Complaint on December 14, 2001 against the following Defendants: (1) the State of Arizona ("State"); (2) the Board; (3) each of the individual members of the

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1 Board, its Executive Director, and their spouses (“State Defendants”); (4) Daniel E. Gurka,
2 a former patient of Plaintiff (“Daniel”); and (5) Edward W. Gurka, a former patient of
3 Plaintiff, and his spouse (“Edward”).

4 Plaintiff and each of the Defendants reside in Arizona. (Complaint ¶¶5-16) (Doc. #1).
5 Plaintiff, invoking federal question and supplemental jurisdiction, alleges the following
6 causes of action: (1) violation of 42 U.S.C. § 1983; (2) malicious prosecution; (3)
7 defamation; (4) intentional infliction of emotional distress (“IIED”); and (5) negligent
8 infliction of emotional distress (“NIED”). Plaintiff requests relief in the form of injunctions,
9 reinstatement, and damages. (Complaint pp.26-28) (Doc. #1). Defendants respond by filing
10 various Motions to Dismiss.

11 **A. Daniel’s Motion to Dismiss**

12 Plaintiff alleges four state causes of action against Daniel. On March 21, 2002, Daniel
13 filed a Motion to Dismiss. (Doc. #41). In this Motion, Daniel argues: (1) all claims against
14 him must be dismissed for lack of supplemental jurisdiction; (2) the statute of limitations bars
15 Plaintiff’s defamation claims; (3) absolute and/or qualified immunity bars Plaintiff’s
16 defamation claims; (4) Plaintiff fails to allege a cause of action for IIED; and (5) Plaintiff
17 fails to allege a cause of action for NIED.

18 On June 3, 2002, Plaintiff filed a Response. (Doc. #55). Plaintiff “recognizes that
19 an action for defamation accrues and statute of limitations begins to run upon publication,”
20 but nevertheless asks the Court to “toll” the statute of limitations in his case. (Response to
21 Daniel pp.2-3) (Doc. #55). Plaintiff also argues that, at most, a qualified privilege protects
22 Plaintiff, and requests “additional discovery [be] undertaken” to determine if Daniel violated
23 this privilege. *Id.* at pp.3-4. Finally, Plaintiff asks leave of the Court to amend his pleadings
24 to properly state a cause of action for the IIED and NIED claims. *Id.* at pp.4-5. Daniel filed
25 a Reply on June 6, 2002 that simply restated his prior arguments. (Doc. #58).

1 **B. The State's Motion to Dismiss**

2 The State filed its Motion to Dismiss on March 26, 2002. (Doc. #42). It argued that:
3 (1) the Eleventh Amendment bars all claims; (2) Will v. Michigan Dept. of State Police, 491
4 U.S. 58 (1989), bars the § 1983 claim; (3) absolute and/or qualified immunity bars all
5 claims; (4) failure to comply with Arizona notice of claims statute A.R.S. § 12-821.01 bars
6 all state claims; (5) statute of limitation A.R.S. § 12-821 bars all state claims; and (6) Plaintiff
7 fails to allege a cause of action under § 1983. Moreover, the State also joins Daniel's Motion
8 to Dismiss in part.

9 Plaintiff responded on June 3, 2002. (Doc. #57). In the Response, Plaintiff concedes
10 that Will bars his § 1983 claim against the State. (Response to State p.4) (Doc. #57).
11 Furthermore, Plaintiff concedes that both (1) the notice of claims and (2) statute of
12 limitations bars all of his state law claims against the State. Id. at pp.5-6.

13 The State filed a Reply on June 13, 2002. (Doc. #60). Recognizing that Plaintiff
14 conceded that all of his claims against the State fail, the State requests dismissal, which will
15 be granted.

16 **C. State Defendants' and Board's Motion to Dismiss**

17 The State Defendants and Board filed a joint Motion to Dismiss on March 29, 2002.
18 (Doc. #43). They requested dismissal because: (1) the Eleventh Amendment bars all claims
19 against the Board and all official capacity claims against the State Defendants; (2) Will bars
20 the § 1983 claim against the Board and all official capacity claims against the State
21 Defendants; (3) absolute immunity bars all claims; (4) qualified immunity bars all claims; (5)
22 the Rooker-Feldman doctrine bars Plaintiff's attempts to re-litigate the decisions of the
23 state's superior court, and *res judicata* and collateral estoppel bar Plaintiff's attempt to re-
24 litigate the revocation of his license; (6) failure to comply with Arizona's notice of claim
25 statute bars all state law claims; (7) the statute of limitations bars all state law claims; (8)
26 failure to exhaust administrative remedies bars all state law claims; (9) the Board is a non-
27 jural state entity not subject to suit; and (10) Plaintiff fails to allege a cause of action under
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1 § 1983. Additionally, both the State Defendants and Board partially join Daniel's Motion
2 to Dismiss (Doc. #41).

3 Plaintiff filed a Response on June 3, 2002. (Doc. #56). Plaintiff concedes that Will
4 bars his § 1983 claim against the Board. (Response to State Def. and Board p.5) (Doc. #56).
5 Plaintiff also concedes that both (1) the notice of claims and (2) statute of limitations bars all
6 of his state law claims only against State Defendant Pritzel. Id. at pp.9-10. However,
7 Plaintiff disputes the rest of Defendants arguments. On June 13, 2002, Defendants filed a
8 Reply. (Doc. #59).

9 **D. Edward's Motion to Dismiss**

10 Edward filed his Motion to Dismiss on April 1, 2002. (Doc. #44). He argues that:
11 (1) Plaintiff fails to allege a malicious prosecution cause of action; (2) the statute of
12 limitations bars the defamation claims; (3) Plaintiff fails to allege an IIED cause of action;
13 and (4) Plaintiff fails to allege a NIED cause of action. Moreover, Edward partially joins
14 Daniel's Motion to Dismiss (Doc. #41).

15 Plaintiff responds by conceding that his malicious prosecution claim fails.
16 Additionally, Plaintiff "recognizes that an action for defamation accrues and [the] statute of
17 limitations begins to run upon publication," but nevertheless asks the Court to "toll" the
18 statute of limitations in his case. (Response to Edward pp.2-3) (Doc. #54). Finally, Plaintiff
19 asks leave of the Court to amend his pleadings to properly state a cause of action for the IIED
20 and NIED claims. Id. at pp.3-5. Edward filed a Reply on June 20, 2002 (Doc. #61) that
21 simply joins Daniel's Reply (Doc. #58).

22 **DISCUSSION**

23 This is a federal question case with state causes of action included under supplemental
24 jurisdiction. The parties agree that Arizona law applies to the state causes of action. Each
25 of the Motions to Dismiss request dismissal pursuant to both Fed. R. Civ. P. 12(b)(1) and
26 12(b)(6).

