No. 40061-1

Court of Appeals, Division III
Of The State of Washington

RICHARD WILKINSON, an individual,
Petitioner-Appellant,

v.

WASHINGTON MEDICAL COMMISSION, a Washington State Agency,
Respondent-Appellee,

On Appeal from
the State of Washington Medical Commission. No. M2022-196
and the Superior Court
of the County of Yakima No. 23-2-02237-39

Appellant's Opening Brief

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I. INTRODUCTION

This matter is before this court on several errors by the Washington State Department of Health Washington Medical Commission ("Commission" or "Respondent") in its issuance of a *Findings of Fact, Conclusions of Law, and Final Order* ("Order") in Master Case No.: M2022-196, *In the Matter of Richard S. Wilkinson, M.D., Credential No. MD.MD.0016229*. AR 4980-5016. Appellant challenges the Order for several reasons, described below.

The challenged errors include: (1) the Commission's failure to address Appellant's Constitutional challenges raised below (*e.g.,* Appellant challenged the Commission's regulation of his speech under the First Amendment of the United States Constitution and received no substantive analysis from the presiding hearing officer on the matter); (2)

the Commission's improper penalization of Appellant by requiring his attendance at a Physician Assessment and Clinical Education ("PACE") without proper notice of and an opportunity to challenge the requirement as required by Revised Code of Washington ("RCW") Section 18.130.170; (3) the retaliatory nature and enforcement of the Commission's COVID-19 Misinformation Position Statement ("Statement") to Appellant's speech and the Commission's related selective enforcement its Statement and the Uniform Disciplinary Act ("UDA"); (4) the Commission's failure to support the Order by clear and convincing evidence; and (5) the Commission's violation of .

Appellant asserts these errors, leaving the matter ripe for this Court's review.

II. ASSIGNMENT OF ERROR

The Errors assigned to this case include:

1. The Commission failed to address Appellant's claims raised under the First Amendment of the United States Constitution;
2. The Commission failed to provide notice and an opportunity to challenge his punishment of the Physician Assessment and Clinical Education (PACE) program at the University of California San Diego School of Medicine in advance the Commission's *Findings of Fact, Conclusions of Law, and Final Order* issued on August 12, 2023; and
3. The Commission failed to support the Order based on clear and convincing evidence.
4. Appellant asserts the following claims, which arose *after* the hearing and addresses these matters herein:
    a. Appellant was retaliated against through the Commission's regulation of his speech, which,

inter alia, culminated in an Order that restricted his license and prohibited him from prescribing specific medications and fined Appellant in the amount of $15,000; and

b. The Commission violated RCW 34.05.570(3)(a)-(d), (h), (i).

III. STATEMENT OF THE CASE

Appellant is a practicing medical doctor ("M.D."), a license he has held since 1977. AR 4985. Appellant has had limited disciplinary history throughout his prior forty-five years of practice. That changed in 2022, when the Commission determined that physicians, including Appellant, who dared discuss or use certain FDA approved drugs to treat COVID-19 which were not authorized for use under the Emergency Use Authorization Act, 21 U.S.C. § 360bbb-3, including Ivermectin, should be disciplined under its COVID-19

Misinformation Position Statement ("Statement"), which it adopted as a standard of care on September 22, 2021. AR 004849.

That the Commission adopted the Statement as a standard of care is clear on the Statement's face as it uses language, including: "standard of care as established by medical experts, federal authorities and legitimate medical research are potentially subject to disciplinary action;" state that the Commission "supports the position taken by the Federation of State Medical Boards (FSMB) regarding COVID-19 vaccine misinformation;" and discusses the Commission's general reliance "on the U.S Food and Drug Administration approval of medications to treat COVID-19 to be the standard of care." *Id*.; AR 004851-52. The Commission enforces this nebulous "standard of care" against Appellant for his advocacy for the treatment of COVID-19 with Ivermectin

and for his treatment of several patients with the same disease with Ivermectin.

When the Commission enforced the Statement against Appellant's *advocacy* for the treatment of COVID-19 with Ivermectin, the Commission infringed on Appellant's right to free speech protected by the First Amendment of the United States Constitution and its corollary protections under the Washington Constitution, Article 1, Section V. In so doing, the Commission acknowledged that Appellant asserted this right as "Respondent argued that the Commission is attempting to regulate speech in a way that is prohibited by the U.S. Constitution," yet the Commission failed to substantively address this claim in the Order. AR 004980 – 5013.

