COA Cause No.
Asotin County Superior Court No: 23-2-00069-02

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

RICHARD J. EGGLESTON, M.D. APPELLANT, vs. WASHINGTON MEDICAL COMMISSION, RESPONDENT	***EMERGENCY*** **MOTION FOR INJUNCTION PURSUANT TO RAP 8.3**

1. IDENTITY OF MOVING PARTY

Dr. Richard J. Eggleston, M.D., Appellant asks for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

This is an emergency motion. We are seeking the Court's consideration of this on an emergency basis as the actions that the

Commission will otherwise take is in the form of a hearing scheduled for this coming Wednesday, Thursday, and Friday (May 24-26). Thus, if the Court does not consider and rule on this before then, the harm sought to be avoided will have occurred. Dr. Eggleston has sought to timely protect his rights as further set forth below. The ruling from the Superior Court below was issued late yesterday; the Appeal was filed shortly after 9:00 this morning, and this motion before close of business and within approximately 24 hours of the ruling by Judge Burns in the Asotin Superior Court.

Appellant seeks the imposition of an injunction prohibiting Respondents from proceeding with a disciplinary hearing until further order of this court, thus protecting the Constitutional rights of Appellant and preserving the status quo of the parties during consideration of this appeal. (RAP 8.3, RCW 7.40.020,*Washington Fed. of State Emp'ees, Council 28, AFL-CIO v State*, 99 Wn.2d 878, 665 P.2d 1337 (Wash., 1983)

("*WFSE*".)

3. FACTS RELEVANT TO MOTION

Dr. Richard J. Eggleston, M.D. is a retired but still licensed ophthalmologist, who seeks to stop the Washington Medical Commission (the "Commission") from attempting to sanction him for the information and opinions he wrote in opinion pieces in a newspaper in Lewiston, Idaho, because the Commission does not agree with the content and viewpoint expressed by Dr. Eggleston.

Thus, the substantive question presented in this case is whether the Commission is violating Dr. Eggleston's Free Speech rights by seeking to discipline him for his pure or soapbox speech unrelated to his treatment of patients, since he has been retired for more than 10 years. Alternatively, does the Commission have the statutory authority to pursue him or others for their publicly expressed views.

Dr. Eggleston, and others, sought an injunction in federal

court (EDW, case 1:23-CV-3035-TOR); which was primarily denied on *Younger* abstention grounds (deferring to state process).

Dr. Eggleston then sought to dismiss the action by motion to the ALJ assigned to the case before the Commission. In an oral ruling (no written decision has been received as of the date of this filing) the administrative law judge denied the motion, most likely because administrative agencies do not have the authority to declare a law or rule unconstitutional. WAC 246-11-480(4).

Dr. Eggleston then filed a Complaint in the Superior Court for Asotin County seeking a preliminary and permanent injunction; the denial of which is the subject of this appeal. By order dated May 17, 2023, the Superior Court denied the motion on two grounds: Failure to show likelihood of success on the merits, and failure to show "actual and substantial injury" in allowing the hearing to go forward and requiring Dr. Eggleston to assert his constitutional challenges after the Commission

disciplines him

The hearing before the Commission's disciplinary panel is scheduled to begin on May 24, 2023; thus time is of the essence in securing a decision from this Court on this motion.

4. **GROUNDS FOR RELIEF AND ARGUMENT**

Dr. Eggleston seeks to have his free speech rights (United States Constitution, First Amendment; and Art. 1, Sec. 5 of the Washington State Constitution) protected from punishment by the Washington Medical Commission. The following authorities, and others as will be discussed below, authorize this court to enter an injunction

A) RAP 8.3;

B) RCW 7.40.020;

C) *Nat'l Inst. of Family & Life Advocates v Becerra,* 138 S.Ct 2361 (2018) ("*NILFA*"); *Elrod v Burns*, 427 U.S. 347, 373 (1976); *Pickup v Brown*, 740 F.3d 1208 (9th Cir. 2014) (abrogated by *NILFA*); *WFSE*,

and other cases.

