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I. Introduction.

Both Warren and the Board in their respective Responses attempt to skip over the question of whether NABP's Discovery Requests are related to one of NABP's arguments on sovereign immunity (in shorthand, the "*Georgia* argument"), to instead attack (unsuccessfully) the *Georgia* argument itself. This approach is flawed, both procedurally and substantively. Because both Warren and the Board make similar arguments on this point, their arguments are addressed together herein.

II. Defendants' attempt to attack NABP's *Georgia* argument is procedurally untimely, and fails on its own substantive merits.

Procedurally, a Motion to Compel responses to discovery is *not* the appropriate stage to adjudicate the merits of the legal argument for which the discovery is sought. *E.g.*, CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2008 ("Discovery is not to be denied because it relates to a claim or defense that is being challenged as insufficient."). NABP never intended for this Motion to Compel to transform into a motion on the ultimate merits of its *Georgia* argument – in fact it purposefully outlined the contours of the argument *only* insofar as was needed to illustrate how the Discovery Requests related to the argument (and hence to the immunity question). It would be wholly improper, as Defendants appear to ask this Court to do, to rule on the merits of one of NABP's sovereign immunity arguments on the basis of this "analysis-lite."

Further, if the rule, as outlined in WRIGHT & MILLER (and the cases cited therein), were not as it is but as Defendants would have it, there would be no need for each side to do its own research – parties could simply force their adversaries to provide a detailed legal memoranda, complete with pinpoint citations, outlining in full any planned legal argument (as Defendants have forced NABP to do), in order to procure the discovery needed to then prove that argument.

That such a rule would *reward* those dilatory in their approach to discovery is obvious – just as it is far easier for the New England Patriots to call offensive plays if they know their opponent’s defensive signals, and just as a pharmacy exam is far easier if the test-takers know ahead of time what questions will be asked, it is far easier to write a brief, or to hinder your adversary’s discovery, if you know exactly what arguments, and cases, will be cited against you.

Thus, NABP is reluctant to provide Defendants with any further briefing on its ultimate *Georgia* argument both because such is not ripe for resolution in the context of a discovery dispute, and because by pointing out all of the flaws in Defendants’ “counterarguments” at this early stage NABP only allows Defendants the opportunity to redress those flaws or, if the flaws are irreparable (as is the case here), to create new counterarguments. That said, several of Defendants’ substantive errors cannot be allowed to stand without a short, non-exhaustive, comment. First, Defendants’ “recital” argument – which alleges that the CRCA ought not be analyzed at all under § 5 given that Congress did not recite § 5 in the legislative history of the CRCA (Board Response at 7; Warren Response at 5, 6) – ignores well-established precedent to the contrary. *E.g. EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 1064 n. 18 (1983) (noting that Congress need not recite the words “section 5” or “Fourteenth Amendment” or “equal protection” to enact § 5 legislation); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 424 (1948) (“[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.”). On this point it is telling that neither *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000), nor *De Romero v. Inst. of Puerto Rican Culture*, 466 F. Supp.2d 410 (D.P.R. 2006), both of which considered the “recital” argument, ruled on that ground. Second, the Board’s argument that *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 119 S.Ct. 2199 (1999) somehow overruled

the twenty-plus years of due process precedent embodied in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984); and *Zinerman v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990) regarding the inadequacy of post-deprivation remedies for “random and unauthorized” conduct (Board Response at 16) ignores both the actual language of *Florida Prepaid* (which nowhere mentions “random and unauthorized”) and the facial approach of *Florida Prepaid* (under which there was no need to analyze whether the alleged conduct was “random and unauthorized”).

But the Defendants’ more important mistake is their mistreatment of the case central to the NABP *Georgia* argument – namely, *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877 (2006).¹ Of the Defendants’ numerous misstatements on *Georgia*, the two most important are: 1) that *Georgia* “applied” the *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997) “congruence and proportionality” test “without comment” (Board Response at 10); and 2) that even under *Georgia* a court cannot “leapfrog” over legislative history (Board Response at 12). The first is the more significant mistake – it makes no sense to say that *Georgia* “applied” the *Boerne* test “without comment” when *Georgia* **explicitly distinguished** *Boerne* as not having addressed an **actual** constitutional violation. *Georgia*, 546 U.S. at 157-58, 126 S.Ct. at 881 (finding that because his claims were based on an actual constitutional violation, Goodman differed from the claimants in the Court’s other § 5 cases including, among others, both *Boerne* and *Lane*). Thus it is not, as Defendants would have it, that *Georgia* simply applied *Boerne* and its “congruence and proportionality” test. Rather, *Georgia* **distinguished** between: 1) those cases that dealt with Congress’s **prophylactic** power to abrogate sovereign immunity for conduct

that did not itself violate the Fourteenth Amendment as a means of protecting against such violations (a category that includes, among others, *Lane* and *Boerne*); and 2) those cases that deal with Congress's **enforcement** power to abrogate sovereign immunity for **actual violations** of the Fourteenth Amendment (a category that includes *Georgia* and the case at bar).

