COA Cause No. 397319

THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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

The First Amendment of the United States Constitution and Article 1, Section 5 of the Washington state Constitution[1] are the controlling laws of this motion.

[1] Art. 1, Sec. 5 states: "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Washington courts have held that it gives broader rights than the First Amendment. *State v Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984); *O'Day v King Cnty*, 109 Wn.2d 796, 802, 749 P.2d 142, 146 (1988); Cf. *Sprague v Spokane Valley Fire Dep't*, 189 Wn.2d 858, 877, 409 P.3d 160, 172 (2018).

In the case before this Court, the Medical Commission seeks to silence the public expression of opinions it disagrees with; and it is attempting to circumvent the Constitutional protections in order to blow a chill wind across the profession to quell any public expressions of disfavored "wrongthink". In this the Commission must be blocked by the tried and tested walls of Constitutional limitations.

Dr. Richard Eggleston, a retired doctor was hired to write monthly opinions to be published as guest editorials in the local newspaper. Each article prominently featured the statement "Commentary: Opinion of Richard Eggleston". The Commission took exception to Dr. Eggleston's opinions related to covid and commenced this action to sanction him for publicly stating these unapproved opinions[2]. The basic facts are incredibly simple, and

[2] The Commission makes much hew and cry about the timing of this and other motions brought by Dr. Eggleston to protect his constitutional rights. The Commission, however fails to explain that *even if* he was slow in bringing the legal actions to protect his rights, the ARE timely in that he has diligently sought to protect his constitutional rights *prior* to the Commission holding a hearing. Thus, we see that the Commission is merely using that in an attempt to cause

not in dispute: 1) Dr. Eggleston wrote opinion editorials in the local newspaper; 2) Dr. Eggleston wrote opinions on March 17, 2021, June 9, 2021, July 11, 2021, and September 5, 2021, that the Commission finds unacceptable. He voiced four (4) opinions in this public forum that the Commission determined they must sanction him for voicing[3].

The Commission pretends that there is some factual record the administrative hearing could develop to support their action[4];

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confusion; there is no legal merit in their claims.

The Commission, disingenuously argues that "[d]elay thwarts the duty of the Commission and leaves the public exposed Dr. Eggleston's unprofessional conduct." The Commission is fully aware of the fact that Dr. Eggleston has voluntarily agreed not to write on these subjects during the pendency of this case. Thus, we see that the Commission's sense of urgency is nothing more the attempting to rush the Court into error.

[3] The opinions included (using the Commission's characterization thereof) the following 4 things: 1) statements minimizing the deaths from SARS-CoV-2; 2) statements that [PCR] tests are inaccurate for SARS-CoV-2; 3) statements that COVID-19 vaccines, and mRNA vaccines are harmful or ineffective; and 4) statements that Ivermectin is safe and effective treatment for COVID-19.

[4] The Commission states, at p.11, "several key issues of material fact require resolution by hearing and the Commission is uniquely suited to resolve those issues." But the issues they suggest they are "uniquely suited to resolve" are First Amendment issues. The Commission seeks to establish themselves as the "Ministry of Truth" and grant to themselves censorship authority because, just as they did with Galileo, this Commission has the ability to declare what is correct with perfect definition, and to declare what opinion or information is fit or unfit for the poor, unschooled, public to consume.

or that, somehow, "medical expertise" has anything to do with determining whether the state and federal constitutions protect the expressions of opinion in a public forum[5]. But the truth of the matter is: there is no possible factual record that could be created that would allow the Commission to become the self-appointed arbiters of what opinions may or may not be voiced in public fora.[6]

The fact is the Commission is scheduled to haul Dr. Eggleston before a panel of its members to consider sanctioning

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In making this argument, the Commission further seeks to strip the Court of its authority to determine the constitutionality of statutes such as RCW 18.71.011 (on which the Commission relies in its assertion that they may sanction a physician for *any* "book, papers, signs *or other written or printed means of giving information to the public* ...." In other words, they claim that doctors lose their freedom of speech when they become doctors (if they dare note they are a "doctor" or "m.d." or so on. This is a patently unconstitutional claim, but the Commission would have us believe that *only* the Commission has the expertise to judge that claim.

[5] Notably, the Commission makes no claim about the how or when medical school teach the First Amendment of the United States Constitution or Article 1, section 5 of the state Constitution, or how physicians and physician assistants have "expertise" in freedom of speech issues.