ARGUMENT

1. The purpose of RAP 8.3 is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent the destruction of the fruits of a successful appeal. *WSFE*, at 883.

Rule 8.3 expressly authorizes the granting of in injunction in a matter such as this, stating in relevant part:

> the appellate court has authority to issue orders, ... to insure effective and equitable review, including authority to grant injunctive or other relief to a party.

RAP 8.3.

In *Washington Fed. of State Emp'ees, Council 28, AFL-CIO v State*, the court notes that the "purpose of the above rule is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent destruction of the fruits of a successful appeal. [internal citations omitted.]" *Id.* at 883. The Court then pointed to the Chief Justice's issuance of an injunction pursuant to RAP 8.3, stating that "the Chief Justice merely

preserved the status quo in order to insure effective and equitable review by the en banc court" *Id*. at 883. This is the same request Appellant makes now: preserve the status quo to insure effective and equitable review.

A grant of an injunction pursuant to RAP 8.3 will allow this Court to fully hear the matter and **give no prejudice to either party**. A delay in this matter, while holding the parties in their current status, does **not** prejudice either party. The acts the Commission seeks to discipline are past acts from 2020 and 2021. Dr. Eggleston, though he remains a guest opinion writer, has agreed with the publisher to NOT address these topics during the pendency of this action. Thus, the Commission remains without prejudice: not further acts will occur which might offend them; the acts they are prosecuting (opinions stated in the newspaper editorial section) remain as they are (past statements with no new statements coming); they have their witnesses and can set a new hearing date in short order (should they prevail).

HOWEVER, should the Court deny the motion for an injunction, the Commission will proceed with prosecution of the doctor, putting his medical license at risk for exercising his First Amendment (and Art. 1, Sect. 5) rights of freedom of speech. The imposition of discipline for exercising freedom of speech rights, even if later reversed, works violence upon the foundational rights enshrined in both our state and federal constitutions. In such a case, the prosecution is the problem: forcing a person to risk having their property[1] or livelihood taken from them for the act of exercising foundational liberties blows a chill wind over those rights[2]; a chill which is not lightly removed nor corrected on appeal.

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[1] Dr. Eggleston has a property interest in his medical license.

[2] Indeed, any sanction is published to the other medical professionals as a warning for them to avoid speaking in ways the Commission may deem unacceptable. Thus, that chill wind blows wide across the state and throughout the profession. It does not strike the undersigned as an unintended consequence, but rather a targeted warning to others who may have notions of engaging in "wrongthink". As the U.S. Supreme Court stated, "[f]ear that speech might persuade provides no lawful basis for quieting it." *Sorrell v IMS Health, Inc.,* 564 U.S. 552, 131 S.Ct. 2653, 180 L.Ed 2d 544 (2011).

The United States Supreme Court addressed this very point in *Dombrowski v Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), when they stated:

> Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

Id.

A mere six months ago, Division 1 of this Court issued the decision in *Jha v Khan*, 24 Wn.App.2d 377, 520 P.3d 470 (Div. 1, 2022). In their reasoning they correctly note that "[u]nder the First Amendment there is no such thing as a false idea." *Jha* at 396; citing *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 339 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The *Jha* court also cites an Arizona case for the proposition that "[i]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.' *Id*, citing *Rogers v Mroz*, 252 Ariz. 335, 502 P.3d

986 (2022). Speech remains protected even when it may "stir people to action," "move them to tears," or "inflict great pain." *Snyder v Phelps*, 562 U.S. 443, 460-61, 131 S.Ct. 1207, 1220, 179 L.Ed. 2d 172 (2011).