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1 **A. Legal Standards**

2 **1. Rule 12(b)(6)**

3 A court may not dismiss a complaint for failure to state a claim “unless it appears
4 beyond doubt that the plaintiff can prove no set of facts in support of his claims which would
5 entitle him to relief.” Barnett v. Centoni, 31 F.3d 813, 813 (9th Cir. 1994) (citing Buckley v.
6 Los Angeles, 957 F.2d 652, 654 (9th Cir. 1992)); see Conley v. Gibson, 355 U.S. 41, 47
7 (1957); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995);
8 W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).¹ “The federal rules require
9 only a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’”
10 Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248 (9th Cir. 1997) (quoting Fed. R. Civ. P.
11 8(a)). “The Rule 8 standard contains a powerful presumption against rejecting pleadings for
12 failure to state a claim.” Id. at 249 (quotation marks omitted). “All that is required are
13 sufficient allegations to put defendants fairly on notice of the claims against them.”
14 McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991) (citing Conley, 355 U.S. at 47; 5 C.
15 Wright & A. Miller, Federal Practice & Procedure § 1202 (2d ed. 1990)). Indeed, though “‘it
16 may appear on the face of the pleadings that a recovery is very remote and unlikely[,] . . . that
17 is not the test.’” Gilligan, 108 F.3d at 249 (quoting Scheur v. Rhodes, 416 U.S. 232, 236
18 (1974)). “‘The issue is not whether the plaintiff will ultimately prevail but whether the
19 claimant is entitled to offer evidence to support the claims.’” Id. Finally, it is well

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21 ¹This standard, ‘often cited in Rule 12(b)(6) motions, . . . is equally applicable in [Rule
22 12(b)(1)] motions challenging subject matter jurisdiction when such jurisdiction may be
23 contingent upon factual matters in dispute.’” Roberts v. Corrothers, 812 F.2d 1173, 1177
24 (9th Cir. 1987) (citation omitted). “If a district court cannot determine jurisdiction on the
25 basis of a threshold inquiry analogous to a 12(b)(6) motion, the court may assume jurisdiction
26 and go on to determine the relevant jurisdictional facts ‘on either a motion going to the merits
27 or at trial.’” Id. at 1178 (citation omitted). A Rule 12(b)(1) motion to dismiss “for lack of
28 subject matter jurisdiction may either attack the allegations of the complaint or may be made
as a ‘speaking motion’ attacking the existence of subject matter jurisdiction in fact.”
Thornhill Publ’g Co. v. Gen. Tel. & Elecs., 594 F.2d 730, 733 (9th Cir. 1979). The defense
of lack of subject matter jurisdiction may be raised at any time by the parties. Fed. R. Civ.
P. 12(h)(3).

1 established that pro se complaints, “however inartfully pleaded[,] are held to less stringent
2 standards than formal pleadings drafted by lawyers[.]” Hughes v. Rowe, 449 U.S. 5, 9
3 (1980) (quotation marks omitted); see Ortez v. Wash. County, 88 F.3d 804, 807 (9th Cir.
4 1996) (“Because Ortez is a pro se litigant, we must construe liberally his inartful
5 pleading[.]”) (citation omitted). “In civil rights cases where the plaintiff appears pro se, the
6 court must construe the pleading liberally and must afford plaintiff the benefit of any doubt.”
7 Karim-Panahi v. L.A. Police Dep’t, 839 F.2d 621, 623 (9th Cir. 1988); see Morrison v. Hall,
8 261 F.3d 896, 899 n.2 (9th Cir. 2001) (citing Karim-Panahi, 839 F.2d at 623; Haines v.
9 Kerner, 404 U.S. 519, 520 (1972)); Frost v. Symington, 197 F.3d 348, 352 (9th Cir. 1999)
10 (citing Karim-Panahi, 839 F.2d at 623).

11 When analyzing a complaint for failure to state a claim, “[a]ll allegations of material
12 fact are taken as true and construed in the light most favorable to the non-moving party.”
13 Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir. 1996); see Miree v. DeKalb County, 433 U.S.
14 25, 27 n.2 (1977). In addition, the district court must assume that all general allegations
15 “embrace whatever specific facts might be necessary to support them.” Peloza v. Capistrano
16 Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994), cert. denied, 515 U.S. 1173 (1995)
17 (citations omitted). The district court need not assume, however, that the plaintiff can prove
18 facts different from those alleged in the complaint. See Associated Gen. Contractors of
19 Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). Similarly, legal
20 conclusions couched as factual allegations are not given a presumption of truthfulness and
21 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a
22 motion to dismiss.” Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998); see Jones v. Cmty.
23 Redev. Agency, 733 F.2d 646, 649-50 (9th Cir. 1984); W. Mining Council, 643 F.2d at 624.

24 “Dismissal can be based on the lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory.” Balistreri v. Pacifica Police Dept.,
26 901 F.2d 696, 699 (9th Cir. 1988); see William W. Schwarzer et al., Federal Civil Procedure
27 Before Trial § 9:187, at 9-46 (2002). Alternatively, dismissal may be appropriate when the
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1 plaintiff has included sufficient allegations disclosing some absolute defense or bar to
2 recovery. See Weisbuch v. County of L.A., 119 F.3d 778, 783, n.1 (9th Cir. 1997) (“If the
3 pleadings establish facts compelling a decision one way, that is as good as if depositions and
4 other . . . evidence on summary judgment establishes the identical facts.”); see also Federal
5 Civil Procedure Before Trial § 9:193, at 9-47.

6 “Generally, a district court may not consider any material beyond the pleadings in
7 ruling on a Rule 12(b)(6) motion.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896
8 F.2d 1542, 1555 n.19 (9th Cir. 1990); see Lee v. City of L.A., 250 F.3d 668, 688 (9th Cir.
9 2001). Indeed, “a court may not look beyond the complaint to a plaintiff’s moving
10 papers, such as a memorandum in opposition to a defendant’s motion to dismiss.”
11 Schneider v. Cal. Dep’t of Corr., 151 F.3d 1194, 1197 (9th Cir. 1998) (citing Harrell v.
12 United States, 13 F.3d 232, 236 (7th Cir. 1993)).

13 “‘However, material which is properly submitted *as part of the complaint* may be
14 considered’ on a motion to dismiss.” Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir.), cert.
15 denied, 512 U.S. 1219 (1994) (quoting Hal Roach Studios, 896 F.2d at 1555 n.19)
16 (emphasis in original); see Federal Civil Procedure Before Trial § 9:212, at 9-54.

17 Similarly, a district court may consider any documents referred to or “whose contents are
18 alleged in a complaint and whose authenticity no party questions.” Id. at 454; see Lee,
19 250 F.3d at 688 (citing Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir.), cert. denied,
20 525 U.S. 1001 (1998)); Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.
21 2001) (citing Branch, 14 F.3d at 453-54); see also Robinson v. Fred Myers Stores, Inc.,
22 184 F. Supp. 2d 968, 972 (D. Ariz. 2002); see Federal Civil Procedure Before Trial
23 § 9:212.1, at 9-54. In addition, “even if the plaintiff’s complaint does not explicitly refer
24 to” a document, “a district court ruling on a motion to dismiss may consider a document
25 the authenticity of which is not contested, and upon which the plaintiff’s complaint
26 necessarily relies” because this prevents “plaintiffs from surviving a Rule 12(b)(6) motion
27 by deliberately omitting references to documents upon which their claims are based[.]”
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1 Parrino, 146 F.3d at 705-06. “Such consideration does ‘not convert the motion to dismiss
2 into a motion for summary judgment.’” Branch, 14 F.3d at 454 (quoting Romani v.
3 Shearson Lehman Hutton, 929 F.2d 875, 897 n.3 (1st Cir. 1991)); see Parrino, 146 F.3d at
4 705-06; Parks Sch. of Bus., 51 F.3d at 1484; cf. Fed. Rs. Civ. P. 12(b), 56.