[6] As will be shown, *infra*, these arguments are merely a canard offered in hopes of causing enough confusion to allow the Commission to prosecute protected free speech. The Commission must be stopped, for the process *is* the punishment, and no review can restore to the good doctor what would otherwise be taken by the Commission.

him for expressing his opinions on a matter of public interest in a public forum. There is no dispute, nor can there be, that Dr. Eggleston expressed opinions. Nor is there any dispute the issue of covid was, or is, a matter of public interest. And newspapers are the quintessential public forum[7]. Thus, the question on which this whole case turns is: Are the expressions of opinion about a matter of public interest in a public forum protected speech? The answer is undeniably: **yes, it IS protected speech, and the Commission has no authority to punish someone for speaking it[8].** As public interest speech in a public forum, Dr. Eggleston's speech is entitled to the fullest and most urgent protections of Art. 1, Sec. 5.

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[7] Public forums include those channels of communication used by the public. *World Wide Video of Washington, Inc.*, 125 Wn. App. at 301.

[8] "There is 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *NAACP v Claiborne Hardware, Co*, 458 U.S. 886, 913 (1982) (*quoting New York Times v Sullivan*, 376 U.S. 254, 270 (1964).) Art. 1, sec. 5 is a broader promotion of this free speech commitment. *Bering v SHARE*, 106 Wn.2d 212, 234, 721 P.2d 918, 931 (1986).

Respondents advocate in favor of the WAC and the APA; and claim they need to build a record. Such an argument is flawed. Neither the WAC nor the APA can deprive someone of the foundational freedoms so strongly protected in the Constitutions; but that *is* what the Commission is attempting to do. Having declared their statutory "duties" to be of greater importance that Dr. Eggleston's constitutional rights (*see i.e.:* Response, at 11, 15, 16, 17, 18.)

In *Prisk v City of Poulsbo*, 46 Wn.App. 793, 732 P.2d 1013 (Div. 2, 1987), the Court pointed out that when it comes to problems involving the exhaustion of remedies, "reviewing courts exercise a great deal of discretion." *Id.,* at 797. Noting that when the "considerations of fairness and practicality outweigh the policies underlying the doctrine [of exhaustion], compliance with the rule is unnecessary. [citations omitted.]" *Id.,* at 798.

The Court's analysis then speaks to the instant case:

Here, there is no factual dispute between the parties,

> and hence no need to defer to agency fact-finding procedures. Rather, this is a purely legal dispute. These factors militate heavily against requiring exhaustion. ...
>
> Moreover, this case comes within the exhaustion exception providing that the requirement of exhaustion of remedies does not apply to prevent review of constitutional issues. Where the issue raised is the constitutionality of the very law sought to be enforced, exhaustion is unnecessary. **This is because the administrative body does not have authority to determine the constitutionality of the law it administers; only courts have that power.** *Bare v Gorton,* 84 Wash.2d 380, 526 P.2d 379 (1974), citing *United States v Kissinger*, 250 F.2d 940 (3d Cir. 1958) and 3 K. Davis, *Administrative Law Treatise* § 20:04, at 74 (1958).

Id., at 798.

The principle that an administrative body does not have the authority to determine the constitutionality of the law it administers is also found within the WAC itself. WAC 246-11-480(3)(c), states the Presiding Officer shall "[n]ot declare any statute or rule invalid[9].

[9] In the case at bar, The ALJ ruled that she did not have the statutory authority to decide whether the Commission has the Constitutional authority to sanction physicians for their fully

Thus, since the WAC precludes the ability to consider the issue, what is there to review? The APA (RCW 34.05) does not provide for a review of an action that the administrative body can't undertake in the first place. ***Only*** courts have the ability to review Constitutionality.

The APA cannot diminish constitutional rights. RCW 34.05.020. The rights, having not been diminished, must be given their full-throated protection. That protection of the individual's first freedoms is the duty of this Court; review must occur in the Courts and not be delayed for the illusory promise of some future review. Protection of Constitutional rights is a threshold matter, not something held in reserve hoping that the individual can withstand the onslaught of the state and survive until some future

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protected soapbox speech which arguably shows the futility and inadequacy of exhaustion. However, the primary reason is the irreparable harm and the chilling effect of forcing physicians like the Appellant to defend their soapbox speech. As set out in the Motion, irreparable injury is presumed, even if the state only violates the preliminary injunction movant's rights for a short period of time. (See motion at pages 12-14). That is all that needs to be shown for the civil courts to hear this First Amendment Free Speech challenge.

review after the punishment has been pronounced and the damage done[10].