In the case at bar, *no allowance* is made for the First Amendment. Dr. Eggleston moved to dismiss based on the First Amendment, that motion was denied without explanation (a written decision was promised, but as of the filing of this motion has yet to be provided to the undersigned). It is anticipated that the administrative law judge will rely on WAC 246-11-480(4) as a precluding her ability to consider constitutional issues; issues which can then be only addressed on appeal. Such a process denies judicial protection to the most basic and fundamental rights our society recognizes. A charged person is left to defend themselves without the most important of all our legal

protections: the state and federal constitutions[3].

Thus, a failure to grant an injunction at this point works prejudice to Dr. Eggleston and allows Constitutional rights to be compromised by actions taken under the administrative code[4].

This Court has the authority to grant the injunction and should grant it to preserve the status quo, protect the interests of both parties without prejudice to either, and to prevent the destruction of the fruits of a successful appeal.

2. The Lower Court Did not use The Constitutionally Required Standard in Adjudging Appellant's injury

Washington jurisprudence establishes that the protection accorded by the Free Speech clause (Article 1 Section 5, like all individual rights is at least as much and often greater than

[3] Such a situation calls to mind the warning from Justice Clark in *Mapp v Ohio*, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

[4] The undersigned can find no case in history in which an administrative code was allowed to supersede the Constitutions of both the state and the nation.

the free constitution rights in the U.S. Constitution. *State v. Reece,* 110 Wn.2d 766, 757 P.2d 947 (Wash. 1988) ("The Washington 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.")).

In First Amendment jurisprudence, arguably the single most important method by which the courts protect First Amendment rights is that most of the requisite elements in a standard civil preliminary injunction motion are waived, presumed or lessened because of the jurisprudential policy of protecting First Amendment rights as quickly as possible.

This applies to the irreparable injury requirement in federal practice which is the counterpart in Washington practice "that the acts complained of either have or will result in actual or substantial injury." *Beauregard v. Wash. State Bar Ass'n,* 197 Wash.2d 67, 72, 480 P.3d 410, 414 (Wash. 2021); *WSEF*, at 888.

Thus, for irreparable injury, "'[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). [5]

[5] Another aspect of the relaxed requirements in First Amendment preliminary injunction jurisprudence is that it is not necessary to show a likelihood of success on the merits, or its state counterpart, "a clear legal or equitable right" (*See Beauregard v. Wash. State Bar Ass'n, supra* 197 Wash.2d 67, 72, 480 P.3d at 414 (Wash. 2021). A "colorable claim" of a violation or a threatened violation is all that is required. *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th

Appellants pointed this out in their Motion papers as well as at oral argument. However, the Superior Court found that Dr. Eggleston did not prove actual or substantial injury. The use of the incorrect standard makes is reversible error and in conjunction with the manifest error in not finding a constitutional violation warrants the entry of an emergency stay of the Commission's hearing scheduled for May 24-26, 2023.

3. Dr. Eggleston has a colorable, probable and compelling case that the Commission's prosecution of him is violation of his Free Speech rights.

Cir. 2011) *overruled on other grounds by Bd. of Trs. of the Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019). This is consistent with the *Tyler Pipe* criteria set out in *WSEF* and *Beauregard.*

Yet another part of the federal preliminary injunction test which is waived in First Amendment cases is the balancing of interests. The Supreme Court has expressed reluctance to balance the equities when the government is attempting to suppress content-based speech. *See United States v. Alvarez,* 567 U.S. 709, 717 (2012) ("In light of the substantial and expansive threats to free expression posed by content-based restrictions, this court has rejected as 'startling and dangerous' a 'free floating test for First Amendment coverage … [based on] an *ad hoc* balancing of relative social costs and benefits.'") quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010). *See also*, *Am. Bev. Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019).

Shifting the focus to the public's interest, there is no public "interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n. 11 (3rd Cir. 2003). "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986).

There is no appellate authority in the United States that has ever allowed a state licensing agency to sanction a physician for public speech. In fact, every single justice or appellate judge in this country who has written on this specific issue has stated that licensing agencies do not have the power to interfere with or sanction a licensee's soapbox speech.

