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 Superior Court
of the County of Yakima
No. 23-2-02237-39

Appellant's Opening Brief

S. PETER SERRANO
KAREN L. OSBORNE
Attorneys for Appellants
Silent Majority Foundation
5238 Outlet Dr.
Pasco, WA 99301
(509) 567-7086
pete@smfjb.org
Karen@smfjb.org

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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*. Appendix ("App.") at 0001 – 0035. Appellant challenges the Order for several issues, described below.

The Commission's errors include: (1) its failure to address Appellant's Constitutional challenges raised below (*e.g.,* Appellate 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"); and (4) the Commission's failure to support the Order by clear and convincing evidence.

Appellant asserts these errors, which leave 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 is 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 selectively enforced its COVID-19 Misinformation Position Statement and/or the Uniform Disciplinary Act against Appellant for his speech and actions, as described in the Order.

5. Finally, Appellant's Order should be stayed pending the outcome of this appeal as Appellant sought a stay from the Yakima County Superior Court and stipulated to a transfer to this court prior to the lower court hearing the matter. Such a stay is proper for the duration of this Court's review.

III. STATEMENT OF THE CASE

Appellant is a practicing medical doctor ("M.D."), a license he's held since 1977. App. at 0007. 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. App. at 0036.

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*. The Commission enforces this nebulous "standard of care" against Appellant for his advocacy for the treatment with Ivermectin and for his treatment of several patients with Ivermectin.

As the Commission enforced the Statement against Appellant's *advocacy* for the treatment of COVID-19 with Ivermectin, the Commission actively infringes on Appellant's right to free speech protected by the First Amendment of the

United States Constitution. 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. *Id.*

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.

App. at 8.

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.

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." App. at 0009. 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." App. at 23. Yet, the Commission did not prove such allegations, let alone, by its requited 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. Thus, the Commission failed to meet its standard of proof for making its findings. *See:* RCW 34.05.570(3)(a)-(e), (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 treatment *and speech*. An abbreviated history of that enforcement (as limited to the First Amendment issue) follows:

A. The Commission issued the Statement of Charges ("SOC") on June 9, 2022, against Appellant. App. at 0037-0051.

B. 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. App. at 0026.

C. 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," basing his lack of authority on RCW 18.130.050(10), RCW 18.130.040(2)(b), and RCW 18.130.020(2), (11).

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

E. 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). App. 0034.

F. 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." App. at 0008. Paragraph 1.7 concludes: "Much of the information that the Respondent spread via his blog was not factual, scientifically grounded or consensus driven." *Id.* Yet, the Commission failed to dispel the "lack of science" or support its position that the speech constituted the practice of medicine.

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, which is impermissible under the First Amendment 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 neither 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 speech as it relates to COVID it 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 as it offers no justification for its adoption. App. at 0036. 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." App. at 0008. 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; App. at 0008.
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. 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, and, in the interim, the Order should be stayed to protect Appellant's rights.

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 [***14] Practices Act (FEPA) was terminated due to a state official's failure to comply with statutorily mandated procedure. *Logan*, 455 U.S. at 424, 433.

Nielsen v. Dep't of Licensing, 177 Wash. App. 45, 55, 309 P.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).

The Order requires Appellant to undergo a physical, cognitive, and psychological examination; this requirement appeared only in the Order, without the notice or right to defend, as required by RCW 18.130.170. The plain language of the statute requires that notice be given before the Commission orders an examination: "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, summary of evidence supporting the examination, the nature, purpose and scope of the examination, a right to challenge such examination, and a stay on the examination while the response is considered. *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.). Additionally, 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 such 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).

> Section 3.3 of the Order requires Appellant to:
>
> > 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 just include screening examinations, including at a minimum a history and physical, as well as cognitive and psychological screening."

App. at 0028 – 0030.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;

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 or they narrowly tailored manner; and

5. The Commission did not state the limitations of the physical, cognitive, and psychological exams based on any alleged incapacity.

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. 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. Where the Commission alleges unprofessional conduct under RCW 18.130.180, the Commission may not conclusorily allege or "find" that the standard of care was breached, resulting an a commission of 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 the conclusion. *Id.* Moreover, where a professional license, such as a medical license, is at risk, the agency (Commission) must support its decision by clear and convincing evidence. *See Nguyen*, 144 Wn.2d at 534 (cert. denied, 535 U.S. 904 (2002)); *See also* WAC 246-16-800(2)(b). Additionally, pursuant to RCW 34.05.570, all findings and sanctions must not violate any state or federal constitutional provisions, must be within the express authority granted it by statute, must apply a lawful decision-making process, must be within a correct interpretation of the law, must be supported by substantial evidence, and must not be arbitrary and capricious. RCW 34.05.570(3)(a)-(e), (h), (i). The Order violates each of these provisions, and, therefore, violates Appellant's rights.

Here, the Commission does not state what actions taken by Appellant 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). App. at 0025.

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 were conclusory without explaining the harm or unreasonable risk of harm the patients endured, while acknowledging there was insufficient evidence to prove severe harm to the patients. App. at 0027. Because of this deficiency, the Commission's findings under RCW 18.130.180(4) are insufficient as they rely on the wrong standard.

Based on the violation of Appellant's free speech, the due process violations, and the Commission's use of the incorrect legal standard, Appellant is likely to succeed on the merits, and a stay is warranted.