5 At this stage of the litigation, however, the district court must resolve any
6 ambiguities in the considered documents in the plaintiff’s favor. See Int’l Audiotext
7 Network, Inc. v. AT&T Co., 62 F.3d 69, 72 (2d Cir. 1995); see also Smith, 84 F.3d at
8 1217; Miree, 433 U.S. at 27 n.2.; Federal Civil Procedure Before Trial § 9:212.1c, at 9-
9 55.

10 2. Rule 12(b)(1)

11 “The party asserting jurisdiction has the burden of proving all jurisdictional facts.”
12 Indus. Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing McNutt
13 v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936)); see Kokkonen v. Guardian
14 Life Ins. Co. of Am., 114 S. Ct. 1673, 1675 (1994); Fenton v. Freedman, 748 F.2d 1358,
15 1359, n.1 (9th Cir. 1994); see also William W. Schwarzer et al., Federal Civil Procedure
16 Before Trial § 9:77, at 9-17 (2002). In effect, the court presumes lack of jurisdiction until
17 the plaintiff proves otherwise. See Kokkonen, 114 S. Ct. at 1675; Stock West, Inc. v.
18 Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). The defense of lack of subject
19 matter jurisdiction may be raised at any time by the parties or the court. See Fed. R. Civ.
20 P. 12(h)(3). A Rule 12(b)(1) motion to dismiss “for lack of subject matter jurisdiction
21 may either attack the allegations of the complaint or may be made as a ‘speaking motion’
22 attacking the existence of subject matter jurisdiction in fact.” Thornhill Publ’g Co. v.
23 Gen. Tel. & Elecs., 594 F.2d 730, 733 (9th Cir. 1979); see Federal Civil Procedure Before
24 Trial § 9:78, at 9-18.

25 In resolving the former motion, a “facial attack” under Rule 12(b)(1), the district
26 court must accept the allegations of the complaint as true. See Federal Civil Procedure
27 Before Trial § 9:84, at 9-20 (citing Valdez v. United States, 837 F. Supp. 1065, 1067
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1 (E.D. Cal. 1993), aff'd, (9th Cir. 1995)). Unlike a Rule 12(b)(6) motion, however, the
2 court will not reasonably infer allegations sufficient to support federal subject matter
3 jurisdiction because a plaintiff must affirmatively allege such jurisdiction. Id. § 9:84a, at
4 9-20.

5 In resolving a “speaking motion” or “factual attack” under Rule 12(b)(1), the court
6 is not limited to the allegations in the pleadings if the “jurisdictional issue is separable
7 from the merits [of the] case.” Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir.
8 1987); see Greene v. United States, — F. Supp. 2d —, No. CIV-S-01-08777GGH, 2000
9 WL 1307309, at *4 (E.D. Cal. May 16, 2002) (citing Trentacosta v. Frontier Pac. Aircraft
10 Indus., 813 F.2d 1553, 1558 (9th Cir. 1987)). Instead, “[t]he court may view evidence
11 outside the record, and no presumptive truthfulness is due to the complaint’s allegations
12 that bear on the subject matter [jurisdiction] of the court.” Greene, 2000 WL 1307309, at
13 *4 (citing Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983)); see Roberts,
14 812 F.2d at 1177; Valdez, 837 F. Supp. at 1067; see also Federal Civil Procedure Before
15 Trial § 9:86, at 9-21. Indeed, “the district court is[] ‘free to hear evidence regarding
16 jurisdiction and to rule on that issue prior to trial, resolving factual disputes where
17 necessary.’” Id. (quoting Augustine, 704 F.2d at 1077); see Federal Civil Procedure
18 Before Trial § 9:85, at 9-20.

19 However, the court must hold an evidentiary hearing before resolving issues of
20 credibility or genuinely disputed material facts. See Federal Civil Procedure Before Trial
21 § 9:85.1, at 9-21.² If the court resolves a Rule 12(b)(1) motion on declarations alone
22 without an evidentiary hearing, it must accept the factual allegations of the complaint as
23 true. See id. (citing McLachlan v. Bell, 261 F.3d 908, 909 (9th Cir. 2001)); Greene, 2000
24 WL 1307309, at *4 (“[I]n the absence of a full-fledged evidentiary hearing, disputes in
25 the facts pertinent to subject matter [jurisdiction] are viewed in the light most favorable to
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27 ²The court has the discretion to order an evidentiary hearing before trial or postpone
28 the motion until trial. See id.

1 the opposing party.”) (citing Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1997)).
2 Similarly, without an evidentiary hearing, genuinely “disputed facts related to subject
3 matter jurisdiction should be treated in the same way as one would adjudicate a summary
4 judgment motion.” Greene, 2000 WL 1307309, at *4 (citing Dreier, 106 F.3d at 847).

5 **B. Analysis**

6 Because the outcome of the Court’s decision on the Defendants’ Motions to
7 Dismiss Plaintiff’s federal question § 1983 claim impacts the Court’s resolution of
8 Plaintiff’s remaining state law claims, the Court first turns to this issue.

9 **1. Federal Question § 1983 Claim**

10 Plaintiff’s Complaint alleges a § 1983 action against: (1) the State; (2) the Board;
11 and (3) the State Defendants, both individually and in their official capacities.

12 **a. Plaintiff Concedes No Claim Exists Against the State**

13 In his Response to the State’s Motion to Dismiss, Plaintiff wrote that he “concedes
14 that the United States Supreme Court decision in Will v. Michigan Department of State
15 Police bars Plaintiff’s federal constitutional claim against the State of Arizona.”
16 (Response to State at p.4) (Doc. #57). As stated previously, construing this concession as
17 Plaintiff’s stipulation to dismiss on the § 1983 count, it will be dismissed.

18 **b. Plaintiff Concedes No Claim Exists Against the Board**

19 In his Response to the Board and State Defendants’ Motion to Dismiss, Plaintiff
20 wrote that “the United States Supreme Court decision in Will v. Michigan . . . bars
21 Plaintiff’s federal constitutional claims against the State Defendant Board only.”
22 (Response to State Defendants at p.5) (Doc. #56). As previously stated, construing this
23 concession as Plaintiff’s stipulation to dismiss the § 1983 count, it will be dismissed.

24 **c. Plaintiff Fails to State a Claim Against the State Defendants**

25 Plaintiff alleges § 1983 actions against the State Defendants both in their
26 individual and official capacity. Neither claim survives the Motion to Dismiss.

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1 **(1) The Eleventh Amendment Bars the Official Capacity Claims Requesting**
2 **Retrospective Relief³**

3 When suing an individual in his official capacity pursuant to § 1983, the Eleventh
4 Amendment provides sovereign immunity protection. The Amendment provides:

5 The Judicial power of the United States shall not be construed as to extend
6 to any suit in law or equity, commenced or prosecuted against one of the
United States by Citizens of another State, or by Citizens or Subjects of any
Foreign State.

7 U.S. Const. amend. XI. In 1934, the Supreme Court stated that this language fails to be
8 dispositive because behind these “words” exist common-law “postulates” of sovereign
9 immunity “which limit and control.” Monaco v. Mississippi, 292 U.S. 313, 322 (1934);
10 see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Port Auth. Trans-Hudson
11 Corp. v. Feeney, 495 U.S. 299, 304 (1990) (“this Court has drawn upon principles of
12 sovereign immunity”).