The oldest and arguably the best articulation of this bedrock principal of First Amendment Jurisprudence comes from Justice Jackson's concurring opinion in *Thomas v. Collins*, 323 U.S. 516, 545-46, 65 S. Ct. 315, 329-30 (1945). Although, he recognized the right of the state to regulate the practice of a profession ("pursuit of a calling"), Justice Jackson eloquently stated:

> "[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."

Justice White quoted Justice Jackson in *Lowe v. SEC*, 472 U.S. 181, 232, (1985) (parallel citations omitted) and added his own take stating that:

> 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.')

The Ninth Circuit in *Pickup v. Brown*, 740 F.3d 1208, 1227-1228 (9th Cir. 2014) *abrogated on other grounds* by *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) quoted both justices cited two other authorities for the same core principle likening First Amendment professional speech to a continuum,

> "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 [citation and quote from Justice White in *Lowe v. SEC*, 472 U.S. 181, 232, (1985) and footnote are omitted]
>
> Robert Post, *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.

Id. at 1227-1278[6].

Finally, in *Nat'l Inst. of Family & Life Advocates v.*

[6] The United State Supreme Court is nothing if not consistent in protecting free speech. In the 2011 case of *Sorrell v IMS Health, Inc.*, they stated:

> There are divergent views regarding detailing and the prescription of brand-name drugs. Under the Constitution, resolution of that debate must result from free and uninhibited speech. As one Vermont physician put it: "We have a saying in medicine, information is power. And the more you know, or anyone knows, the better decisions can be made." App. 279. There are similar sayings in law, including that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." Virginia Bd., 425 U.S., at 770, 96 S.Ct. 1817. The choice, "between the dangers of suppressing information, and the dangers of its misuse if it is freely available," is one that "the First Amendment makes for us." *Sorrell*, at 578, 131 S.Ct at
>
> page 2671.

The Supreme Court then concluded, "[i]n considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate." *Id.*, at 580.

Becerra, 138 S. Ct. 2361, (2018), the Supreme Court rejected the notion that speech by professionals was entitled to less protection that unlicensed professionals. The clear implication of *NIFLA* is the same principle articulated by Justices Jackson and White and that it is a violation of the First Amendment for a licensing board to attempt to sanction a licensee for soapbox speech.

The above case law is more than adequate to demonstrate a colorable First Amendment and Free Speech claim, a likelihood of success on the merits or a clear legal and equitable right. *Beauregard v. Wash. State Bar Ass'n,* 197 Wash.2d 67, 72, 480 P.3d 410, 414 (Wash. 2021)[7]

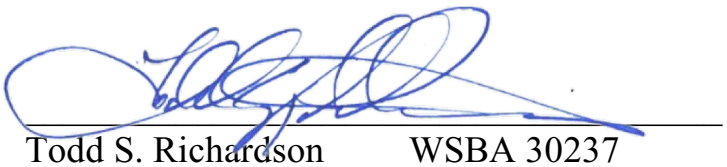
Thus, this Court has the authority to issue the injunction to protect the appeal and protect Constitutional rights, and should do so now.

This document contains 3626 words.

[7] The second element is a well-grounded fear of immediate invasion of that right. The existence of the Commission's prosecution and the hearing scheduled to commence next week is an actual invasion of Dr. Eggleston's Free Speech rights.

DATED this 18th day of May, 2023.

Respectfully submitted,



Todd S. Richardson WSBA 30237
Attorney for Appellant

Todd S. Richardson
604 Sixth Street
Clarkston, WA 99403
509-758-3397, phone
Todd@MyAttorneyTodd.com, email

Richard Jaffe, Pro Hac Vice
428 J. Street, 4th Floor
Sacramento, CA
916-492-6038, phone
RichardJaffeEsquire@gmail.com, email

ADDENDUM:
After completing this Motion and supporting documents on 5/18/23 and attempting to file them (unsuccessfully); at 5:01pm we received the administrative law judge's order which included her reasoning for denial of our Motion to Dismiss. In order to avoid confusion or any possibility that my comments above may mislead the Court in any way, I am attaching a true and correct copy of that Order hereto as ATTACHMENT 1 for full disclosure and convenience of the Court.

