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**SUPERIOR COURT OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES**

MICHAEL K. TURNER, an individual,
RICHARD WILKINSON, an individual;
RYAN N. COLE, and an individual;
RENATA S. MOON, an individual;

CASE NO.: 23-2-01316-03

Plaintiffs,

**PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

v.

WASHINGTON MEDICAL COMMISSION,
a Washington State Agency,

Defendant

I. INTRODUCTION

On September 22, 2021, through a Special Meeting with limited notice and without opportunity for public comment, the Washington Medical Commission ("WMC") adopted a position statement, *COVID-19 Misinformation* ("Statement" or "Position Statement"), which adopted a standard of care for Washington medical providers' treatment of COVID-19. The WMC has enforced the Statement.

The Statement reads: "WMC relies on the U.S Food and Drug Administration approval of medications to treat COVID-19 to be the standard of care." Compl. Ex. 1. The Statement ignored the existing Standard of Care in RCW 18.130.180(4) and the standard of care more recently adopted by

COPY

1 the legislature four months prior, through RCW 7.70.040, which provided a “reasonably prudent”
2 standard for medical professionals, in the State of Washington, and further grants a measure of liability
3 protection. Accordingly, the Statement is not an interpretive statement, but is a legislative rule that
4 was adopted and implemented outside the WMC’s statutory authority and legal rulemaking processes,
5 exceeding the Agency’s authority and violating the Administrative Procedures Act and the
6 Washington State Constitution.

7 The Statement twice notes that medical professionals not adhering to the Statement may be
8 subject to discipline; three of the four Plaintiffs have been charged with allegations of violations of
9 professional conduct based on their COVID-19 related speech and treatment. The fourth Plaintiff
10 relinquished her Washington State Medical license under duress, noting that other physicians were
11 being charged with violating the Statement. While the Statement was advertised as a benign measure,
12 it has had significant effect on the *entire* regulated community as it has been used to prosecute medical
13 professionals who willingly speak against the Commission’s sanctioned “information.” As a result, it
14 undeniably has a chilling effect on the speech of doctors. Each Plaintiffs’ Charges bely the
15 Commission’s claim that it is not enforcing the Statement.
16

17 Plaintiffs Wilkinson and Cole filed a complaint in the District Court for the Eastern District
18 of Washington *Wilkinson v. Rodgers*, Docket No. 1.23-cv-03035 on March 10, 2023, which included
19 the two Claims alleged herein, but Judge Thomas O. Rice declined to exercise his discretion to hear
20 the state claims and denied Plaintiffs Temporary Restraining Order against the enforcement of the
21 Position Statement. On March 31, 2023, Plaintiffs amended their Complaint and removed all state
22 claims including allegations that Defendants adopted the Statement outside of the Administrative
23 Procedures Act. The remaining claims before the Federal District Court arise under the First
24

1 Amendment of the United States Constitution and allegations of civil rights violations under 42 USC
2 §1983. With the amended Complaint, there is no overlap between the claims in the two cases, and
3 any activity occurring in the Eastern District will not impact this matter as this matter requests that
4 this court enjoin and declare the Position Statement invalid for its adoption outside of the APA and
5 for its violation of Washington Constitution, Article 1, Section 5.

6 **II. STATEMENT OF FACTS**

7 Plaintiffs incorporate herein the complaint and attached exhibits.

8 On September 22, 2021, through a Special Meeting with limited notice and without opportunity
9 for public comment, the Washington Medical Commission (“WMC”) adopted a position statement on
10 *COVID-19 Misinformation* (“Statement” or “Position Statement”), which adopted a standard of care
11 for Washington medical providers’ treatment of COVID-19. The Statement reads: “WMC relies on
12 the U.S Food and Drug Administration approval of medications to treat COVID-19 to be the standard
13 of care.” Compl. Ex. 1. The Statement also includes a prohibition of “misinformation” and
14 “disinformation” as it relates to COVID-19, the vaccines, and its treatment and care. Compl. Ex. 1.

