IN THE SUPERIOR COURT FOR WASHINGTON STATE
ASOTIN COUNTY

RICHARD J. EGGLESTON, M.D. Plaintiff/Petitioner, vs. WASHINGTON MEDICAL COMMISSION, Defendant/Respondent.	NO. **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION UNDER RCW 7.24 .010, ET. SEQ., AND RCW 34.05.534 (3) (a)-(c), BASED ON A VIOLATION OF ARTICLE 1, SECTION 5 OF THE WASHINGTON CONSTITUTION**

AS THE HEARING ON THE MEDICAL COMMISSION'S CHARGES AGAINST PLAINTIFF IS SET TO COMMENCE ON MAY 24, 2023, IMMEDIATE RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION HEARING IS REQUESTED PRIOR TO COMMENCEMENT OF THE HEARING

COMES NOW Richard J. Eggleston, M.D. by his undersigned counsel and states as follows:

INTRODUCTION

By this case, Plaintiff/Petitioner (hereinafter "Plaintiff"), who is a retired but still licensed physician, seeks to stop the Defendant Washington Medical Commission (the "Commission") from attempting to sanction him for the information and opinions he

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

wrote in opinion pieces in a regional newspaper. The Commission does not agree with the content and viewpoint expressed in Plaintiff's articles. A disciplinary hearing is set to commence on May 24, 2023.

There has never been a case in Washington or any place else in the country which has allowed a professional licensing board to do what the Commission is trying to do in its prosecution of the Plaintiff. Furthermore, every justice and judge who has addressed this issue has stated that licensing agencies have no such power. The Commission grounds its prosecution on the statutory pretext that the information and opinions Plaintiff wrote constitutes "moral turpitude", "dishonesty", or obstructing the Commission's investigation by "misrepresentations" when he explained his views, which is what the Commission demanded he do in response to a complaint for a random reader of his opinion pieces.

This is a dangerous abuse of power by the Commission. This prosecution is a Constitutional outlier in terms of United States jurisprudence and also in light of all other states which have considered sanctioning physicians for their public speech, but in the end, common and constitutional sense prevailed in all these states, except in the State of Washington. It is now up to this Court to at least temporarily stop the Commission from repudiating the freedom of speech norms historically and contemporaneously recognized by all judicial and administrative authorities, except for the administrative part of the Washington Medical Commission

As will be demonstrated herein, the facts in this case demonstrate that Plaintiff has satisfied the requisite elements for obtaining a preliminary injunction barring the Commission from commencing its hearing under the pretext of moral turpitude,

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

dishonestly or misrepresentations. Finally, there is no need for Plaintiff to exhaust his administrative remedies because of the manifest chilling effect and harm resulting from the Commission's prosecution of him for exercising his Free Speech rights under the Washington Constitution.

FACTUAL BACKGROUND

The factual allegations are set up in detail in the Verified Complaint. However, there are only a few mostly undisputed facts necessary for this Court to grant Plaintiff's Preliminary Injunction.

A. Undisputed Facts Relating to the Parties

1. Plaintiff is a retired Ophthalmologist. He has no medical office and sees no patients.
2. The Board's entire case against him is based solely on opinion columns he wrote in a regional newspaper in 2021 and early 2022. His articles contain his views and opinions on a wide range of topics, such as critical race theory, abortion and wokeness. Plaintiff has a decidedly conservative viewpoint.
3. He also writes extensively many aspects of the pandemic, the safety and efficacy of the vaccines, the use of off-label drugs such as Ivermectin, and what he believes to be government's overestimation of deaths from Covid based on the confusion between people dying from Covid with people who died with Covid.
4. The Commission's staff, its retained experts, and some of the people reading his opinion pieces disagree with most of the positions taken by Plaintiff in his opinion pieces relating to the pandemic.

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

5. The Commission is alleging that Plaintiff's opinion pieces constitute moral turpitude, and dishonesty under the Washington Physician licensure statute (RCW 18.130.180 (1).

B. Undisputed Jurisprudential Facts

1. There is no case in U.S. jurisprudence that has held or stated that a health care licensing agency has the Constitutional authority to investigate, charge or sanction a health licensee for that practitioner's pure or soapbox speech.
2. Every single justice and judge in the U.S. who has specifically addressed whether a licensing agency can sanction a licensee for speaking out in public on a matter of public interest has said that a professional's First Amendment free speech rights prohibit a licensing board from taking such action.