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
WASHINGTON MEDICAL COMMISSION

In the Matter of: RICHARD J. EGGLESTON, Credential No. MD.MD.00014109, Respondent.	Master Case No. M2022-204 PREHEARING ORDER NO. 3: ORDER DEFINING CONDUCT OF HEARING

Presiding Officer: Jessica L. Blye, Review Judge

The Presiding Officer convened a prehearing conference on April 28, 2023, pursuant to RCW 18.130.095(3) and WAC 246-11-390. Present at the prehearing conference were Jessica Blye, the Presiding Officer; Kristin Brewer, Assistant Attorney General; and Todd Richardson and Richard Jaffe, Attorneys at Law.

This prehearing order contains the stipulations and agreements of the parties related to the conduct of the hearing in this matter, and the prehearing orders and decisions of the Presiding Officer on discovery, evidentiary issues, and motions brought by either party.

1. Amendments of the Pleadings. On October 9, 2022, after receiving an extension of time to file, the Respondent timely filed an Answer to Statement of Charges. On March 21, 2023, the Respondent filed another Answer to Statement of Charges. On April 19, 2023, the Respondent filed a First Amended Answer to Statement of Charges. The Department objected to including the updated Answers in the materials to be submitted to the panel deciding this matter. The March 21 and April 19, 2023, Answers were filed beyond the deadline for filing an Answer and there is no provision for filing amendments after the deadline beyond permitting the Respondent to later admit or not contest previously denied allegations. Therefore, the March 21 and April 19, 2023 Answers will not be submitted to the panel.

2. Discovery Issues. The Respondent's Attorneys indicated that they would provide to the Department a declaration from Sanjay Verma, M.D.

3. Statement of Issues.

A. Did the Respondent engage in unprofessional conduct as alleged under RCW 18.130.180(1), (13), and (22)?

B. If unprofessional conduct is proven by the Department, what is the appropriate sanction under RCW 18.130.160?

4. Witnesses. Any witness not identified during the prehearing conference shall not be allowed to testify at the adjudicative proceeding absent good cause. WAC 246-11-390(8).

A. The Department may call the following witnesses:

1. Richard Eggleston, M.D., Respondent
2. Anna Wald, M.D., MPH
3. Leslie Enzian, M.D.
4. Brian Rhodes
5. Don Greggain, M.D.
6. G. Michael Piechota, Department Investigator

B. The Respondent may call the following witnesses:

1. Richard Eggleston, M.D., Respondent
2. Harvey Risch, M.D., Ph.D.
3. Pierre Kory, M.D. or Dr. Paul Marik in the alternate
4. Sanjay Verma, M.D.
5. Colleen Huber, NMD
6. James Lyon Weiler, Ph.D.
7. Peter McCullough, M.D.
8. Butch Alford

Greg Glaser, Esq. is not permitted to testify at the adjudicative proceeding. However, the Respondent is permitted to file a declaration of this witness for the purpose of creating a record.

5. Exhibits. Documentary evidence not offered in the prehearing conference shall not be received into evidence at the adjudicative proceeding absent good cause. WAC 246-11-390(7).