15
16 In the 2021 regular session, the Washington Legislature passed RCW 7.70.040, which became
17 effective on May 10, 2021, four months prior to the adoption of the Statement. The standard adopted
18 by the legislature was the “reasonably prudent” standard, with a “good faith” reliance as a liability
19 protection.¹

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22 ¹ RCW 7.70.040 Findings of Intent, “(1) The legislature finds that the COVID-19 pandemic, a public
23 health crisis, has placed an oversized burden on Washington's health care providers and health care
24 facilities, as they care for communities and families. (2) The legislature further finds that during the
25 pandemic, the law should accurately reflect the realities of the challenging practice conditions. It is
fair and appropriate to give special consideration to the challenges arising during the pandemic, such
as evolving and sometimes conflicting direction from health officials regarding treatment for
COVID-19 infected patients, supply chain shortages of personal protective equipment and testing

1 All Plaintiffs practice in the community outside of a hospital setting.

2 Plaintiff Dr. Michael Turner is a resident of Pasco, Washington, and owns his own practice
3 Michael K. Turner, PLLC. Compl., Turner Decl. ¶ 4. He maintains a license in Washington. Compl.,
4 Turner Decl. ¶ 7, Ex. 1. After receiving complaints regarding website and treatment of COVID
5 positive patients, Dr. Turner was investigated and charged with unprofessional conduct on May 1,
6 2023. Compl., Turner Decl. ¶ 9, Ex. 2. Dr. Turner has suffered reputational damage and has been
7 unable to get medical licenses in other states because investigations have been pending in Washington
8 since Fall 2021. Additionally, the SOC has brought defamatory media attention which has led to
9 tension in the workplace.

10 Plaintiff Dr. Richard Wilkinson is a resident of Yakima, Washington and owns Wilkinson
11 Wellness Clinic in Yakima. Compl., Wilkinson Decl., ¶ 2. After receiving complaints regarding blog
12 posts and treatment of COVID positive patients, Dr. Wilkinson was charged with unprofessional
13 conduct. Compl. Ex. 2. The Statement of Charges (“SOC”) No. M2022-196 was issued on June 7,
14 2022, and addresses Dr. Wilkinson’s public COVID-19 blog statements as follows: “Respondent’s
15 public false and misleading statements regarding the COVID-19 pandemic, COVID-19 vaccines, and
16 public health officials are harmful and dangerous to individual patients, generate mistrust in the
17 medical profession and in public health, and have a wide-spread negative impact on the health and
18 well-being of our communities.” *Id.* Dr. Wilkinson has suffered reputational harm and lost his right to
19 free speech Under Article I, Section 5 of Washington Constitution. Dr. Wilkinson challenged SOC
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23 supplies, and a proclamation on nonurgent procedures resulting in delayed or missed health
24 screenings and diagnoses. (3) The legislature intends, during the period of the declared state of
25 emergency due to the COVID-19 pandemic, to amend the current standard of care law governing
health care providers to give special consideration to additional relevant factors.”

PLAINTIFFS’ MEMORANDUM IN
SUPPORT OF MOTION FOR
DECLARATORY AND INJUNCTIVE RELIEF - 4

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PASCO, WA 99301

1 No. M2022-196, and a hearing was April 3-7, 2023. Dr. Wilkinson has not yet received a decision
2 from the Commission.

3 Plaintiff Ryan Cole is a resident of Idaho and maintains medical licenses in nine states
4 including Washington. Compl. Cole Decl. ¶ 3. Prior to COVID-19, Cole's Washington license
5 allowed him to service Washingtonians who sent skin biopsies to Cole for laboratory review through
6 his laboratory, Cole Diagnostics, he formerly owned in Boise, Idaho. *Id.* ¶ 4. Cole was contacted by
7 Washington residents via telehealth seeking assistance with COVID-19 treatment throughout the
8 pandemic. *Id.* ¶ 9 The Commission issued SOC No.: 2022-207 against Cole on January 10, 2023.
9 The SOC and other investigations have negatively impacted Cole and his practice as Cole has been
10 required to dissolve his Pathology practice, Cole Diagnostics with significant reputational and
11 financial loss.