C. Undisputed Facts Relating to the Idea and Implementation of Board Prosecting Licenses for Pure Soapbox Speech

3. The idea that the Commission should discipline physicians for their pure/soapbox speech relating to Covid came from a press release issued by the Federation of State Medical Boards dated July 21, 2021. (*See* Verified Complaint at page 3, para. 2.1)
4. The Washington Medical Commission passed a guidance policy in September 2021, supporting the Federation's press release. (*Id.* at page 4, para. 2.3)
5. In its original version of AB 2098, the California Legislature attempted to implement the Federation's press release. However, prior to the first hearing, the sponsors were forced to remove the ability of the California Medical Board from disciplining

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

physicians for their pure/soapbox speech, which limitation was eventually passed and is now law. (Counsel's Declaration at pages 3, para. 9 to page 4, para. 11).

6. The Maine Medical Board initially charged a Maine physician with publicly challenging the mainstream Covid narrative, but later dropped the charge, instead pursuing prescribing and record keeping allegations. *Id.* at page 4, para. 14).
7. At some point, as reported by Legislative Counsel to the California Assembly, as many as fourteen states had bills prohibiting their medical boards from disciplining physicians for publicly spreading what the Federation and the medical boards called "Covid Misinformation." *Id*. at page 5 para. 16 referencing Exhibit A attached thereto at page 8, highlighted).

These undisputed or indisputable facts certainly mean that this notion that a licensing board has the authority to discipline a physician for public speech has never been considered to be a violation of a physician's free speech rights and under Washington law is enough for the Court to issue a preliminary injunction pending further briefing and development of the record as demonstrated hereinafter.

ARGUMENT

I. Requisite Elements for a Preliminary Injunction

Plaintiff seeks a preliminary injunction under RCW 7.40.020 which provides that:

> When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when during the litigation, it appears that the defendant is doing, or threatened, or is about to do, or

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

> is procuring, or is suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion. ***

In interpreting this statute, the Washington courts state that:

> A party seeking preliminary injunctive relief must establish (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of either have or will result in actual and substantial injury. San Juan County v. No New Gas Tax , 160 Wash.2d 141, 153, 157 P.3d 831 (2007) (citing Wash. Fed'n of State Emps. v. State, 99 Wash.2d 878, 888, 665 P.2d 1337 (1983)); see RCW 7.40.020.

Beauregard v. Wash. State Bar Ass'n, 197 Wash.2d 67, 72, 480 P.3d 410, 414 (Wash. 2021).[1]

II. Plaintiff has a Free Speech right to express his views on a matter of public interest and the Commission's prosecution of him violates Article 1 Section 5 of the Washington Constitution

Article 1 Section Five of the Washington Constitution entitled "FREEDOM OF SPEECH" provides that "Every person may freely speak, write and publish on all subjects being responsible for the abuse of that right."

Washington jurisprudence establishes that the protection accorded by this section is sometimes greater than the free speech rights granted under the First Amendment to the U.S. Constitution. *State v. Reece*, 110 Wn.2d 766, 757 P.2d 947 (Wash. 1988) ("The Washington

[1] The latter two elements are obvious and will not be discussed in detail. The fact that the Commission's disciplinary case starts in two weeks is certainly is a "well-grounded fear of immediate invasion of that right" and a disciplinary sanction for Plaintiff's exercising his free speech rights will surely result in actual and substantial injury. As set forth in page infra. Irreparable injury is presumed from an unconstitutional infringement of free speech rights.

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

Supreme Court has in the past and will continue in the future to accept its duty to interpret its constitution to be more protective of individual rights than the federal constitution. 'We have often independently evaluated our state constitution and have concluded that it should be applied to confer greater civil liberties than its federal counterpart when the reasoning and evidence indicate such was intended and is necessary.' (Italics ours.) *Alderwood,* 96 Wash.2d at 238, 635 P.2d 108."

Washington courts consider six factors in determining whether the protection under the Washington Constitution is greater than under the First Amendment, but that factorial analysis is not necessary in this case because there has never been a case in Washington or U.S. jurisprudence which has allowed a professional disciplinary board to sanction a licensee for speaking out in public or publishing on matters of public concern.

In fact, when discussion what is called "pure" or "soapbox", every single judge in the United States has indicated that professional boards have no power to discipline licensees for their pure/soapbox speech.

The most instructive and efficient method of demonstrating the unconstitutionality of the Commission's action is by a close examination of *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014) *abrogated on other grounds* by *Nat'l Inst. of Family & Life Advocates v. Becerra,* 138 S. Ct. 2361, (2018). *Pickup* involved two separate lawsuits filed by mental health care practitioners who provided sexual orientation change therapy, and families of minors who wanted the therapy for their children. The lawsuits challenged the constitutionality of a California law which made it a board disciplinable offense to provide sexual orientation change therapy to minors. The plaintiffs in both cases argued that the First Amendment protected their rights to give (and receive) this therapy and thus the statute was

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

unconstitutional. One district court used strict scrutiny and issued a preliminary injunction against the law (*Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012). The other district court denied the preliminary injunction applying a rational relationship standard because the law targeted therapy which is professional conduct, not speech, and thus does not call for First Amendment heightened scrutiny.