> After a five-day hearing the Commission determined that Respondent made numerous false and misleading statements on his blog regarding the COVID-19 pandemic, COVID-19 vaccines, and public health officials. These

> statements—which in context can only be characterized as constituting the practice of medicine—were harmful and dangerous to individual patients, generated mistrust in the medical profession and in public health, and had a widespread negative impact on the health and well-being of the community.

AR 004987.

The Commission further held that "Much of the information that the Respondent spread via his blog was not factual, scientifically grounded, or consensus driven." *Id.* Yet, the Commission offered no basis for this conclusory statement, a statement that directly and substantially impacted Appellant's freedom by infringing on his medical license, his right to free speech, and ignored Appellant's proffered scientific basis for his conclusion that Ivermectin was an effective early/preventative treatment of COVID-19. The Commission also found that physicians "must share information that is factual, scientifically grounded, and

consensus-driven for the betterment of the public" without definition or without substantiation. *Id.*

The Commission also concluded that Appellant "spread inaccurate information via his blog, relying on his status as a physician to spread the misinformation" and claimed that he made "false statements," including "Ivermectin is effective in preventing or treating a COVID-19 infection." *Id.* Finally, the Commission concluded "Here, the Respondent failed to conform his COVID treatment to what the evidence showed was appropriate at the time. Consequently, the Respondent's rationale for the care he provided was insufficient and not credible. Thus, the Respondent failed to meet the standard of care for a Washington physician." AR 005002. Yet, the Commission did not prove such allegations, let alone, by the requisite standard of clear and convincing evidence. *See: Nguyen v. Department of Health*, 144 Wn. 2d 516, 534 (2001),

cert. denied, 535 U.S. 904 (2002). In fact, none of the Commission's claims was proven by a preponderance of evidence, let alone by clear and convincing evidence. The Commission cited limited scientific evidence that supported its conclusions that ivermectin was dangerous and gave no critical review of that evidence. AR 007739-42. The majority of Respondent's evidence was unsupported conclusions. *See* AR 007110-7116; 007360; 007361; 007364; 007387; 007398; 007406; 007413; 007433-34; 007436-39; 007442; 007444; 007448; 007455-56; 00767; 007471; 007483; 007739-42. In fact, the FDA has been judicially required to remove the information found in Exhibit D-38 after Petitioner's hearing took place. AR 007110-12; *See* Stipulation of Dismissal, *Bowden v. HHS*, No. 3:22-cv-184 (S.D. Tex. March 21, 2024). Thus, the Commission failed to meet its standard of proof for making its findings. *See:* RCW 34.05.570(3)(a)-(d), (h), (i).

IV. ARGUMENT

A. The Commission failed to address Appellant's claims raised under the First Amendment of the United States Constitution.

As addressed above, Appellant has long alleged that the Commission violated his First Amendment rights, having enforced its Position Statement against him for *speech* and treatment. An abbreviated history of that enforcement (as limited to the First Amendment issue) follows:

1. The Commission issued the Statement of Charges ("SOC") on June 9, 2022, against Appellant. AR 000002 – 000016.

2. Appellant filed a Motion to Dismiss on February 28, 2023, requesting dismissal of all allegations and claims based on speech, specifically paragraphs 1.7-1.9. AR 000071-000076.

3. On March 31, 2023, the presiding officer denied Appellant's summary judgment motion concluding that "the Presiding Officer's authority does not include motions to dismiss pertaining to standards of practice or where clinical expertise is necessary," RCW 18.130.050 (10). basing his lack of authority on RCW 18.130.050(10), RCW 18.130.040(2)(b), and RCW 18.130.020(2), (11). AR 004972-74

4. A hearing, at Appellant's request, was held April 3-7, 2023.

5. On August 15, 2023, Appellant was served the Findings of Fact, Conclusions of Law and Final Order ("Order"), dated August 12, 2023. The Order claims Dr Wilkinson violated RCW 18.130.180(1), (4), and (13). AR 005004-005005. Paragraphs 1.6 – 1.8.5, the Order quote or paraphrase Appellant's blog in some detail with a heading of "The Respondent's Public Statements," and the Order

concludes that Appellant's speech "in context can only be characterized as constituting the practice of medicine—were harmful and dangerous to individual patients, generated mistrust in the medical profession and in public health and had a widespread negative impact on the health and well-being of the community." AR 004987-88. Paragraph 1.7 concludes: "Much of the information that the Respondent spread via his blog was not factual, scientifically grounded or consensus driven." *Id.* All findings in these paragraphs are solely about speech and do not include any direct interactions with patients that could be construed as conduct.