12
13 Plaintiff Dr. Renata Moon is a resident of Idaho and held a Washington State medical license
14 until March 27, 2023, when she elected not to renew it. ¶ 9. Dr. Moon retains two other state medical
15 licenses. Compl. Moon Decl. ¶ 7. Dr Moon also has taught at Washington State University. *Id.* ¶ 6.
16 During her medical practice in Washington, she had a clean record with no actions against her license.
17 *Id.* ¶ 4. On December 7, 2021, at the request of Senator Johnson of Wisconsin, she testified in
18 Washington, D.C. regarding the COVID vaccines. *Id.* ¶ 11. On January 6, 2023, under duress and
19 concerned that complaints might be lodged against her license based on the Statement, Dr. Moon wrote
20 the Commission to relinquish her license. *Id.* ¶ 8. Further, Dr. Moon's employer, Washington State
21 University, informed her that it was ethically obliged to lodge a complaint against her license because
22 of her testimony at Senator Johnson's hearing. *Id.* ¶ 12. On June 29, 2023, Washington State
23 University informed Dr. Moon that they would not be renewing her contract. *Id.* ¶ 16. Dr. Moon has
24

1 suffered reputation damage, as well as the loss of her medical license and her teaching job based on
2 the Position Statement.

3 III. ARGUMENT AND AUTHORITY

4 A. Legal Standard

5 Plaintiffs seek to enjoin enforcement of the Statement and ask this Court to declare it invalid
6 and unconstitutional. Declaratory action arises under RCW 7.24 and relies on the same three-pronged
7 analysis as does injunctive relief. To obtain a preliminary injunction, a party must show: (1) a clear
8 legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) that the
9 acts complained of are either resulting in or will result in actual and substantial injury to the individual.
10 *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn. 2d 785, 793 (Wash. 1982); see also:
11 *Riddle v. Elofson*, 193 Wn.2d 423, 436 (2019); *Fed. Way Family Physicians, Inc., v. Tacoma Stands*
12 *Up for Life*, 106 Wash.2d 261, 265; and *Washington Fed'n of State Emps., Council 28, AFL-CIO*
13 *v. State*, 99 Wn.2d 878, 887-88, (1983). "The primary purpose of a preliminary injunction is to
14 preserve the status quo until such time that a trial on the merits can take place." *Eash v. Russell*, No.
15 31059-1-III, 2013 Wash. App. LEXIS 2899, at *3 (Ct. App. Dec. 24, 2013) quoting *State ex rel. Pay*
16 *Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940).

18 "Courts have generally found remedies to be inadequate in three circumstances: (1) the injury
19 complained of by its nature cannot be compensated by money damages, (2) the damages cannot be
20 ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the
21 injury is of a continuing nature." 15 LEWIS H. ORLAND & [*211] KARL B. TEGLAND,
22 WASHINGTON PRACTICE: TRIAL PRACTICE, CIVIL § 646, at 468-69 (1996)."
23 *Kucera v. DOT*, 140 Wn.2d 200, 210-11, 995 P.2d 63, 69 (2000). In determining whether the party

1 has a clear legal and equitable right, the court examines the likelihood the party will prevail on the
2 merits. *Id.*, at 216. Here, injunctive relief should precede, or be issued contemporaneously with, this
3 Court's issuance of declaratory relief to protect Plaintiffs' medical licenses, which are already at
4 jeopardy—said another way, Plaintiffs *have been* harmed and remain at high risk of greater harm,
5 barring an injunction and a future declaration that the Statement is invalid and unconstitutional.