The second mistake follows from the first. The Supreme Court has repeatedly said that a statute's legislative history is not dispositive in and of itself. *See, e.g., Boerne*, 521 U.S. at 531-32, 117 S.Ct. at 2170 ("Judicial deference, in most cases, is based not the state of the legislative record Congress compiles but on due regard for the decision of the body constitutionally appointed to decide.") (citations omitted); *Florida Prepaid*, 527 U.S. at 646, 119 S.Ct. at 2210 ("[T]he lack of support in the legislative record is not determinative."). Rather, the relevance of legislative history is that it helps to determine, under the "congruence and proportionality" test, how far Congress may go in regulating conduct that is not itself unconstitutional as part of its **prophylactic** power to enforce constitutional provisions. If the need for the prophylaxis is strong because the legislative history shows extensive state violations of the Fourteenth Amendment right at issue, then a statute can go more into the prophylactic realm; if the need is slight, then the prophylactic power is more circumscribed. *See, e.g., Florida Prepaid*, 527 U.S. at 646, 119 S.Ct. at 2210 ("[S]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one."). But this "congruence and proportionality" test is wholly inapposite in the *Georgia* category of cases, which deal not with Congress's **prophylactic** power but its **enforcement** power – that is, its power to provide remedies for conduct that **actually** violates the Fourteenth Amendment.

¹ The Board's extensive discussion of *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978 (2004) in its Response somewhat misses the crux of this argument – *Lane* is relevant not so much on its own but for the context it provides, both in the Stevens majority and the Scalia dissent, for understanding *Georgia*.

The Board in its Response never appears to comprehend this aspect of *Georgia* (namely, why the legislative history was irrelevant in *Georgia*). Warren, on the other hand, does. Warren's Response at 14 states: "[T]he misconduct alleged in *Georgia* is conduct that also rose to a violation of § 1 of the Fourteenth Amendment independent of any Title II claim (**i.e. not prophylactic**)." (emphasis added). But then Warren, curiously, attempts to **distinguish** *Georgia* by claiming "No such independent violation is at issue in the case at hand." (Warren Response at 14). Yet that is the *exact* issue on which NABP is attempting to take discovery. Warren's argument is thus circular: NABP is apparently not entitled to discovery because it can't prove its procedural due process allegations – which it can't prove because its not entitled to discovery.

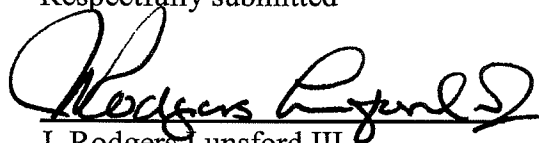
III. Conclusion.

In sum, Defendants cannot not meet their heavy burden of showing that NABP's Discovery Requests do not relate to one of NABP's jurisdictional arguments (namely, the *Georgia* argument) by attempting (unsuccessfully) to poke holes in the *Georgia* argument itself. There will be a time and place for briefing on the merits. This is not it.

This 25th day of October, 2007.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION**

THE NATIONAL ASSOCIATION OF)
BOARDS OF PHARMACY,)

Plaintiff,)

v.)

CIVIL ACTION NO: 3:07-CV-84 (CDL)

THE BOARD OF REGENTS OF THE)
UNIVERSITY SYSTEM OF GEORGIA and)
FLYNN WARREN, JR.,)

Defendants.)
_____)

CERTIFICATE OF SERVICE

This is to certify that on this 25th day of October, 2007, the foregoing "Plaintiff's Reply to Defendant Flynn Warren's Motion for Protective Order and Response in Opposition to Plaintiff's Motion to Compel" was electronically filed with the Clerk of the Court using the Court's ECF system which automatically generates a Notice of Electronic Filing of such Pleading to the following attorneys of record, and that a copy of the same has also been electronically transmitted to:


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