The Commission's enforcement of its Statement *against* Appellant leaves the matter ripe for this Court's review under the First Amendment, which provides, in part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. 1. This amendment is

incorporated to the states through the Fourteenth Amendment. *Stromberg v. California,* 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) ("[T]he conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech."). The Washington Constitution's corollary right to freedom of speech reads, "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right. Const. art. 1, § 5. The free speech rights protected under the Washington Constitution are often greater than those protected by the United States 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.").

Appellant's free speech rights have been abridged by the Commission, through the Order, and, "[s]uppression of speech as an effective police measure is an old, old device, outlawed by our Constitution." *Watts v. United States*, 394 U.S. 705, 712 (1969). Despite the Supreme Court's clear directive to protect speech, the Commission targeted Appellant's speech based on its content – an impermissible act under the First Amendment of the US Constitution and the Washington Constitution. Controlling federal caselaw is clear: "As a general matter, such laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *National Inst of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2371, 201 L. Ed. 2d 835 (2018); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1145 (W.D. Wash. 2003) ("the First Amendment precludes the

government from proscribing speech because it disapproves of the ideas expressed." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382 (1992)).

Here, the Commission's Statement and its Order were not narrowly tailored, and neither the Statement nor the Order serves a compelling interest. The Commission failed to make such a showing. Additionally, because the Order pertains to the complete silencing of certain COVID-related speech with which the Commission or other governing authorities disagree, the Statement is a prior restraint under the Washington State Constitution and is therefore prohibited in Washington, as argued below. One need only look at the Statement on its face as it offers no justification for its adoption. AR 004849. Through the Statement, the Commission made conclusory statements to advance a political position to "support[] the position taken by the

Federation of State Medical Boards" and to enforce the same. *Id.* Moreover, through the Order, the Commission did no more than adopt unsupported conclusions that Appellant's speech, "in context can only be characterized as constituting the practice of medicine—were harmful and dangerous to individual patients." AR 4987. It is these egregious violations of his rights that Appellant raised below, with each allegation being ignored by the presiding officer, and, which the Commission summarily denied. The presiding officer and the Commission's conduct subject this matter to review by this Court as Appellant has a right for consideration of his constitutional claims.

1. Washington strongly opposes prior restraints such as the Commission's Statement and Order.

In Washington State, many content-based restrictions are considered prior restraints. Prior restraints are "official

restrictions imposed upon speech or other forms of expression in advance of actual publication." *State v. Noah*, 103 Wn. App. 29, 41 (Wash. Ct. App. 2000). Prior restraints are "presumptively unconstitutional unless they deal with non-protected speech." *Id.* The Washington Supreme Court has declared that:

> The Washington Constitution is less tolerant of overly broad restrictions on speech than the federal First Amendment and finds that regulations that sweep too broadly chill protected speech prior to publication, and thus may rise to the level of a prior restraint, while the United States Supreme Court considers the overbreadth doctrine strong medicine, employing it only as a last resort. A prior restraint is an administrative or judicial order forbidding communications prior to their occurrence. Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech. A court may strike down prior restraints even though the particular expression involved could validly be restricted through subsequent criminal punishment.

Soundgarden v. Eikenberry, 123 Wn.2d 750, 753, 871 P.2d 1050, 1052 (1994). Additionally, content-neutral time, place, and manner restrictions must meet strict scrutiny and must be narrowly tailored to serve a compelling government interest. *Noah*, 103 Wn. App. at 41. A compelling government interest is of the highest order and must be higher than a mere significant government interest. *Id.*

As prior restraints are not tolerated in Washington, the Commission may not use Appellant's speech as a pretense for disciplining him or considering him a threat to public health and safety simply because it disapproves of the content of his speech. In fact, discussion of regulations affecting health and welfare are one of the most deserving of free speech protections. *NIFLA*, 138 S. Ct. at 2374.