6 **B. The Plaintiffs are likely to prevail on the merits because the Washington Medical
7 Commission's Position Statement was not properly promulgated and because it is
8 facially unconstitutional.**

9 The WMC is the state agency charged with issuing licenses for physicians, surgeons,
10 Physician's Assistants, and other medical professionals, taking disciplinary action, where needed, and
11 the related/underlying rulemaking; the Commission held this authority prior to its adoption of the
12 challenged Statement. *See*: RCW 18.71, 18.120, 18.122, and 18.130. The WMC's authority includes
13 the power to "adopt, amend, and rescind such rules as are deemed necessary to carry out" their role,
14 and to "adopt standards of professional conduct or practice." RCW 18. 130.050(1), (14); *See also*
15 18.71.017. "Whether an agency's action is rule making, despite bearing some other label, is
16 determined under the APA." *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d
17 316, 322, 12 P.3d 144, 147 (2000). As a state agency, rules used by the WMC to regulate Physicians
18 and Physicians Assistants must comply with the APA. *See Ocosta Sch. Dist. v. Brouillet*, 38 Wn. App.
19 785, 791, 689 P.2d 1382, 1385 (1984) ("Rules are invalid unless adopted in substantial compliance
20 with the APA.").

21 **1. The Position Statement is a Significant Legislative Rule which must comply with the APA.**

22 Unlike the Position Statement, some rules may forgo the rule-making process. Rules which are
23 merely procedural or interpretive are exempt from the requirement that the public have an opportunity
24

1 to comment. RCW 34.05.328(5)(c). “A ‘procedural rule’ is a rule that adopts, amends, or repeals (A)
2 any procedure, practice, or requirement relating to any agency hearings; (B) any filing or related
3 process requirement for making application to an agency for a license or permit; or (C) any policy
4 statement pertaining to the consistent internal operations of an agency.” RCW 34.05.328(5)(c)(i). “An
5 ‘interpretive rule’ is a rule, the violation of which does not subject a person to a penalty or sanction,
6 that sets forth the agency’s interpretation of statutory provisions it administers. RCW
7 34.05.328(5)(c)(ii). On the other hand, a ‘significant legislative rule’ like the Position statement are
8 rules which adopt “substantive provisions of law pursuant to delegated legislative authority, the
9 violation of which subjects a violator of such rule to a penalty or sanction;” “establishes . . . any . . .
10 standard for the . . . suspension or revocation of a license;” or makes new or significantly amends
11 policies or regulatory programs. RCW 34.05.328(5)(c)(iii). The adoption of a standard of care, by its
12 very nature, is a standard, the violation of which implicates the suspension or revocation of a license.

13
14 The APA requires that all significant legislative rules undergo rulemaking procedures,
15 including providing the public notice of the proposed rule and an opportunity to comment on the
16 proposal. RCW 34.05.320, .325, 328(1)(c). “These procedures allow members of the public to
17 meaningfully participate in the development of agency policies that affect them.” *Nw. Pulp & Paper*
18 *Ass’n v. Dep’t of Ecology*, 200 Wn.2d 666, 672, 520 P.3d 985, 988 (2022); RCW 34.05.001. “Full
19 consideration of public comment prior to agency action is both a statutory and constitutional
20 imperative.” See RCW 34.05.335(2); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510, 516
21 (1987); *Ocosta Sch. Dist.*, 38 Wn. App.at 791.

22
23 Through the Statement, the WMC expressly denied the physicians, physician assistants, and
24 the public an opportunity to comment *prior to* the adoption of the Statement. *See*: WMC 9/22/2021

1 Meeting available at: <https://www.youtube.com/watch?v=P5qDoNWfdhI>. Time stamp 0:41-0:48. As
2 the Statement adopts a standard of professional conduct or practice, i.e. a standard of care, the violation
3 of which exposes practitioners to complaints and discipline, it is a significant legislative rule, requiring
4 compliance with RCW 34.05.328. The APA's procedural requirements include solicitation of public
5 comments *prior to* filing with the code reviser a notice of proposed rule-making. RCW 34.05.310.
6 Additionally, for "[a]t least twenty days before the rule-making hearing at which the agency receives
7 public comment regarding adoption of a rule, the agency shall cause notice of the hearing to be
8 published in the state register. The publication constitutes the proposal of a rule." RCW 34.05.320.
9 The WMC undertook neither action prior to its adoption of the Statement. Nor did it adopt the
10 Statement as an emergency rule which would require that the statement be filed with the code reviser
11 and last only 120 days without utilizing the normal procedures. RCW 34.05.328(5)(b)(1); RCW
12 34.05.350. These procedural flaws render the Statement void *ab initio* as the Statement was adopted
13 non-compliant with the APA.
14