13 Applying this concept, in Hans v. Louisiana, 134 U.S. 1 (1890), the Supreme Court
14 established that, despite its language, the Amendment applies to federal court actions
15 brought by citizens of the defendant state. Moreover, the Amendment applies to suits
16 against state agencies and state officials sued in their official capacities. Pennhurst State
17 Sch. & Hosp. v. Halderman, 465 U.S. 89, 101-2 (1984). Finally, despite specifically
18 stating that it bars suits “in law or equity,” the Supreme Court holds that the Amendment
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22 ³The Court notes that federal courts should avoid reaching the merits of a
23 constitutional issue when the case may be decided on other grounds. However, in this case,
24 the Court turns first to the constitutional issue of sovereign immunity because it presents a
25 controlling jurisdictional question that antecedes State Defendants’ other arguments for
26 dismissal. See In re: Jackson, 184 F.3d 1046, 1048 (9th Cir. 1999) (stating that courts must
27 resolved Eleventh Amendment jurisdictional issues prior to reaching the merits); Bellsouth
28 Telecommunications, Inc., v. North Carolina Utils. Comm’n, 240 F.3d 270, 275-76 (4th Cir.
2001); Fent v. Oklahoma Water Resources Bd., 235 F.3d 553, 557-59 (10th Cir. 2000);
United States v. Texas Tech Univ., 171 F.3d 279, 285-94 (5th Cir. 1999). But see Calderon
v. Ashmus, 523 U.S. 740, 745 n.2 (1998) (implying that Eleventh Amendment matters are
excluded from Article III issues that must be addressed before the merits).

1 fails to bar federal court prospective relief that requires state officials to comply with
2 federal law. Ex parte Young, 209 U.S. 123 (1908).

3 To achieve the Young holding, the Supreme Court created a legal fiction. The
4 Court reasoned that, because any authority given by the states to their officials must be
5 exercised consistently with the commands of the federal Constitution, a state official who
6 acts in violation of the Constitution is “stripped of his official or representative character
7 and is subjected in his person to the consequences of his individual conduct.” Id. at 160.
8 Therefore, prospective relief that requires a state official to comply with the federal
9 Constitution operates against the official in her personal capacity and falls outside the
10 scope of the Amendment, which affords sovereign immunity to states but not individuals.
11 See also Papasan v. Allain, 478 U.S. 265, 276-79 (1986) (plurality opinion) (Young “was
12 based on a determination that an unconstitutional state enactment is void and that any
13 action by a state official that is purportedly authorized by that enactment cannot be taken
14 in an official capacity since the state authorization for such action is a nullity”); Pennhurst
15 State Sch. & Hosp., 465 U.S. at 102-5.

16 Young applies whenever “‘the underlying authorization upon which the named
17 official acts is asserted to be illegal’ under federal law, the ‘violation of federal law by
18 [the] state official is ongoing’ [or threatened], and the relief sought will end the
19 violation.” Ezzell v. Board of Regents, 838 F.2d 1569, 1571 (11th Cir. 1988) (quoting
20 Papasan, 478 U.S. at 277).

21 Young creates a dichotomy, immunizing state officials from retrospective relief,
22 but not prospective relief. The Supreme Court recognizes that the distinction between
23 these two forms of relief is not always the difference between “day and night.” Edelman
24 v. Jordan, 415 U.S. 651, 667 (1974). However, resolution of an Eleventh Amendment
25 defense in a federal court § 1983 suit requires a determination of whether the relief
26 requested falls on the prohibited, retrospective side or on the permissible Young,
27 prospective side.

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1 The party asserting Eleventh Amendment immunity bears the burden of proving its
2 applicability. Hyland v. Wonder, 117 F.3d 405, 413 (9th Cir. 1997) (quoting ITSI TV
3 Prods., Inc. v. Agricultural Ass'ns, 3 F.3d 1289, 1291 (9th Cir. 1993)). Here, the
4 Governor appoints Board members, who are paid by the State Treasury. A.R.S. § 32-901.
5 Moreover, the Board appoints the Executive Director, who also receives a salary from the
6 State Treasury. A.R.S. § 32-905. Therefore, State Defendants meet their burden of
7 proving that they constitute state officials. Having established this, the Court now turns
8 to the applicability of immunity to Plaintiff's claim for relief.

9 Here, Plaintiff requests that (1) damages be awarded; (2) State Defendants be
10 "permanently enjoined from engaging in" the alleged unlawful conduct described in his
11 Complaint; and (3) reinstatement of his license. The first two forms of requested relief
12 constitute prohibited, retrospective relief. However, reinstatement constitutes prospective
13 relief.

14 **(a) Retrospective Relief Request Barred**

15 First, damages for the alleged wrongs committed against Plaintiff constitute
16 retrospective relief designed to compensate Plaintiff for past harm. See, e.g., Papasan,
17 478 U.S. at 278 (holding that the Eleventh Amendment bars federal court relief payable
18 out of the state treasury designed to compensate for past harm); Edelman, 415 U.S. at 668
19 (holding Eleventh Amendment provided immunity against a federal court award of
20 retroactive welfare benefits payable from the state treasury).

21 Second, Plaintiff's Complaint only describes completed, allegedly illegal conduct
22 engaged in by the State Defendants personally directed toward Plaintiff. Plaintiff makes
23 no allegations that State Defendants are engaged in any ongoing actions that are illegal
24 under federal law or that there is a prospect that they will undertake such activities in the
25 future against him. Without such a showing, Plaintiff simply asks to "enjoin" past,
26 completed actions. This fails to constitute prospective relief under Young. See, e.g.,
27 Papasan, 478 U.S. at 277-78 ("Young has been focused on cases in which a violation of
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1 federal law by a state official is ongoing as opposed to cases in which federal law has
2 been violated at one time or over a period of time in the past . . .”).

3 **(b) Prospective Request for Reinstatement Not Barred**

4 While no Ninth Circuit case specifically finds a request for reinstatement of a
5 medical professional’s license to be prospective relief, the Ninth Circuit does hold
6 requests for reinstatement of employment to be prospective relief.

7 In Doe v. Lawrence Livermore Laboratory, 131 F. 3d 836 (9th Cir. 1997), the
8 Ninth Circuit held that reinstatement of employment constituted prospective injunctive
9 relief. Id. at 839-842.

10 The goal of reinstatement . . . is not compensatory; rather it is to compel the
11 state official to cease her actions in violation of federal law and to comply
12 with constitutional requirements. [Plaintiff’s] alleged wrongful discharge is
13 a continuing violation; as long as the state official keeps him out of his
14 allegedly tenured position the official acts in what is claimed to be
15 derogation of [Plaintiff’s] constitutional rights.

16 Id. at 841 (quoting Elliott v. Hinds, 786 F.2d 298, 302 (7th Cir. 1986). The court went on
17 to explain that reinstatement simply prevents “prospective violation of [Plaintiff’s] rights
18 which would result from denying him employment in the future.” Id.; see also, Olson v.
19 Morris, 188 F.3d 1083 (9th Cir. 1999) (implying that immunity fails to bar a § 1983 claim
20 for reinstatement of psychologist license after state board revocation by affirming lower
21 court dismissal based on res judicata instead of immunity).