In this we find guidance from *State v Dawley*, 11 Wn.App. 2d 527, 455 P.3d 205 (Div. 1, 2019), wherein we are taught that "in the context of a First Amendment challenge, the State 'bears the burden of justifying a restriction on speech.' [citation omitted.]" *Id.,* at 535; *see also: Ino Ino, Inc. v City of Bellevue*, 132 Wn.2d 103 (1997).

Thus, it is *the Commission*, not Dr. Eggleston, who must come forward with a threshold demonstration of Constitutionality. In this they have failed.

The Commission claims that Dr. Eggleston did not show

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[10] Washington law unquestionably grants the state courts the power to waive exhausting "any or all administrative remedies upon a showing that:

1. The remedies would be patently inadequate;
2. The exhaustion of remedies would be futile; or
3. 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). As noted in fn.6, *supra*, the "irreparable harm" element is presumed.

the balance of interests weigh in favor of stopping the prosecution of his fully protected soapbox speech. However, there is no balancing of interests where there is a First Amendment violation.

United State v Alvarez, 567 U.S. 709 717 (2012) held:

> 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 and Cty of San Francisco*, 916 F.3d 749, 758 (9th Cir, 2019).

The Commission also asserts that is it protecting the public's interest from Dr. Eggleston's dangerous ideas. As a matter of law, 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).

In terms of the requisite elements to obtain a preliminary injunction in a First Amendment free speech challenge, essentially all that is required is a colorable or serious question concerning a First Amendment violation by the government. Upon that showing, th courts stop the violation pending final judgment. (*See:* Motion, at 13, fn 5.)

Finally, the Commission argues that it has a compelling interest to protect the public from Appellants dangerous ideas expressed in his opinion pieces. However, the argument fails as a matter of First Amendment law. Under strict scrutiny (which requires a compelling state interest), the defender of the alleged unconstitutional action has the burden of proof that the state considered other less restrictive activities and determined that the other alternatives would not have been effective. *United States v. Playboy Ent Grp. Inc*. 529 U.S. 803, 817 (2000). Cf.

South Bay Pentecostal Church v. Newsom, 141 S. Ct 716, 718-719 (2021)[11].

The Respondent has not demonstrated that it considered less restrictive means to protect the public than sanctioning its licensees for conveying information with which it does not agree. Hence, it has failed to satisfy strict scrutiny.

Under Article 1, §5 the State must first have a compelling State interest to limit political speech in a public forum. *Bering*, 106 Wn.2d at 234. Then the State may impose time, place, and manner restrictions that are (1) are content

[11] "In cases implicating this form of 'strict scrutiny,' courts nearly always face an individual's claim of constitutional right pitted against the government's claim of special expertise in a matter of high importance involving public health or safety. It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. Of course, we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. The whole point of strict scrutiny is to test the government's assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217 (1993). Even in times of crisis—perhaps especially in times of crisis—we have a duty to hold governments to the Constitution." *South Bay Pentecostal,* 141 S. Ct. at 718.

neutral, (2) are narrowly tailored to serve a compelling State interest, and (3) leave open ample alternative channels of communication. *Id.*

The Commission has no compelling interest in restricting the public forum expression of opinions relating to public interest issues by Dr. Eggleston. Their intended remedy is to sanction disfavored opinions and the result is that medical professionals are not left with any alternative channels of public communications given that the Commission is claiming the authority to control *all* speech by one who claims the title of "Dr." or "m.d.", etc. done in "books, papers, signs, written or printed means given to the public."

CONCLUSION

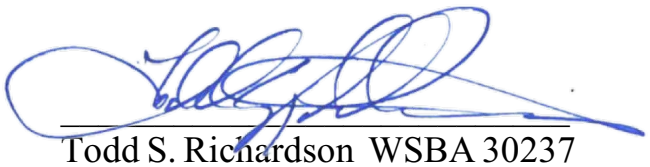
The Commission seeks to usurp power never given it. They seek to be appoint themselves the arbiter of what is true and what is false when it comes to public opinion statements made by a licensee regardless of where it is expressed. To allow the Commission to seize such power from the individuals on whom the Creator bestowed such right, is to sanction one of the greatest abrogations of foundational rights in the history of the American freedom of speech.

Such overreach and usurpation cannot be tolerated.

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. 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.

Respectfully submitted this 23rd day of May, 2023.



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