15 Additionally, the Washington Medical Commission bypassed all other rule making procedures
16 required by RCW 34.05.328 before it implemented the Statement as it failed to (1) identify the statute
17 with its goals and specific objectives it seeks to implement. RCW 34.05.328(1)(a); (2) analyze the
18 need for the rule or the possible alternatives. RCW 34.05.328(1)(b); (3) provide notice of proposed
19 rule making with a preliminary cost-benefit analysis of both qualitatively and quantitatively which
20 showed that probable benefits are greater than the costs. RCW 34.05.328(1)(c-d); (4) determine
21 whether it was the least burdensome alternative. RCW 34.05.328(1)(e); (5) state whether it required
22 those regulated to violate other state or federal law. RCW 34.05.328(1)(f); (6) determine whether
23
24

1 private entities were more regulated than public entities. RCW 34.05.328(1)(g); (7) determine whether
2 it differed from other regulation of same activity. RCW 34.05.328(1)(h).

3 As the Statement was adopted outside of the Administrative Procedures Act requirements for
4 such a Rule the adoption of the Rule and its enforcement violate Plaintiffs' legal and equitable rights.

5 **2. The Statement also violates Article 1, Section 5 of the Washington Constitution and is a**
6 **Prior Restraint.**

7 The Statement must also be overturned because it facially infringes the Plaintiff Doctors' rights
8 to free speech under the Washington Constitution as it is a prior restraint and is a content-based
9 regulation infringing on Plaintiffs' protected speech rights. Plaintiffs' facial challenge is ripe and
10 proper, and Plaintiffs, having suffered injury, have a basis to challenge the Statement as applied to
11 them. This invasion of Plaintiffs' rights to speech have been invaded and cause the challenged harm.

12 The right of free speech is a broad right of the people and is protected by both our Federal and
13 State Constitutions. "Suppression of speech as an effective police measure is an old, old device,
14 outlawed by our Constitution." *Watts v. United States*, 394 U.S. 705, 712 (1969). Article I, Section 5
15 of the Washington Constitution states, "Every person may freely speak, write and publish on all
16 subjects, being responsible for the abuse of that right." WA Const. art. I, § 5. "The right to free speech
17 bars the government from dictating what people see, read, hear, or speak." *State v. Hammerquist*, No.
18 75949-3-I, 2018 Wash. App. LEXIS 1039, at *7 (Ct. App. Apr. 30, 2018); *Ashcroft v. Free Speech*
19 *Coal.*, 535 U.S. 234, 245, 122 S. Ct. 1389, 1399, 152 L.Ed.2d 403, 418 (2002). The "right to receive
20 information and ideas, regardless of their social worth . . . is fundamental to our free society." *Fed.*
21 *Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 268, 721 P.2d 946, 950 (1986).
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1 Prior restraints are “official restrictions imposed upon speech or other forms of expression in
2 advance of actual publication.” *State v. Noah*, 103 Wn. App. 29, 41 (Wash. Ct. App. 2000). They are
3 also “presumptively unconstitutional unless they deal with non-protected speech.” *Id.* The Washington
4 Supreme Court has declared that:

5 The Washington Constitution is less tolerant of overly broad restrictions on speech than
6 the federal First Amendment and finds that regulations that sweep too broadly chill
7 protected speech prior to publication, and thus may rise to the level of a prior restraint,
8 while the United States Supreme Court considers the overbreadth doctrine strong
9 medicine, employing it only as a last resort. A prior restraint is an administrative or
10 judicial order forbidding communications prior to their occurrence. Simply stated, a
11 prior restraint prohibits future speech, as opposed to punishing past speech. A court
12 may strike down prior restraints even though the particular expression involved could
13 validly be restricted through subsequent criminal punishment.
14 *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 753, 871 P.2d 1050, 1052 (1994).