22 Applying this rationale to Plaintiff’s request for reinstatement of his chiropractic
23 license establishes that this request constitutes prospective relief, which under Young, is
24 not barred by the Eleventh Amendment. Plaintiff seeks only reinstatement of his license.
25 This request fails to compensate Plaintiff for any past harm. Instead, any funds obtained
26 by Plaintiff after reinstatement derive from work completed well after the alleged
27 violations. Thus, while reinstatement relates to his alleged past violations, it fails to
28 constitute relief solely for these past violations. Therefore, this claim for relief against
the State Defendants in their official capacities survives Eleventh Amendment scrutiny.

1 **(2) Immunity Bars the Individual Claims**

2 The Eleventh Amendment applies only when a claimant seeks to establish liability
3 that operates in substance against state governments. Therefore, it fails to apply when a
4 claimant seeks to recover damages against a state public official in his personal capacity.
5 Hafer v. Melo, 502 U.S. 21 (1991); Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974).

6 However, such individual claims against state officials may “hamper” performance of the
7 public duties of these officials. Hefer, 502 U.S. at 31. Consequently, the Supreme Court
8 turns to “personal immunity jurisprudence” to address this concern. Id.

9 Public officials defeat individual § 1983 claims by asserting common-law
10 immunity as an affirmative defense. While the language of § 1983 fails to provide for
11 any immunities, the Supreme Court consistently takes the position that, in enacting the
12 original version of § 1983 in 1871, Congress did not intend “to abolish wholesale” all
13 common-law immunities. Pierson v. Ray, 386 U.S. 547, 554 (1967); see also Will, 491
14 U.S. at 67 (“in enacting § 1983, Congress did not intend to override well-established
15 immunities or defenses under the common law”).

16 Therefore, when an absolute immunity existed in 1871, and proves compatible
17 with the purposes and policies of § 1983, it is incorporated into § 1983. Owen v. City of
18 Independence, 445 U.S. 622, 638 (1980).

19 However, in defining qualified immunities, the Supreme Court “diverge[s] to a
20 substantial degree from the historical standards.” Wyatt v. Cole, 504 U.S. 158, 170
21 (1992) (Kennedy, J., concurring). The Supreme Court explains:

22 Although it is true that we have observed that our determinations as to the
23 scope of official immunity are made in the light of the common-law
24 tradition, we have never suggested that the precise contours of official
25 immunity can and should be slavishly derived from the often arcane rules of
26 the common-law. This notion is plainly contradicted by Harlow [v.
27 Fitzgerald, 457 U.S. 800 (1982)], where the Court completely reformulated
28 qualified immunity along principles not at all embodied in the common-law,
replacing the inquiry into subjective malice so frequently required at
common-law with an objective inquiry into the legal reasonableness of the
official actions.

Anderson v. Creighton, 483 U.S. 635, 644-45 (1987) (citations omitted).

1 Whether and to what extent a § 1983 defendant benefits from protection by
2 immunity from liability involves a question of federal law. Howlett v. Rose, 496 U.S.
3 356, 375 (1990); Kimes v. Stone, 84 F.3d 1121, 1126-28 (9th Cir. 1996). The “immunity
4 question involves the construction of a federal statute,” therefore, state law immunity
5 defenses and privileges cannot control a § 1983 claim. Wood v. Strickland, 420 U.S. 308,
6 314 (1975).⁴

7 Whether a public official claims an absolute or qualified immunity depends upon
8 the nature of the function she carried out. See, e.g., Antoine v. Byers & Anderson, 508
9 U.S. 429 (1993); Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Burns v. Reed, 500 U.S.
10 478 (1991). Absolute immunity provides protection from personal liability even for
11 clearly erroneous or malicious behavior. Qualified immunity protects from liability as
12 long as the official did not contravene clearly established federal law. Anderson, 483
13 U.S. 635; Harlow, 457 U.S. 800.

14 The Supreme Court regards qualified immunity as the norm because “[a]s the
15 qualified immunity defense has evolved, it provides ample protection to all but the plainly
16 incompetent or those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335,
17 341 (1986). The Court “has generally been quite sparing in its recognition of claims to
18 absolute official immunity.” Forrester v. White, 484 U.S. 219, 224 (1988). It engages a
19 presumption “that qualified rather than absolute immunity is sufficient to protect
20 government officials in the exercise of their duties.” Burns, 500 U.S. at 486-87.
21 Therefore, an official claiming absolute immunity bears the burden of showing that such
22 immunity “is justified by overriding considerations of public policy.” Forrester, 484 U.S.
23 at 224.

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27 ⁴Plaintiff erroneously argues that state law controls and therefore defeats State
28 Defendants’ claim of absolute immunity. (Response to State Defendants pp.5-7) (Doc. #56).

1 **(a) Absolute Immunity Applies to the State Defendants**

2 In some cases, administrative hearing officers may assert absolute quasi-judicial
3 immunity. The applicability of this immunity depends primarily upon whether (1) the
4 employed process contains procedural safeguards that sufficiently resemble those
5 afforded by judicial process, and (2) the decision-maker exists sufficiently independent
6 and free of political influence. Butz v. Economou, 438 U.S. 478, 512-13 (1978).⁵

7 Applying the Butz rule, the Ninth Circuit held that absolute immunity protects
8 state medical board members' decisions to revoke a doctor's medical license. Mishler v.
9 Clift, 191 F.3d 998 (9th Cir. 1999). In Mishler, the Court conducted an absolute
10 immunity analysis using several factors that the Supreme Court articulated in Butz.

11 These factors — relating to the purpose of § 1983 immunity — include: (a)
12 the need to assure that the individual can perform his functions without
13 harassment or intimidation; (b) the presence of safeguards that reduce the
14 need for private damages actions as a means of controlling unconstitutional
conduct; (c) insulation from political influence; (d) the importance of
precedent; (e) the adversary nature of the process; and (f) the correctability
of error on appeal.

15 Id. at 1003 (quoting Cleavinger v. Saxner, 474 U.S. 193, 202 (1985)). See also Romano
16 v. Bible, 169 F.3d 1182, 1186-88 (9th Cir. 1999) (holding that absolute immunity protects
17 members of Nevada Gaming Control Board in investigating and initiating proceedings,
18 and members of the Nevada Gaming Commission in adjudicating disciplinary
19 proceedings); Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999) (holding that
20 absolute immunity protects members of state zoning board for zoning decisions).

21 Moreover, numerous lower federal courts also hold that state health professionals'
22 board hearing officers who are insulated from political pressure and exercise independent
23 quasi-judicial power enjoy absolute judicial immunity. See, e.g., O'Neal v. Mississippi
24 Board of Nursing, 113 F.3d 62, 66 (5th Cir. 1997) (nursing board members); Alexander v.

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26 While Butz fails to be a § 1983 claim, it involves claims against federal officers, and the
27 Supreme Court deemed "it untenable to draw a distinction for purposes of immunity law
28 between suits brought against state officials under § 1983 and suits brought directly under
the Constitution" Id. at 504.