Regulation of speech within the context of a licensing authority may occur **only** if it is incidental to actions it may

regulate, such as the treatment of an individual patient. *See Id.*; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566-67, 131 S. Ct. 2653, 2664-65, 180 L.Ed.2d 544, 556-57 (2011); *Lowe v. SEC*, 472 U.S. 181, 232, (1985) (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."); *Tingley v. Ferguson,* 47 F.4th 1055, 1074 (9th Cir. 2022); *Conant v. Walters*, 309 F.3d 629, 634-35 (9th Cir. 2002); *See also NIFLA*, 138 S. Ct. at 2374 ("Speech is not unprotected merely

because it is uttered by 'professionals.'"); *Lowe*, 472 U.S. at 231("Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.") The Ninth Circuit has found that, "In the marketplace of ideas, few questions are more deserving of free-speech protection than whether regulations affecting health and welfare are sound public policy." *Conant* at 634.

Even as it concerns discussions between doctor and patient, if the discussions do not directly implicate care of that patient, the speech is protected. *Id.* The "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." *Fed. Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 268, 721 P.2d 946, 950 (1986). Finally, even false public speech is fully

protected regardless of whether the speaker knows or believes it is false when spoken in a public forum. *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.). Thus, outside of the narrow circumstances of direct patient treatment, doctors are public speakers and receive the robust protection of the both the Washington and United States Constitutions.

The Commission, through the Order, regulated, censured, and punished Appellant for his public speech (*i.e.*, on his blog and in public meetings), having concluded:

1. That the blog constituted the practice of medicine without explaining how it was tantamount to patient care. AR 004987.
2. That the blog was a danger to individual patients without stating which patients and how Appellant's speech implicated patient care; *Id.*
3. That the blog generated mistrust in the medical profession without providing any evidence of a single person who mistrusted the medical profession based upon reading Appellant's blog; *Id.*
4. That the blog had a widespread negative impact on the health and well-being of the community without offering any evidence to prove this claim. *Id.*

Despite the Commission's lack of explanation of or citation to any authority to regulate speech, let alone providing authority to regulate Appellant's speech in his blog or in a community

meeting, the Commission nonetheless regulated such speech contrary to constitutional prohibitions.

Additionally, the Commission claims that all speech by doctors must be "consensus driven" without providing support for this position. App. at 0036. AR 004849. This type of regulation is constitutionally prohibited. *See:* U.S. Const. amend. 1. If speech may be punished when it is not lock-step with the consensus, such regulation is, by definition, content based, and content-based restrictions must be narrowly tailored to meet a compelling purpose. As the Commission failed to demonstrate how requiring consensus-based speech meets these thresholds and how such regulation does not constitute a prior restraint, the regulation fails and Appellant's Order should be overturned.

B. The Washington Medical Commission violated Appellant's due process rights by failing to provide Appellant notice and a fair hearing on the Order's requirement that Appellant undergo a physical, cognitive, and psychological examination.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (citing U.S. Const. amends. V, XIV). "A medical license is a constitutionally protected property interest which must be afforded due process." *Nguyen*, 144 Wn.2d at 523. "[T]he applicability of the constitutional due process guaranty is a question of law subject to de novo review." *Durland v. San Juan County*, 182 Wn.2d 55, 70, 340 P.3d 191 (2014).

> The United States Supreme Court has held that the right to use statutory adjudicatory procedures provided by state law constitutes a species of

> property protected by the due process clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-31, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). There, the Court determined that Logan had been deprived of a protected property interest when his claim under the Illinois Fair Employment Practices Act (FEPA) was terminated due to a state official's failure to comply with statutorily mandated procedure. *Logan*, 455 U.S. at 433.

Nielsen v. Dep't of Licensing, 177 Wash. App. 45, 55, 309 bP.3d 1221, 1226 (2013).

"In a case involving disciplinary proceedings . . . the charging document must state the respondent's acts or omissions in sufficient detail to inform the respondent of the nature of the allegations of misconduct. *Neravetla v. Dep't of Health*, 198 Wn. App. 647, 664-65, 394 P.3d 1028, 1038 (2017) (internal quotations omitted). The allegations against a medical professional must be "clear and specific . . . and be afforded an opportunity to anticipate, prepare, and present a defense." *Id.* (internal quotation omitted).