15 Content-based regulations target speech based on its communicative content. “Under the First
16 Amendment, and under Washington Constitution’s Article I, Section 5, the government has no power
17 to restrict expression because of its message, its ideas, its subject matter, or its content.” *Catlett v.*
18 *Teel*, 15 Wn. App. 2d 689, 706, 477 P.3d 50, 59 (2020) (internal quotations omitted). Such “content-
19 based restrictions on speech are presumptively unconstitutional and are thus subject to strict scrutiny.”
20 *Id.* In Washington State, even content-neutral time, place, and manner restrictions must meet strict
21 scrutiny and must be narrowly tailored to serve a compelling government interest. *State v. Noah*, 103
22 Wn. App. 29, 41 (2000). A compelling government interest is of the highest order and must be higher
23 than a mere significant government interest. *Id.*

24 The Position Statement provides, “The WMC does not limit this perspective to vaccines but
25 broadly applies this standard to all misinformation regarding COVID-19 treatments and preventive
26 measures such as masking. Physicians and Physician Assistants, who generate and spread COVID-19

1 misinformation, or disinformation, erode the public trust in the medical profession and endanger
2 patients.” See: Exh. 1. Clearly, the Position Statement is a content based prior restraint. The words
3 misinformation and disinformation target particular messages, ideas, subject matter, and content
4 disapproved of by government officials – specifically information that is not first generated and spread
5 by government officials, agencies, or approved scientists. The imprimatur of the Statement is not
6 conduct based, but speech based. The Statement targets the generation and spread of “unapproved”
7 ideas— not treatment, prescriptions, or techniques related to a particular patient — but what the doctor
8 is saying about the same. By targeting the generation and dissemination of information, the Statement
9 suppresses speech before it is uttered and is a textbook example of a prior restraint. Because the
10 position statement targets a *type* of speech, and because that *type* of speech is not well-defined, it is
11 presumptively unconstitutional.

12
13 As a prior restraint, the Position Statement, if it was duly promulgated, and it was not, must
14 pass strict scrutiny to be valid, and it cannot meet that threshold. The WMC states that the purpose of
15 the policy is “for the betterment of the public health.”² While states have the right to create laws and
16 policies pertaining to public health, these police powers must be used within the framework of the
17 Constitution. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (“If the First Amendment means
18 anything, it means that regulating speech must be a last--not first--resort.”) (quoting *Thompson v.*
19 *Western States Medical Ctr.*, 535 U.S. 357, 152 L. Ed. 2d 563, 122 S. Ct. 1497 (2002). The debate
20 over public policy is deserving of the highest protections.

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23 ² *FSMB: Spreading COVID-19 Vaccine Misinformation May Put Medical License at Risk*, FED’N OF
24 ST. MED. BDS., fsmb.org (July 29, 2021), <https://www.fsmb.org/advocacy/news-releases/fsmb-spreading-covid-19-vaccine-misinformation-may-put-medical-license-at-risk/> (Last visited July 3, 2023).

1 Through this policy, the WMC is derailing that debate, especially when it comes to the right
2 of the public to hear from the experts, i.e., medical professionals. Instead, the WMC allows itself to
3 speak freely, touting its self-claimed expertise and the expertise of other government agencies and
4 officials, but denies other medical professionals the same right. In other words, the WMC has
5 preempted the field of information that the public may hear by limiting the speech of medical
6 professionals requiring that the speech fall within the approved constraints.