1 Margolis, 921 F. Supp. 482 (W.D. Mich 1995), *aff'd*, 987 F.2d 1341 (6th Cir. 1996)
2 (medical board members); Wang v. New Hampshire Bd. of Registration in Medicine, 55
3 F.3d 698 (1st Cir. 1995) (same); Watts v. Burkhardt, 978 F.2d 269 (6th Cir. 1992) (en
4 banc) (same); Bettencourt v. Board of Registration, 904 F.2d 772 (1st Cir. 1990) (same);
5 Horwitz v. State Bd. of Medical Examiners, 822 F. 2d 1508 (10th Cir. 1987) (same);
6 Howard v. Miller, 870 F.Supp. 340 (N.D. Ga. 1994) (same); Ivancie v. State Bd. of
7 Dental Examiners, 678 F. Supp. 1496 (D. Colo. 1988) (dental board members); State
8 Board of Chiropractic Examiners v. Stjerholm, 935 P.2d 959 (Colo. 1997) (chiropractic
9 board members)

10 Furthermore, applying Butz, numerous courts hold that various staff members
11 associated with state health professional boards also receive absolute immunity for their
12 actions connected to a board's disciplinary proceedings. *See, e.g., O'Neal*, 113 F.3d 62
13 (executive director); Wang, 55 F.3d 698 (professional staff); Bettencourt, 904 F.2d 772
14 (staff members); Howard, 870 F. Supp. 340 (executive director and secretary); Connolly
15 v. Beckett, 863 F. Supp. 1379 (D. Colo. 1994) (program administrator); Kutilek v.
16 Gannon, 766 F. Supp. 967 (D. Kan. 1991) (executive director and medical consultants).

17 Here, all Plaintiff's allegations and claims arose from an administrative
18 enforcement proceeding by the Board, and the subsequent Board ordered revocation of
19 Plaintiff's chiropractic license. This administrative enforcement proceeding, like the
20 other health professional board proceedings cited, satisfies both of the key factors
21 required by Butz to confer absolute immunity on the State Defendants.

22 First, the Board's proceedings contain procedural safeguards that sufficiently
23 resemble those afforded by judicial process. Arizona statutes empower the Board to: (1)
24 enforce the licensing of the chiropractic profession;⁶ (2) hold administrative hearings to
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28 ⁶A.R.S. § 32-904.

1 suspend or revoke licenses;⁷ and (3) issue subpoenas.⁸ Anyone appearing before the
2 Board possesses the right to be represented by counsel and seek subpoenas from the state
3 superior court for the production of documents or the appearance of individuals. A.R.S.
4 §§ 32-929(B)(2)-(3). Moreover, the Board conducts all hearings pursuant to the
5 Administrative Procedure's Adjudicative Proceedings provision, A.R.S. § 41-1061-67.
6 See A.A.C. R4-7-303(A). Finally, any Board decision may be appealed to the State
7 Superior Court. A.R.S. § 12-904(A).

8 Second, the Board member decision-makers exist sufficiently independent and free
9 of political influence. The Board consists of five members, appointed by the Governor to
10 serve five year terms, with no more than two consecutive terms. A.R.S. § 32-902.
11 Additionally, the members each take an oath to fairly exercise their duties. Id. Finally, to
12 guard against protectionist practices, the Board consists of both chiropractor and lay,
13 consumer members.

14 The Board's administrative enforcement proceedings satisfy the requirements of
15 Butz, thereby qualifying the State Defendants for absolute immunity. Consequently,
16 Plaintiff's § 1983 claims against them in their personal capacities fail.

17 **(b) Qualified Immunity, if it Applied, Would Bar Plaintiff's Claim**

18 Even if State Defendants failed to qualify for absolute immunity, qualified
19 immunity also bars Plaintiff's claim. In Harlow, the Supreme Court established the test
20 for qualified immunity: whether the official violated "clearly established [federal]
21 statutory or constitutional rights of which a reasonable person would have known."
22 Harlow, 457 U.S. at 818. The Supreme Court desired to simplify the qualified immunity
23 defense by defining it using objective terms, which lower courts could use to decide the
24 issue as a matter of law. See Id. at 819.

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⁷A.R.S. § 32-924.

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⁸A.R.S. § 32-929(B)(1).

1 Qualified immunity seeks to reconcile two important competing considerations.
2 First, the interest in providing compensation to persons whose federally protected rights
3 have been violated. “When governmental officials abuse their offices, ‘action[s] for
4 damages may offer the only realistic avenue for vindication of constitutional
5 guarantees.’” Anderson, 483 U.S. at 638 (quoting Harlow, 457 U.S. at 814). Second,
6 “permitting damage suits against government officials can entail substantial social costs,
7 including the risk that fear of personal monetary liability and harassing litigation will
8 unduly inhibit officials in the discharge of their duties.” Id. Qualified immunity seeks to
9 balance these two competing interests by protecting public officials from personal
10 liability as long as they do not violate clearly established federal law.

11 Unfortunately, the Supreme Court provides lower courts with little guidance on
12 how to evaluate whether federal law is “clearly established.” In Anderson, the Supreme
13 Court summarized the Harlow standard:

14 The operation of this [objective reasonableness] standard . . . depends
15 substantially upon the level of generality at which the relevant ‘legal rule’ is
16 to be identified. For example, the right to due process of law is quite
17 clearly established by the Due Process Clause, and thus there is a sense in
18 which any action that violates that Clause (no matter how unclear it may be
19 that the particular action is a violation) violates a clearly established right.
20 Much the same could be said of any other constitutional or statutory
21 violation. But if the test of ‘clearly established law’ were to be applied at
22 this level of generality, it would bear no relationship to the ‘objective legal
23 reasonableness’ that is the touchstone of Harlow. Plaintiffs would be able
24 to convert the rule of qualified immunity . . . into a rule of virtually
25 unqualified liability simply by alleging violation of extremely abstract rights
26 . . . [T]he right the official is alleged to have violated must have been
27 ‘clearly established’ in a more particularized, and hence more relevant,
28 sense: *The contours of the right must be sufficiently clear that a reasonable
official would understand that what he is doing violates that right.* This is
not to say that an official action is protected by qualified immunity unless
the very action in question has previously been held unlawful, . . . but it is
to say that in the light of pre-existing law the unlawfulness must be
apparent.

24 Anderson, 483 U.S. at 639-40 (emphasis added); see also Capoeman v. Reed, 754 F.2d
25 1512, 1514 (9th Cir. 1985) (commenting on lack of clear standards and holding that “in
26 the absence of binding precedent, a court should look to whatever decisional law is
27 available to ascertain whether the law is clearly established . . .”).

1 More recently, in United States v. Lanier, 520 U.S. 259 (1997), the Supreme Court
2 provided additional guidance, stating that the “clearly established” standard “is simply the
3 adaptation of the fair warning standard to give officials . . . the same protection from civil
4 liability and its consequences that individuals have traditionally possessed in the face of
5 vague criminal statutes.” Id. at 270-71.

6 The Ninth Circuit developed a test for qualified immunity based on the above
7 guidance from the Supreme Court. At times, the Ninth Circuit describes this test as two-
8 part, and at other times as three-part:

9 [A]pplication of the Harlow standard varies depending on the type of case
10 we are addressing. In classes of cases in which we have considered it
11 helpful we have divided the Harlow/Anderson inquiry into various two-part
12 or three-part tests. In other types of cases, we have straightforwardly
13 conducted the Harlow/Anderson inquiry, without any need for mediating
14 doctrines or multipronged test.

15 Grossman v. City of Portland, 33 F.3d 1200, 1208 (9th Cir. 1994) (footnote omitted).

16 See, e.g., Sweaney v. Ada County, 119 F.3d 1385, 1388 (9th Cir. 1997) (defining three-
17 part test as “(1) whether the plaintiff has identified a specific federal statutory or
18 constitutional right that has been allegedly violated, (2) whether that right was so clearly
19 established as to alert a reasonable official to its parameters, and (3) whether a reasonable
20 officer could have believed his or her conduct was lawful”); Trevino v. Gates, 99 F.3d
21 911, 916 (9th Cir. 1996) (defining two-part test as if “(1) the ‘right’ [defendants]
22 allegedly violated was not ‘clearly established at the time of the violation, or (2) if a
23 reasonable [official] would have thought that the defendants’ actions were
24 constitutional”). Any way articulated, the test centers on the legal interpretation of
25 whether the official violated a clearly established law.