On the combined appeal, the Ninth Circuit affirmed *Pickup's* denial of the preliminary injunction and reversed the *Welch* court's granting of a preliminary injunction, holding that because the speech was actually professional conduct (therapy directed towards a patient), it was unprotected by the First Amendment, meaning rational relationship was the standard to be applied.

The *Pickup* holding and result dealt with communications between health care practitioners and their patients, as opposed to public, pure, or soapbox speech. However, to get to that holding and result, the *Pickup* panel viewed the different kinds of speech by professionals along what it called a "continuum" of professional speech. *Id* at 1227.

> At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocated a treatment that the medical establishment considers outside the mainstream, *or even dangerous*, is entitled to robust protection under the First Amendment - just as any person is - even though the state has the power to regulate medicine *See Lowe v. SEC*, 472 U.S. 181, 232, (1985) (parallel citations omitted) (White, J. , concurring ("*Where the personal nexus between professional and client does not exist, and the speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that 'Congress shall make no law… abridging the freedom of speech, or the press.*'); [2] Robert Post,

[2] Justice White's words are a restatement of the concurring opinion by Justice Jackson in *Thomas v. Collins*, 323 U.S. 516, 545-46, 65 S. Ct. 315, 329-30 (1945). Although Justice Jackson recognized the right of the state to regulate the practice of a profession ("pursuit of a calling"), he eloquently stated:

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech 2007 U. Ill. L.Rev. 939, 949 (2007) ("When a physician speaks to the public, his opinions cannot be censored or suppressed , even if they are at odds with preponderant opinion within the medical establishment."); cf, *Bailey. V. Huggins Diagnostic & Rehab. Ctr. Inc*., 952 P.2d 768, 773 (Colo. Ct. App. 1997) (holding that the First Amendment does not permit a court to hold a dentist liable for statements published in a book or made during a news program, even when those statements are contrary to the opinion of the medical establishment). That principle makes sense because communicating to the *public* on matters of *public concern* lies at the core of First Amendment values. *See e.g., Snyder v. Phelps*, 131 S. Ct 1207, 1215 (2011) (parallel citations omitted) ('Speech on matters of public concern is at the heart of the First Amendment's protection.' ***Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment***.

(Emphasis added)

Id. at 1227-1278.

The extensive discussion of the *Pickup* panel on soapbox speech makes it abundantly clear that the Commission's case against Respondent for the views he expressed in his newspaper column violate the First Amendment.

> "[I]t is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628. Nor would I. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom. * * *
>
> This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy."

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

Although *Pickup's* soap box speech analysis is still good law, its result and holding that there are certain kinds of professional speech deserving of less First Amendment protection was directly criticized and abrogated by *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018). NIFLA involved a California statute which compelled pro-life pregnancy care centers to post notices to its patients of the availability of free abortions. So, like *Pickup*, *NIFLA* dealt with communications between practitioners and their patients, not soapbox speech. But even in the context of communications between a health care practitioner and patients, the *NIFLA* plurality was extremely harsh towards a state government's attempt to interfere with professional speech quoting a concurring opinion by an Eleventh Circuit judge who noted:

> Throughout history, governments have `manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities." This *NIFLA* opinion then continued quoting the concurring judge's examples of Chinese, Soviet and Nazi doctors who "systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of the individual patient.

Id. quoting Wollschlaeger v. Governor of Florida, 848 F.3d. 1293, 1328 (11th Cir. 2017) (Pryor, J. concurring opinion).

If the Supreme Court thought it appropriate to liken compelling physicians to deliver a government created message to *patients* to the Chinese, Soviet and Nazi regimes, imagine (*a fortiori)* what the Supreme Court majority would say about the Commission's prosecution of Respondent for expressing his personal opinions in his newspaper opinion column.

Tingley v. Ferguson, 47 F.4th 1055 (9th Cir. 2022) is not to the contrary. *Tingley* involved the same kind of First Amendment challenge to a Washington sexual

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

orientation conversion therapy prohibition for minors that was rejected by the Ninth Circuit in *Pickup.* The basic rule of the case is that therapy that is delivered as speech as was the case before it and in *Pickup* is unprotected and adjudged under the rational relationship test. *Tingley* did not and did not purport the question or undermine the longstanding jurisprudential history that a licensee's public or soapbox speech cannot be stopped or sanctioned by the government.[3]

Finally, is it worth noting that even false soapbox speech is fully protected, and even when the speech is false and known to be false. *United States v. Alverez,* 567 U.S. 709, (2012) (wherein the Supreme Court struck down the Stolen Valor Act, which made it a crime to lie about receiving the Congressional Medal of Honor. The Supreme Court held that the act was an improper content-based restriction barred by the First Amendment free speech clause, even though the speech criminalized by the act involved a lie.)