Statutory interpretation requires *de novo* review. *In re Dependency of D.L.B.*, 188 Wn. App. 905, 916, 355 P.3d 345, 352 (2015). Any construction "must avoid constitutional deficiencies." *Id.* "The purpose of statutory interpretation is to carry out the legislature's intent." *Id.* "If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words." *Id.*

> Statutory interpretation starts with the statute's plain meaning. *State v. Slattum*, 173 Wn. App. 640, 649, 295 P.3d 788 (2013). "If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words." *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 317, 190 P.3d 28 (2008). "'In determining the plain meaning of a provision, we look to the text of the statutory provision in question, as well as the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *State v. Garcia*, 179 Wn.2d 828, 836-37, 318 P.3d 266 (2014) (internal quotation marks omitted) (quoting *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)). We give

> effect to the plain meaning of the statute if it is plain on its face. *Slattum*, 173 Wn. App. at 649.

Id. at 916-17.

The Order requires Appellant to undergo a physical, cognitive, and psychological examination, for the first time. The only provision that allows the Commission to require an examination of a licensed medical professional is RCW18.130.170. [1] This provision is plain on its face, and taken within context, it is clear that the legislature intended physical and mental examinations be done in very limited circumstances with clear procedural protections.

The plain language of RCW 18.130.170 requires that notice be given before the Commission orders an examination:

[1] RCW 18.130.150 allows the commission to "require successful completion of an examination as a condition of reinstatement" after a license has been suspended and is, therefore, no longer valid. Additionally, RCW 18.130.155 allows the WMC to order an applicant to undergo a similar examination under nearly identical conditions as RCW 18.130.170.

"The license holder shall be provided written notice of the disciplinary authority's intent to order a mental or physical examination." RCW 18.130.170(2)(a). Such notice must include the specific conduct justifying the examination (RCW 18.130.170(2)(a)(i)); summary of evidence supporting the examination(RCW 18.130.170(2)(a)(ii)); the nature, purpose, and scope of the examination (RCW 18.130.170(2)(a)(iii)); a right to challenge such examination (RCW 18.130.170(2)(a)(iv)); and a stay on the examination while the response is considered (RCW 18.130.170(2)(a)(v));. *Id.*

Additionally, the examination must be "narrowly tailored to address **only** the alleged mental or physical condition and the ability to of the license holder to practice with reasonable skill and safety." RCW 18.130.170(2)(c) (Emphasis added.). Such examination is for the purpose of investigation, not for the purpose of discipline. *Humenansky*

v. Minn. Bd. of Med. Exam'rs, 525 N.W.2d 559, 566 (Minn. Ct. App. 1994). Once an examination is over, the Commission may charge a license holder with the inability to practice due to lack of mental or physical capacity but must do so in the statement of charges and must allow a hearing on the **sole** issue of capacity. RCW 18.130.170(1). Additionally, RCW 18.130.160(4) allows a sanction of "remedial education or treatment," but does not include examination as a sanction. WAC 246-16-800 allows some deviation from the disciplinary schedule, but in adopting the deviation, the Commission must "acknowledge the deviation and state its reasons for deviating from the sanction schedules in the order." WAC 246-16-800(c).

The legislative intent to protect the licensee from unwarranted and intrusive examinations is clear on the face of the statute. Nowhere does the statute allow the Commission

to use a mental or physical examination as a sanction. And, under only two other circumstances can the Commission require a mental or physical examination – RCW 18.130.150 for reinstatement of a suspended license, and RCW 18.130.155 for an applicant seeking a license in Washington with very similar requirements as RCW 18.130.170. RCW 18.130.150; RCW 18.130.155. If such an examination is required, it is to be solely for investigative or adjudicational purposes to determine whether a "license holder may be unable to practice with reasonable skill or safety by reason of any mental or physical condition." RCW 18.130.170(1), (2). If the legislature had intended physical or mental examination as a sanction, it could clearly have added it the sanction schedule in RCW 18.130.160, but it chose not to. Therefore, by the plain language of the statute and surrounding context, the legislative intent is clear that the ordering of physical and

mental examination may be used only under very circumscribed and narrow circumstances that do not exist in this Order.