26 In 1980, the Supreme Court held in Gomez v. Toledo, 446 U.S. 635 (1980), that
27 qualified immunity constitutes an affirmative defense that the defendant official has the
28 burden of pleading. Siegert v. Gilley, 500 U.S. 226, 231 (1991) (quoting Gomez);
Harlow, 457 U.S. at 815 (stating that qualified immunity “is an affirmative defense that
must be pleaded by a defendant official”). However, the Supreme Court leaves open the

1 question of the burden of persuasion. The Ninth Circuit fills this gap by establishing a
2 switching burden of persuasion.

3 First, after the defendant properly raises the defense of qualified immunity, the
4 plaintiff initially bears the burden of showing the violation of a “clearly established”
5 federal right. Sweaney v. Ada County, 119 F.3d 1385, 1388 (9th Cir. 1997) (“The
6 plaintiff bears the initial burden of proving that the right was clearly established.”);
7 Trevino v. Gates, 99 F.3d 911, 916-17 (9th Cir. 1996) (same); Houghton, 965 F.2d at
8 1534 (“[Plaintiff] bears the initial burden of proving that the rights allegedly violated by
9 [Defendant] were clearly established at the time of the alleged misconduct.”).

10 Then, after Plaintiff makes the above showing, the ultimate burden of persuasion
11 switches back to the defendant officials. Trevino, 99 F.3d at 916-17 (stating that
12 defendants bear the final burden of proving their conduct reasonable); Houghton v. South,
13 965 F.2d 1532, 1534 (9th Cir. 1992) (stating that the defendant “carries the burden of
14 proving that his ‘conduct was reasonable under the applicable standards’”); Benigni
15 v. City of Hemet, 879 F.2d 473, 479 (9th Cir. 1988) (“the burden of proving the defense
16 lies with the official asserting it”).

17 Here, the State Defendants asserted the affirmative defense of qualified immunity
18 in their Motion to Dismiss. Therefore, the burden of persuasion shifted to Plaintiff to
19 establish a violation of clearly established federal right. Plaintiff fails to make such a
20 showing.

21 First, the Ninth Circuit requires that “[d]ue process violations . . . be
22 particularized before they can be subjected to the clearly established test.” Newell v.
23 Sausser, 79 F.3d 115, 117 (9th Cir. 1996) (quoting Kelley v. Borg, 60 F.3d 664, 667 (9th
24 Cir. 1995)). While Plaintiff fails to specifically allege in his Complaint what federal right
25 State Defendants’ violated, a liberal reading of the Complaint indicates that Plaintiff
26 contends his federal due process rights were violated because the Board hearing was not
27 conducted before an “independent Administrative Law Judge.” (Complaint ¶93) (Doc.
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1 #1). Plaintiff's Complaint contains numerous details about his particular concerns
2 regarding his interactions with the Board. Therefore, he provides sufficient particularized
3 allegations of due process violations.

4 However, in the second part of the test, Plaintiff fails to establish that these alleged
5 due process violations violate clearly established law. Plaintiff's Response contains no
6 case law from the Ninth Circuit, or any other jurisdiction, showing that "a reasonable
7 official would understand that what he is doing violates [due process rights]." Anderson,
8 483 U.S. at 640. Instead, Plaintiff simply states that State Defendants "have misapplied
9 [qualified immunity law] to the facts of the instant case." (Response at 5) (Doc. #56).
10 This unsubstantiated claim fails to persuade the Court.⁹

11 **(3) *Res Judicata* Bars the Official Capacity Claim Requesting Prospective Relief**

12 After applying the Eleventh Amendment and common law immunity doctrines,
13 Plaintiff's official capacity suit against State Defendants for reinstatement constitutes his
14 sole surviving federal claim. State Defendants argue that *res judicata* bars Plaintiff's §
15 1983 claim because it seeks to re-litigate, in the guise of a federal civil rights lawsuit,
16 issues heard and decided by the Board which Plaintiff failed to appeal and subsequently
17 became final. Plaintiff responds that no bar exists because the claim presents a
18 constitutional civil rights issue.¹⁰ The Court agrees with State Defendants, finding that
19 *res judicata* bars this claim.

22 ⁹Plaintiff also argues he may amend his Complaint at any time to correct any defect
23 in his pleading associated with qualified immunity. (Response to State Defendants pp.7-8)
24 (Doc. #56). However, five months have passed without Plaintiff filing any such amendment.
25 Furthermore, the Response (not the Complaint) constitutes the proper place for addressing
the qualified immunity issue.

26 ¹⁰This response actually addresses only State Defendants' Rooker-Feldman argument.
27 However, as State Defendants' presented their *res judicata* argument in the same subsection
28 as the Rooker-Feldman argument, the Court construes Plaintiff's response to also apply to
res judicata.

1 When a state agency acts in a judicial capacity to resolve disputed issues of fact
2 and law properly before it, and when the parties possessed an adequate opportunity to
3 litigate those issues, federal courts must give the state agency's fact-finding and legal
4 determinations the same preclusive effect as entitled in that state's courts. University of
5 Tennessee v. Elliott, 478 U.S. 788, 798-99 (1986); Skysign Int'l, Inc. v. City and County
6 of Honolulu, 276 F.3d 1109, 1115 (9th Cir. 2002); Olson, 188 F.3d at 1086.

7 However, the Court must first independently assess the adequacy of the state's
8 administrative forum.

9 The threshold inquiry . . . is whether the state administrative proceeding was
10 conducted with sufficient safeguards to be equated with a state court
11 judgment. This requires careful review of the administrative record to
12 ensure that, at a minimum, it meets the state's own criteria necessary to
13 require a court of that state to give preclusive effect to the state agency's
14 decisions . . . Although a federal court should ordinarily give preclusive
15 effect when the state court would do so, there may be occasions where a
16 state court would give preclusive effect to an administrative decision that
17 failed to meet the minimum criteria set down [for federal courts].

18 Olson, 188 F.3d at 1086 (quoting Miller v. County of Santa Cruz, 39 F.3d 1030, 1033
19 (9th Cir. 1994)). The Supreme Court listed these criteria in United States v. Utah
20 Construction & Mining Co., 384 U.S. 394 (1966): (1) that the administrative agency act
21 in a judicial capacity; (2) that the agency resolve disputed issues of fact properly before it;
22 and (3) that the parties have an adequate opportunity to litigate. Id. at 422.

23 Under Arizona law, failure to appeal a final administrative decision renders the
24 decision final and *res judicata*. Hawkins v. State Dep't of Economic Sec., 183 Ariz. 100,
25 103-4, 900 P.2d 1236, 1239-40 (App. 1995); Olson, 188 F.3d at 1086. *Res judicata*
26 constitutes an affirmative defense barring the same parties from litigating a second
27 lawsuit on the same claim, or any other claim arising from the same transaction or series
28 of transactions that could have been — but was not — raised in the first suit. Black's
Law Dictionary 1312 (7th ed. 1999); Gilbert v. Board of Medical Examiners of the State
of Arizona, 155 Ariz. 169, 174, 745 P.2d 617, 622 (App. 1987).