7 Debate over the pandemic policies foisted upon both medical professionals and the public are
8 not granted a special exemption under the First Amendment; as the Supreme Court has stated, “even
9 in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese v. Cuomo*,
10 141 S. Ct. 63, 68, 208 L.Ed.2d 206, 210 (2020). As *Conant* emphasizes, public health policies are
11 government policy open for vigorous public debate, and are protected by the First Amendment.
12 *Conant*, at 634-35. Without the ability to speak about these policies, individuals seeking medical
13 treatment cannot be assured that the best measures are employed in their care. Nor can the people have
14 confidence that the government is doing its most important job--protecting the rights of a free people.
15 After all, open debate is the bulwark of a free society. *Richmond Newspapers v. Virginia*, 448 U.S.
16 555, 587 n.3, 100 S. Ct. 2814, 2833, 65 L.Ed.2d 973, 996 (1980) (quoting *Saxbe v. Wash. Post Co.*,
17 417 U.S. 843, 862-63, 94 S. Ct. 2811, 2821, 41 L.Ed.2d 514, 527 (1974)). It is only through the sieve
18 of open and public debate that truth is realized in society, and the best debate for this purpose is a
19 debate amongst experts in the field. Thus, limitations on the debate of health policies are not a
20 compelling government interest.
21

22
23 Even if limiting speech to protect the public health constitutes a compelling interest, the
24 Statement is not narrowly tailored; therefore, the policy is constitutionally impermissible. “The First

1 Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for
2 what the government perceives to be their own good.” *Sorrell*, 564 U.S. at 577 (quoting *Discovery*
3 *Network*, 507 U.S.,484, 426, 113 S. Ct. 1505, 123 L. Ed. 2d 711, 99 (1996)). It is not the government’s
4 place to decide the value of speech; that is the purview of the audience, nor are divergent views on a
5 topic to be suppressed by the government as is the WMC with the policy. *Id.*, at 578-79. Thus, the
6 generation of information and the discussion of early treatments for COVID-19 cannot be proscribed,
7 nor can discussion of a newly formulated vaccine that lacks long term safety data. For the same reason,
8 the discussion of mask use, whether policies are tyrannical, or the accuracy of the PCR test cannot be
9 proscribed. Mere talk cannot be considered dangerous. *Id.* And the generation of information is
10 certainly not dangerous. Because proscribing the generation and dissemination of disfavored speech
11 cannot be a narrowly tailored method of advancing public health, the policy cannot stand as it violates
12 the Washington Constitution.

14 Finally, because the Statement implicates the professional’s license, and because “a
15 professional license is property and is protected by the Constitution,” regulation of speech “must be
16 merely incidental as it pertains to the treatment of a particular patient, or noncontroversial factual
17 information required in advertising.” *Mishler v. Nevada State Bd. Of Medical Examiners*, 896 F.2d
18 408, 409 (9th Cir. 1990) and *Conant v. Walters*, 309 F.3d 629, 635 (9th Cir. 2002). “In the marketplace
19 of ideas, few questions are more deserving of free-speech protection than whether regulations affecting
20 health and welfare are sound public policy.” *Conant*, at 634. “[T]he danger of content-based
21 regulations in the fields of medicine and public health, where information can save lives,” is
22 particularly high. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374 (2018)
23 (referred to as “*NIFLA*”) (internal quotation marks and citations omitted).

1 As the Position Statement violates both the APA and the Washington Constitution, Plaintiffs
2 are likely to prevail on the merits.

3 **3. *Plaintiffs' rights have been invaded and this invasion of rights has resulted in actual and***
4 ***substantial injury which this Court can remedy through the requested relief.***

5 Plaintiffs have been subjected to, or threatened with, disciplinary proceedings based on this
6 Position Statement, which puts their property interest in their medical license at risk and causes
7 reputational harm. Additionally, their speech rights have been chilled. The SOCs clearly show that
8 the Position Statement is being enforced against Plaintiffs. Drs. Wilkinson and Cole have charges
9 implicating their speech, and Dr. Moon has been threatened by an arm of the State of Washington, her
10 employer, Washington State University, with complaints to the Commission regarding her speech. All
11 but Dr. Moon have charges against them regarding the use of ivermectin. Drs. Cole and Moon have
12 lost their jobs based on speech. Dr. Turner cannot get licenses in other states based on the actions of
13 the Commission in enforcing this Position Statement. All doctors have suffered reputational harm,
14 and all doctors have had their speech chilled.