Section 3.3 of the Order requires Appellant to undergo a physical, cognitive and psychological examination:

> Within six (6) months, the Respondent must undergo a clinical competency evaluation that includes an assessment performed by the Physician Assessment and Clinical Education (PACE) program at the University of California San Diego School of Medicine. . . . The assessment must include screening examinations, including at a minimum a history and physical, as well as cognitive and psychological screening."

AR 005007-005009.

Here, none of the statutory due process requirements was met resulting in a fatally flawed process by the Commission. These flaws include:

1. Appellant's Statement of Charges did not cite or offer punishment under RCW 18.130.170;

2. Appellant's Statement of Charges did not mention that Appellant could be subjected to an inability to practice due to mental or physical incapacity; (AR 000001-15.)

3. Appellant was not provided a hearing solely on the issue of (in)capacity;

4. The Commission failed to provide the basis for and scope of the exam in a clear language; AR 005007-005009.

5. The exam is not narrowly tailored as there is not clear justification provided for requiring such an exam; AR 005007-005009 and

6. The Commission did not state the limitations of the physical, cognitive, and psychological exams based on any alleged incapacity. AR 005002-5006.

Thus, the requirement that Appellant undergo these evaluations violated the due process rights afforded through the Uniform Disciplinary Act, violating Appellant's rights to due process for lack of notice and an opportunity to be heard.

Further, though WAC 246-16-800(c) allows for deviation from the disciplinary schedule, such deviation can be neither unconstitutional nor contrary to legislative intent. So, even if the Commission believed deviation was necessary, it could not use an examination as a sanction as this is clearly contrary to legislative intent and unconstitutional. This requirement should be stricken from the Order for such violations.

C. The Washington Medical Commission applied the incorrect standard to find that Appellant committed unprofessional conduct by failing to support such allegations with clear and convincing evidence.

The Commission failed to use the correct standard for a finding of unprofessional conduct to establish its allegations as it failed to prove its case by clear and convincing evidence as required when a medical license is at the center of the disciplinary hearing.

The US Supreme Court has clearly articulated that "[t]he clear and convincing standard of proof has been variously defined in this context as 'proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented,'" *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 285 n.11, 110 S. Ct. 2841, 2855, 111 L.Ed.2d 224, 246 (1990) (citing *In re Westchester County Medical Center on behalf of O'Connor*, 72 N.Y.2d 517, 531, 531 N.E.2d 607, 613, 534 N.Y.S.2d 886 (1988)). The Court continued that clear and convincing evidence "'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts

in issue.'" *Id.* (citing *In re Jobes*, 108 N.J. at 407-408, 529 A.2d at 441) (quotation omitted).

The Washington Supreme Court is clear: where a professional license, such as a medical license, is at risk, the agency (Commission) must support its decision by clear and convincing evidence. *Nguyen*, 144 Wn.2d at 534 (cert. denied, 535 U.S. 904 (2002)); *See also* WAC 246-16-800(2)(b).Thus, where the Commission alleges unprofessional conduct under RCW 18.130.180, as occurred here, the Commission may not rely solely upon a conclusory finding that the standard of care was breached to discipline a doctor for unprofessional conduct. The Commission must also find that the violation of the standard "results in injury to a patient or which creates an unreasonable risk that a patient is harmed." RCW 18.130.180(4). An agency must "articulate a satisfactory explanation for its action including a "rational connection

between the facts found that choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43, 103 S. Ct. 2856, 2866 (1983). It must also consider all factors relevant to support its conclusion. *Id.*

Here, the Commission failed to state the actions taken by Appellant that it claimed caused an unreasonable risk of harm to each patient. Rather, the Order simply states:

> As amply demonstrated in the Findings of Fact above, the Respondent failed to meet the standard of care for Patients A, B, C, D, E, F, G, and H. This included failure to provide appropriate care for the treatment of COVID-19, failure to keep appropriate medical records, and failure to get informed consent for the treatment that the Respondent provided (including a persistent failure to engage in an informative discussion of the off-label use of ivermectin with his patients). Consequently, the Commission has proved by clear and convincing evidence that the Respondent has committed unprofessional conduct under RCW 18.130.180(4).

AR 005004.