[T]he failure to seek judicial review of an administrative order precludes
collateral attack of the order in a separate complaint. If no timely appeal is

1 taken, the decision of the board is “conclusively presumed to be just,
2 reasonable, and lawful.” . . . This principle applies even to alleged
3 constitutional errors that might have been corrected on proper application to
4 the court which has jurisdiction to the appeal.

5 Olson, 188 F.3d at 1085 (quoting Gilbert, 155 Ariz. at 176, 745 P.2d at 624).

6 At Plaintiff’s administrative hearing, the issues before the Board consisted of
7 determining whether Plaintiff (1) engaged in unprofessional conduct; (2) made false or
8 misleading statements; (3) failed to create and maintain patient records; and (4) failed to
9 allow properly authorized Board personnel to access documents pursuant to a Board
10 issued subpoena. Plaintiff appeared alone, but neither party disputes that Plaintiff knew
11 he could be represented by counsel. Plaintiff refused to mount a defense, despite
12 numerous requests by the Board. Instead, he responded: “You are violating my
13 constitutional and civil rights to a fair and just hearing before an independent
14 Administrative Law Judge.” (Complaint ¶93) (Doc. #1). The Board considered
15 Plaintiff’s argument, and determined due process did not require a hearing before an
16 independent Administrative Law Judge. (State Defendant’s Motion to Dismiss, Exhibit 3,
17 pp. 14-19) (Doc. #43). Therefore, the Board (1) conducted a hearing, with testimony
18 from witnesses and experts; (2) issued findings of facts and conclusions of law; and (3)
19 issued an order to revoke Plaintiff’s license.

20 Pursuant to A.R.S. § 12-904(A), appeals of the Board’s decision needed to be
21 made within thirty-five days. However, instead of appealing to Arizona Superior Court as
22 the law allowed, Plaintiff filed this federal lawsuit. After the appeals period ran, state law
23 rendered the Board’s factual and legal determinations preclusive.

24 Our examination of the record reveals that the Board’s process comports with the
25 requirements of Utah Construction. First, the Board acted in a judicial capacity when
26 conducting Plaintiff’s hearing. See, supra, discussion on Absolute Immunity.

27 Second, the Board afforded both parties an adequate opportunity to litigate.
28 Plaintiff possessed every right to raise any constitutional defenses with the Board or on
29 appeal in state court. Olson, 188 F. 3d at 1086-87; Gilbert, 155 Ariz. at 174 (holding that

1 an assertion of irregularity in the proceedings before the Board of Medical Examiners —
2 that the board members were conspiring against him and were motivated to act for
3 reasons other than protection of the public — could have been raised before the board and
4 on appeal of the board decision to the superior court).

5 Finally, the agency properly resolved all issues before it after conducting an
6 extensive hearing involving witnesses and experts. In fact, Plaintiff actually raised the
7 same due process concerns alleged in his § 1983 claim, and the Board ruled on them
8 during his hearing. Therefore, *res judicata* bars re-litigating these concerns.

9 2. State Claims

10 In various Responses to the Motions to Dismiss, Plaintiff concedes that he fails to
11 state a claim for some of his state law claims. However, Plaintiff continues to allege the
12 following state law claims: (1) malicious prosecution against Daniel; (2) Defamation
13 against Daniel, Board, all State Defendants except Pritzel, and Edward; (3) IIED against
14 Daniel, Board, all State Defendants except Pritzel, and Edward; and (4) NIED against
15 Daniel, Board, all State Defendants except Pritzel, and Edward.

16 The Court only possesses jurisdiction over these claims pursuant to supplemental
17 jurisdiction. 28 U.S.C. § 1367. Section 1367(a) provides:

18 In any civil action of which the district courts have original jurisdiction, the
19 district courts shall have supplemental jurisdiction over all other claims that
20 are so related to claims in the action within such original jurisdiction that
21 they form part of the same case or controversy under Article III of the
22 United States Constitution. Such supplemental jurisdiction shall include
23 claims that involve the joinder or intervention of additional parties.

24 Although a district court may hear state law claims brought under §1367(a), the
25 Court possesses discretion to refuse jurisdiction.

26 The district court may decline to exercise supplemental jurisdiction over a
27 claim under subsection (a) if . . . (3) the district court has dismissed all
28 claims over which it has original jurisdiction

28 U.S.C. § 1367(c). “In the usual case in which all federal-law claims are eliminated
before trial, balance of factors to be considered under the pendent jurisdiction doctrine —
judicial economy, convenience, fairness, and comity — will point toward declining to

1 exercise jurisdiction over the remaining state law claims.” Carnegie-Mellon University v.
2 Cohill, 484 U.S. 343, 350 n.7 (1988); Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d
3 1303, 1309 (9th Cir. 1992); Hembree v. San Francisco Bay Area Rapid Transit Dist.,
4 2002 U.S. Dist. LEXIS 11089, *25-27, No. C-01-03102 EDL (N.D. Cal. June 18, 2002).
5 Some circuits find that a court may retain jurisdiction over state law claims if
6 extraordinary or unusual circumstances justify retention. See, e.g., Musson Theatrical,
7 Inc. v. Federal Express Corp., 89 F.3d 1244, 1255 (6th Cir. 1996); Wentzka v. Gellman,
8 991 F.2d 423, 425 (7th Cir. 1993).

9 As the Court grants dismissal for all Defendants on Plaintiff’s § 1983 claim, only
10 state law claims remain. Plaintiff’s federal claim provided the only basis for federal
11 jurisdiction.¹¹ The Court acknowledges that a state court, more familiar with applicable
12 local law, provides a better forum for resolving Plaintiff’s remaining claims. While the
13 Court recognizes that litigation of a new suit in state court may create some
14 inconveniences to Plaintiff, Plaintiff makes no showing of extraordinary or unusual
15 circumstances to warrant this Court retaining jurisdiction over his state law claims.
16 Consequently, the Court declines to exercise supplemental jurisdiction over the remaining
17 state law claims. See, e.g., Hembree, 2002 U.S. Dist. LEXIS 11089 (declining to exercise
18 supplemental jurisdiction over IIED and NIED state claims).

19 Accordingly,

20 **IT IS THEREFORE ORDERED** that the State of Arizona’s Motion to Dismiss
21 is **GRANTED** (Doc. #42). Count 1 (§1983) is dismissed with prejudice, and the
22 remaining state law counts are dismissed without prejudice pursuant to 28 U.S.C. §
23 1367(c).

24 **IT IS FURTHER ORDERED** that the Board and State Defendants’ Motion to
25 Dismiss is **GRANTED** (Doc. #43). Count 1 (§1983) is dismissed with prejudice, and the
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¹¹Plaintiff fails to allege diversity jurisdiction.

1 remaining state law counts are dismissed without prejudice pursuant to 28 U.S.C. §
2 1367(c).

3 **IT IS FURTHER ORDERED** that Daniel's Motion to Dismiss (Doc. #41) and
4 Edward's Motion to Dismiss (Doc. #44) is **GRANTED**. All counts against them are
5 dismissed without prejudice pursuant to 28 U.S.C. § 1367(c).

6 DATED this 27 day of March, 2003.

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12 Roslyn O. Silver
13 United States District Judge
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