A. The following exhibits are admitted as numbered:

Exhibit D-1: Curriculum Vitae of Anna Wald, MD, MPH

Exhibit D-2: Report of Anna Wald, MD, MPH

Exhibit D-3: Curriculum Vitae of Leslie Enzian, MD

Exhibit D-4: Complaint

Exhibit D-5: Department's letter of Cooperation (LOC) to Respondent dated December 9, 2021

Exhibit D-6: Response to Department's LOC dated January 26, 2022

Exhibit D-7: Respondent's statement

Exhibit D-8: Articles and commentaries written by Respondent

Exhibit D-9: Commentary of Dr. Don Greggian and Dr. John Rusche published in the Lewiston Tribune on March 27, 2021

Exhibit D-10: AMA Opinion, Code of Medical Ethics, 2.3.2. Professionalism in the Use of Social Media

Exhibit D-11: "About Us" page from The Lewiston Tribune Website

Exhibit D-12: Why You Should Not Use Ivermectin to Treat or Prevent COVID-19 –FDA article updated as of December 10, 2021

Exhibit D-13: Merck Statement on Ivermectin use During the COVID-19 Pandemic – Merck article dated February 4, 2021

Exhibit D-14: Proclamation by the Governor Amending and Extending Proclamation 20-05, 20-60, Yakima County – Face Coverings dated June 24, 2020

Exhibit D-15: Order of the Secretary of Health, 20-03, Face Coverings – Statewide dated June 24, 2020

Exhibit D-16: FDA News Release: Coronavirus (COVID-19) Update: FDA Revokes Emergency User Authorization for Chloroquine and Hydroxychloroquine dated June 15, 2020

Exhibit D-17: CDC COVID-19 Interim Public Health Recommendations for Fully Vaccinated People updated April 29, 2021

Exhibit D-19: "Opinion: What I wrote was intentional, but not in error" by Richard Eggleston, published in The Lewiston Tribune on October 2, 2022 (Sanctions Only)

Exhibit D-20: "Opinion: Why American Medicine has become what it is" by Richard Eggleston, published in The Lewiston Tribune on April 16, 2023 (Sanctions Only)

Exhibit R-2: CDC: Vital Statistics Reporting Guidance

Exhibit R-8: WA Medical Commission: COVID 19 Misinformation position paper

Exhibit R-13: Harvey Risch Curriculum Vitae

Exhibit R-14: Dr. Colleen Huber CV

B. The following exhibits were withdrawn or rejected:

Exhibit R-1: Dr. Eggleston articles (withdrawn as duplicative)

Exhibit R-15: American Journal of Therapeutics: Review of the Emerging Evidence Demonstrating the Efficacy of Ivermectin (withdrawn as duplicative)

C. The Presiding Officer reserved ruling on the following exhibits:

Exhibit D-18: COVID-19-Related Infodemic and Its Impact on Public Health: A Global Social Media Analysis, Am. J. Trop. Med. Hyg., 103(4), 2020, pp. 1621-1629

Exhibit R-3: Journal of Antibiotics: Mechanisms of action of ivermectin against SARS-CoV

Exhibit R-4: Molecular Basis for Disease: Repositioning Ivermectin for Covid-19 treatment

Exhibit R-5: Journal of Infectious Diseases: The Crux of Ebola Diagnostics

Exhibit R-6: Antiviral Research: Ivermectin inhibits the replication of SARS-CoV-2

Exhibit R-7: European Journal of Clinical Investigation: Reconciling estimates of global spread and infection fatality rates of COVID

Exhibit R-9: Clinical Infections Diseases: Predicting Infectious Sever Acute Respiratory Syndrome COVID from Diagnostic Samples

Exhibit R-10: Johns Hopkins Newsletter: A closer look at U.S. deaths due to COVID

Exhibit R-11: American Journal of Therapeutics: Review of the Emerging Evidence Demonstrating the Efficacy of Ivermectin

Exhibit R-12: Johns Hopkins Working Paper: COVID-19 Deaths: A look at U.S. Data

Exhibit R-16: Transboundary and Emerging Diseases: Pitfalls in SARS-CoV2 PCR Diagnostics

Exhibit R-17: Pathology: Accuracy amidst ambiguity: false positive SARS-CoV2 nucleic acid tests when COVID-19 prevalence is law

Exhibit R-18: Institute for Pure and Applied Knowledge: Has CDC's COVID 19 Death Ascertainment and Diagnosis Protocol Condemned Public Health and Medicine to Sisyphean Task?