While the Commission "found" Appellant's actions were below the standard of care, and lists such actions, the Order offers neither support nor a conclusion that those facts amount to harm or an unreasonable risk of harm. Nor does the Order articulate what evidence it relied upon to meet the threshold of clear and convincing evidence. Again, statements, including the expert testimony proffered through expert witness reports and through the testimony of the same witnesses, were conclusory and offered no explanation of the harm or unreasonable risk of harm endured by the patients. *See* AR 007110-7116; 007360; 007361; 007364; 007387; 007398; 007406; 007413; 007433-34; 007436-39; 007442; 007444; 007448; 007455-56; 00767; 007471; 007483; 007739-42. In fact, the Commission's experts acknowledged that there was insufficient evidence to prove severe harm to the patients. AR 005006. Conviction on such limited testimony was the precise

concern expressed by the Court in *Nguyen*: "An inadequate standard of proof increases the risk of erroneous deprivation and, therefore, requires recognition, as so many other courts have, that the constitutional minimum standard of proof in a professional disciplinary proceeding for a medical doctor must be something more than a mere preponderance. *Nguyen* 144 Wn.2d at 534. The Commission's evidentiary deficiencies leave the Commission's findings under RCW 18.130.180(4) wholly inadequate as the Commission applied the incorrect evidentiary standard by failing to support the Order by clear and convincing evidence and by failing to address one element of the offense.

D. Respondent's Order violates RCW 34.05.570(3).

Pursuant to RCW 34.05.570, all findings and sanctions must not violate any state or federal constitutional provisions (RCW 34.05.570(3)(a)); must be within the express authority

granted it by statute (RCW 34.05.570(3)(b)); must follow a prescribed procedure (RCW 34.05.570(3)(c)); must be within a correct interpretation of the law (RCW 34.05.570(3)(d)); must not be "inconsistent with rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate the rational basis for inconsistency (RCW 34.05.570(3)(h)); and must not be arbitrary and capricious (RCW 34.05.570(3)(i));. RCW 34.05.570(3)(a)-(d), (h), (i). The Order violates each of these provisions, and, therefore, violates Appellant's rights. As explained previously, the findings and sanctions violate constitutional provisions, are outside of the express authority granted by statute and are applied by an incorrect interpretation of the law, failed to follow a prescribed procedure; and is inconsistent with agency rule without explanation. For all these reasons, the order is also arbitrary and capricious.

1. Respondent's Order is arbitrary and capricious.

"An agency abuses its discretion when it exercises its discretion in an arbitrary and capricious manner." *Kenmore MHP, LLC v. City of Kenmore*, 528 P.3d 815, 818 (Wash. 2023) (quoting *Conway v. Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 419, 120 P.3d 130 (2005)). "An agency's decision is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. *Id.* (quoting Whidbey Envt'l Action Network v. Growth Mgmt. Hr'gs Bd., 14 Wn. App. 2d 514, 526, 471 P.3d 960 (2020)). The "standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158, 209 L.Ed.2d 287, 294 (2021).

The failure of the Respondent to explain how speech "in context can only be characterized as constituting practice of

medicine," is arbitrary and capricious. AR 4987. This is a purely conclusory statement and not based upon law and not explained using the facts of the case. The Respondent fails to explain how statements made on a blog could possibly be construed as conduct involving the treatment of an individual. *Lowe*, 472 U.S. at 232; *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968). Thus, any sanctions based upon this is willful and unreasoning and therefore arbitrary and capricious. Likewise, all findings that fail to explain the harm or unreasonable risk of harm and are based purely on unsupported conclusions are likewise willful and unreasoning and therefore arbitrary and capricious. *See* AR 007110-7116; 007360; 007361; 007364; 007387; 007398; 007406; 007413; 007433-34; 007436-39; 007442; 007444; 007448; 007455-56; 00767; 007471; 007483; 007739-42.

Because Respondent has violated Appellant's free speech rights, violated due process rights, and used the incorrect legal standard, Respondent is in violation of RCW 34.05.570(3).

E. The Commission's punishment of Appellant is in retaliation for his speech and should not be allowed.

While Appellant did not raise a claim that the Commission's enforcement of its Statement was retaliatory in nature, during his hearing below, these claims are properly before this Court as they are based on a constitutional right and a party may raise claimed errors for the first time in the appellate court if there was "manifest error affecting a constitutional right." RAP 2.5(a). That is precisely what occurs here as Appellant raised his First Amendment rights before the Commission, although he did not address the retaliatory nature of the Commission's discipline. Notably,

Appellant did not have a final decision or an Order at the time he raised these issues before the Commission.