III. PLAINTIFF DOES NOT HAVE TO EXHAUST HIS ADMINISTRATIVE REMEDIES

In the ordinary course, a respondent in an administrative proceeding may only seek judicial review after exhausting all administrative remedies, that is to say going through the entire administrative process. RCW 34.05.534. However, the court may relieve a party

[3] Based on *Tingley*, there is now a conflict in the circuit courts on what level of scrutiny applies to therapy delivered as speech, as the Eleventh Circuit invalidated on First Amendment grounds a sexual orientation conversion ban in *Otto v. City of Boca Raton,* 981 F.3d 854 (11th Cir. 2020). *Tingley i*s now up on a petition for certiorari in the Supreme Court.

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

of the exhaustion requirement "to exhaust any or all administrative remedies upon a showing that:

(a) The remedies would be patently inadequate;

(b) The exhaustion of remedies would be futile; or

(c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies."

RCW 34.05.534 (3) (a)-(c). [4]

Plaintiff has satisfied all three independent grounds. The ALJ has denied Plaintiff's motion to dismiss the administrative hearing, most likely on the grounds that WAC 246-11-480 (3)(c) prohibits the presiding officer from ruling on the constitutionally of a statute or

---

[4] *See also Prisk v. City of Poulsbo*, 712 P.2d 1013, 46 Wn. App. 793, 798-799 (Wash. App. 1987) …this case comes within the exhaustion exception providing that the requirement of exhaustion of remedies does not apply to present review of constitutional issues. *** Some cases recognize a distinction between situations where the challenge is to the facial validity of the agency's authority, rather than the validity of that authority, as applied to the particular claimant. Generally, in the latter case exhaustion still should be required. *See* Schwartz, *Administrative Law,* Section 8.37 (2nd Ed. 1984)".

Plaintiff claims herein that the Free Speech clause of the Washington Constitution would prohibit it from initiating a disciplinary action against any licensee on the pretextual grounds of moral turpitude, dishonesty or responding to a demand that a doctor explain why he takes positions opposed to the mainstream Covid narrative and hence would fall under the *Prisk* and general administrative rule that exhaustion does not apply in this situation. Even if *Prisk* has been superseded by RCW 34.05.534, in the absence of more direct authority, it is suggested that the Court can make use of the case and its reference to general administrative principles.

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

rule. This satisfies RCW 34.05.534 (3) (a) and (b) because there does not appear to be administrative redress for Plaintiff's constitutional challenges. (See. Counsel's Declaration at page 4 para. 4-5).

The Commission is making a direct attack on Plaintiff's State Constitutional Free Speech rights. Plaintiff's prosecution by the Commission has an obvious chilling effect on him as well as all other physicians who wish to speak in public critically of the government's response to the pandemic. Although there is no direct Washington case law on point, but in the context of federal preliminary injunction actions to stop federal and state government entities from violating First Amendment rights, the federal court have without exception held that the interference of First Amendment rights for even a brief period of time constitutes irreparable injury justifying extraordinary preliminary injunctive relief. "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for purposes of the issuance of a preliminary injunction." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also S.O.C., Inc. v. County of Clark*, 152 F.3d. 1136, 1148 (9th Cir. 1998) (establishing "probable success on the merits" of a First Amendment claim itself demonstrates irreparable harm).

Based on the foregoing, the Court should find that all three grounds exist to hear this constitutional challenge despite failure to exhaust administrative remedies.

//

//

//

//

//

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Motion for a Preliminary Injunction be granted and that the Defendant and its employees and agents be prohibited from commencing the hearing presently scheduled for May 24-26, 2023.

DATED this 8th day of May, 2023.

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
WSBA 30237
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax
todd@myattorneytodd.com

RICHARD JAFFE, ESQ.
(Pro Hac Vice Pending)
428 J Street, 4th Floor
Sacramento, Ca. 95814
916-492-6038 (ph)
713-626-9420 (fax)
rickjaffeesquire@gmail.com

TODD S. RICHARDSON
Law Offices of Todd S Richardson, PLLC
604 Sixth Street
Clarkston, WA 99403
509/758-3397, phone
509/758-3399, fax