Exhibit R-19: Science, Public Health Policy, and The Law: COVID-19 Data Collection, Comorbidity & Federal Law

Exhibit R-20: International Journal of Geriatrics and Rehabilitation: Testing for SARS-CoV-2 in cellular components by routine nested RT-PCR followed by DNA sequencing

Exhibit R-21: Nature Communications: Post-lockdown SARS-CoV-2 nucleic acid screening in nearly ten million residents of Wuhan, China

6. Prehearing Motions.

A. Respondent's Motion to Dismiss.

On March 22, 2023, the Respondent filed a Motion to Dismiss. The Respondent argued that the allegations in the Statement of Charges were not unprofessional conduct as a matter of law, punished him for his speech in violation of his First Amendment rights, and must be dismissed.

On April 3, 2023, the Department filed a response. The Department argued that alleged facts do not, in fact, violate the Respondent's First Amendment rights. Further, the Department argued that the allegations required the clinical expertise of the Commission to determine, and the motion could not be granted because it was asking for one or more statutes to be declared partially invalid.

On April 14, 2023, the Respondent filed a reply. The Respondent reiterated his Constitutional arguments.

The Commission's procedural rules (chapter 246-11 WAC) do not specifically provide for a motion to dismiss. However, pursuant to WAC 246-11-480(3), the Presiding Officer shall:

> (a) Apply as the first source of law governing an issue those statutes and rules deemed applicable to the issue;
> (b) If there is no statute or rule governing the issue, resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington Constitutions, statutes, rules, and court decisions; and
> (c) Not declare any statute or rule invalid.

The undersigned Presiding Officer can rule on some motions for summary judgment or motions to dismiss. For example, the Presiding Officer can determine that a party has not met the criteria for summary judgment or a motion to dismiss. However, the Presiding Officer's authority does not include granting motions to dismiss where clinical expertise is necessary.

RCW 18.130.050(10) states in part:

> Disciplining authorities identified in RCW 18.130.040(2)(b) may not delegate the final decision regarding disposition of the license or imposition of sanctions to a presiding officer in any case pertaining to standards of practice or where clinical expertise is necessary, <u>including deciding any motion that results in dismissal of any allegation contained in the statement of charges</u>. (emphasis added)

The Washington Medical Commission is identified as a disciplining authority in RCW 18.130.040(2)(b). "Clinical expertise" means the proficiency or judgment that a license holder in a particular profession acquires through clinical experience or clinical practice and that is not possessed by a lay person. RCW 18.130.020(2).

The Statement of Charges does not involve allegations that the Respondent treated patients below the standard of care. However, the allegations of moral turpitude,

dishonesty, or misrepresentation involve evaluating the statements the Respondent made regarding medical treatment and COVID-19. Because of this, the case requires clinical expertise to make a final determination. As a result, the undersigned Presiding Officer may not issue a final decision, including dismissing the allegations at issue here. Only the Commission may issue such a decision. Thus, the motion must be DENIED.[1]

7. Relief Statement. The Department requests that the charges alleged in the Statement of Charges be affirmed and appropriate sanctions be imposed. The Respondent requests dismissal.

8. Hearing. The parties predict the hearing will be three days in length. The hearing date is therefore scheduled for **May 24-26, 2023**. A Notice of Hearing will be sent describing the start time and format of the hearing.

Dated this 18th day of May, 2023.

JESSICA L. BLYE, Review Judge
Presiding Officer

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[1] It is true that the motion could be provided to a Commission panel if there was a legal basis for a panel to grant the motion. However, there is not a legal basis in this case as the law is clear in Washington that administrative agencies have only the authority granted to them by the legislature. This authority does not include the authority to declare any statute or portion of a statute invalid. *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 744, 406 P.3d 1199, 1217 (2017); WAC 246-11-480(3)(c).