The Ninth Circuit succinctly addressed the issue of retaliatory action against an individual's right of free speech, although it is not clear that Washington has adopted the test. Nonetheless, the elements of the inquiry are as follows: "Otherwise lawful government action may nonetheless be unlawful if motivated by retaliation for having engaged in activity protected under the First Amendment." *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016). The Court then provided a three-pronged test to determine whether the injury was suffered due to the retaliatory action. These prongs are:

> (1) he was engaged in a constitutionally protected activity, (2) the defendant's actions would chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the protected activity was a substantial or motivating factor in the defendant's conduct.

Id. Appellant meets all three criteria.

Appellant was engaged in a constitutionally protected activity as described above as he was exercising his right to free speech. *Supra* section IV(A). Appellant's speech appeared on his blog hosted on his website, but without offering treatment or other services at a cost. AR 004986-004988. Appellant's speech also occurred during a presentation at a church. AR 000127; 000126-213. Such activities are protected by the First Amendment and Article 1 Section V of the Washington Constitution, as briefed above. *Supra* section IV(A) Moreover, insofar as the Commission regulated a specific viewpoint through the Statement, which operated as a prior restraint, any enforcement of the same violate the Washington Constitution and its supporting case law. *Supra*, section IV(A).

The second prong of the inquiry is a "generic and objective" test. *O'Brien*, 818 F.3d at 933. The Supreme Court has found that the loss or the threatened loss of employment is "a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. Here, the Commission's enforcement of the Statement and regulation of Appellant and other physician's speech, which is evidenced by the fact that (1) a handful of other doctors are being investigated by the Commission, yet there remains no public dialogue that runs contrary to the Commission's Statement. Unquestionably, the Statement has had a chilling effect on "persons of ordinary firmness" as the Court could infer that it is "entirely plausible" that the Commission's actions *could* deter such a person from engaging in protected conduct (here, speech). *Id.*

Additionally, Dr. Wilkinson's speech has in fact been chilled. He has chosen not to update his blog with new

information, which is coming regularly regarding ivermectin, the COVID-19 vaccine and other related issues based on the commissions actions.

The third prong requires the Court to determine whether the Appellant's speech was a substantial motivating factor in the Commission's actions. First, the Respondent demonstrates its animosity to Appellant's speech through the passage of the Position Statement, which facially prohibits speech. It clearly includes words that identifies speech as a punishable element including "advice," "recommendation," "perspective," "misinformation," and "disinformation." AR 004849. This alone makes clear that speech was a substantial motivating factor to the Commission. Additionally, Appellant was assessed a $15,000 fine and was required to undergo the PACE assessment; collectively, these are some of the most egregious sanctions assessed by the Commission for alleged violations

of the Statement. Moreover, Appellant had sued the Commission and the individual commissioners a month prior to his hearing (April 3-7, 2023), seeking declaratory, injunctive relief, and damages available under 42 USC §1983 for a violation of his civil rights based on the Position Statement. This matter was filed in the Eastern District of Washington as *Wilkinson v. Rodgers*, 1:23-cv-03035-TOR (EDWA). "Considered together," these facts support the claim that Appellant's "protected activity was a substantial or motivating factor in the defendant[s'] conduct." *O'Brien*, 818 F.3d at 935. Under these circumstances Appellant's claim for retaliatory enforcement is reasonable and offers a basis for this Court to overturn the discipline.

V. CONCLUSION

This Court should reverse the **Findings of Fact, Conclusions of Law and Final Order** dated August 12, 2023,

as the Order: (1) infringes on Appellant's constitutionally protected rights; (2) applies a retaliatory scheme; (3) clearly demonstrates the Commission's selective enforcement; and (4) is not supported by clear and convincing evidence. Moreover, the punishment is retaliatory in nature. Under these circumstances, this Court should vacate the Order as Respondent violated Petitioner's rights and failed to meet the evidentiary standard required to issue the Order.

This document contains 6,563 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 3rd day of May 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on 3rd day of May 2024, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Courts' Secure Portal, which sends a copy of uploaded files and a generated transmittal letter to active parties on the case. The generated transmittal letter specifically identifies recipients of electronic notice.

DATED this 3rd day of May 2024, at Pasco, Washington.

*/s/ S. Peter Serrano*_____

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