15 The loss of speech rights cannot be remedied through monetary compensation. "The loss of
16 First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable
17 injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547, 565 (1976). Plaintiffs
18 have faced discipline, or the threat of discipline based on their speech under the guise of a Rule that
19 was illegally adopted and enforced. The fact that they must choose between speaking and facing
20 discipline is an irreparable harm. Nothing prevents the WMC from investigating further complaints or
21 issuing additional charges against Plaintiffs. Moreover, Plaintiffs have suffered this harm due to their
22 viewpoint. Plaintiffs have suffered and are suffering substantial and irreparable harm through the
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1 WMC's illegal adoption and enforcement of a Statement that is facially invalid. This Court may
2 remedy Plaintiffs' harm by issuing the relief sought.

3 **CONCLUSION**

4 Plaintiffs are entitled to preliminary injunctive and declaratory relief. Plaintiffs have a clear
5 and equitable legal right to be regulated only through and by duly promulgated rules and are likely to
6 succeed on the merits of their case based on the WMC's failure to adhere to APA requirements and
7 for the WMC's violation and chilling of Plaintiffs' free speech rights. Plaintiffs have suffered an
8 invasion of their rights as the Position Statement is facially an invasion of their free speech rights, an
9 injury that is irreparable and substantial. For these reasons, the Plaintiffs respectfully ask the court to
10 grant a preliminary or permanent injunction and declare the Position statement unconstitutional.
11

12 Dated this 11th Day of July 2023.

13 **SILENT MAJORITY FOUNDATION**

14 /s/Simon Peter Serrano

15 Simon Peter Serrano, WSBA No. 54769

16 /s/Karen L. Osborne

17 Karen L. Osborne, WSBA No. 51433

18 5238 Outlet Dr.

19 Pasco, WA 99301

20 (509)567-7083

21 pete@smfjb.org

22 karen@smfjb.org

23 *Counsel for Plaintiffs*

24 *Brian Curless* *WSBA*
#39061

CERTIFICATE OF SERVICE

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I hereby certify, under penalty of perjury under the laws of the state of Washington, that on this date a true and correct copy of this Memorandum In Support of Motion for Injunctive and Declaratory Relief on the Washington Attorney General’s Office, as Counsel for the Washington Medical Commission were served via electronic mail, as required by the Washington Attorney General on its website, *Electronic Service of Original Summons & Complaint* (<https://www.atg.wa.gov/electronic-service-original-summons-complaint>), at: serviceATG@atg.wa.gov.

DATED this of 11th day of July 2023, at Camas, Washington.

/s/Karen L. Osborne
Karen L. Osborne, WSBA No. 51433

SILENT MAJORITY FOUNDATION
5238 Outlet Dr.
Pasco, WA 99301

Attorney for Plaintiffs

 WSBA #
39061

JUL 13 2023

FILED

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR BENTON AND FRANKLIN COUNTIES

MICHAEL K. TURNER, an individual,
RICHARD WILKINSON, an individual;
RYAN N. COLE, and an individual;
RENATA S. MOON, an individual;

Plaintiffs,

v.

WASHINGTON MEDICAL COMMISSION,
a Washington State Agency,

Defendant

No. 23-2-01316-03


GR17 AFFIDAVIT RE:
FAXED MATERIALS

I, Brian Anderson, Attorney, with Anderson Law, PLLC, declare and state the following:

The attached is a digital transmission of the Memorandum In Support of Plaintiffs' Motion for Preliminary Injunction and Declaratory Relief submitted by Simon Peter Serrano, attorney for Plaintiffs, in the above-entitled matter.

The attached document, prepared for filing this 12th day of July, 2023, and consisting of 17 pages, including this affidavit page, has been examined and determined by me to be complete and legible.

Dated: 7/12/2023



WSBA # 39061