D. 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. (Section III, IV A). Appellant's speech appeared on his blog hosted on his website, but without offering treatment or other services at a cost. App. at 0007 – 0009. Appellant's speech also occurred during a presentation at a church. Such activities are protected by the First Amendment and Article 1 Section V of the Washington Constitution, as

briefed above. 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.

The second prong of the inquiry is a "generic and objective" test. *O'Brien*, 818 F.3d at 933. 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 Commission may have had ulterior motivating retaliatory factors in its decision making process. Here, Appellant was assessed a $15,000 fine and was required to undergo the PACE assessment; collectively, these are some of the most egregious fines 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. 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.

E. The Commission's selective enforcement was improper and violates Appellant's rights.

"To succeed in an unconstitutional selective prosecution claim the defendant must show (1) disparate treatment, i.e., failure to prosecute those similarly situated, and (2) improper motivation for the prosecution." *State v. Terrovonia*, 64 Wn. App. 417, 422, 824 P.2d 537 (1992) (citing *Wayte v. United States*, 470 U.S. 598, 602-03, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)). Here, Appellant challenges the Commission's arbitrary

enforcement of the Statement and its further arbitrary decision to sanction Appellant at such a high level. Here, that arbitrary decision is the Statement, itself, the Commission's *COVID-19* ***Misinformation*** *Position Statement*, which discriminates against a viewpoint. Here, that viewpoint is any viewpoint that disagrees with the Commission's sanctioned dogma, thus seeking to offer COVID-19 "misinformation" treatment methodologies, including Ivermectin or Hydroxychloroquine. Appellant's sin was that he offered such information and treatment that was not sanctioned by the Commission. Where the Commission is punishing "misinformation," there can be no question that the Commission is enforcing the Statement **against** Appellants' viewpoint. App. at 0007; 0036.

The selective enforcement cannot be clearer as Appellant was punished for his position, which the Commission disputes as it labels Appellant('s speech) with terms, including "false and

misleading statements," which were "harmful and dangerous to individual patients," and "generated mistrust in the medical profession and in public health and widespread negative impact on the health and well-being of the community." Similarly, the Commission determined that the (mis)information Appellant shared was "inaccurate," "not factual, scientifically grounded, or consensus driven," and, most egregiously, Appellant "significantly misrepresented information about COVID vaccines." App. at 0008; 0024 – 0025. Dare a medical doctor or a scientist diverge from the Commission's "consensus;" if one does, punishment for offering such "misinformation" must come swift and sound as it did with Appellant.

Because Appellant offered information noting that the COVID vaccines "could cause birth defects and infertility, and that somehow COVID vaccines were not really vaccines," the Commission concluded that "Respondent has clearly violated

commonly accepted standards of honesty." The Commission reached this conclusion without supporting evidence that demonstrated that the Commission's position, or any other position that differed from Appellant's, was more accurate. More importantly, the Commission did not demonstrate that it punished other dissenters. As the Commission only punished one point of view, the one it deemed "misinformation," the Commission the Statement, itself was discriminatory, and the enforcement thereof was selective against the unsanctioned "misinformation." The Commission's selective enforcement—regulation of speech with which it disagrees—is yet another reason this Court should overturn the lower Court's Order.

1. The Commission has selectively punished Appellant for his speech.

Appellant appears to have been treated more harshly than other physicians who offered telemedicine services for COVID-19 treatment with Ivermectin and advocated for the same. While Appellant did not offer telemedicine services, the Commission targeted his speech as Sections 1.7 – 1.9 of Appellant's Statement of Charges is entitled *Public Statements*. App. at 0008 – 0009. The Commission also labeled his speech as "misrepresentation or fraud." App. at 0025 – 0026. Yet, other medical professionals who maintained websites, blogs, and/or telemedicine practices were not punished for their speech. More egregiously, much of Wilkinson's public speech was not done in a commercial context, unlike some of the other Drs. who were not punished. One such example of a Drs. who had public-facing website that consisted of commercial speech related to

the treatment of COVID-19 with Ivermectin, who was not punished for such speech, is Dr. Miguel Antonatos.

Dr. Antonatos provided telemedicine services to Washington residents, including treatment of COVID-19 with Ivermectin. These patient interactions were initiated online through a five-page questionnaire. App. at 0037. Yet, the Commission did not address Dr. Antonatos' speech in his Statement of Charges or in his Stipulated Findings of Fact, Conclusions of Law, and Agreed Order. Additionally, the impetus for the Commission's punishment (or not) of a Drs. speech in this COVID-19 treatment context remains unclear as Dr. Antonatos' speech was clearly commercial (i.e., an intake form/advertising), which is more reasonably regulated by the Commission, while Appellant's blog and speech were opinion oriented, albeit, misaligned with the Commission's Statement. If the Commission is punishing Appellant for expressing a non-

commercial opinion simply because it disagrees with that position, the Commission is applying a discriminatory approach to its enforcement of a Dr.'s speech. Additionally, Dr. Antonatos' charges were issued over six months after Appellant's SOC was issued; it is unclear whether the timing of the issuance of SOC demonstrates a shift in the Commission's approach to enforcing the Statement.

Similarly, Dr. Robert Apter provided telemedicine, and each encounter commenced with a questionnaire available on the website. App. 0082. Yet, the Commission only addresses "misrepresentation" (RCW 18.130.180(13)) in Paragraph 1.13.6 of Apter's Statement of Charges, as follows: "Respondent misrepresented to pharmacy staff that the prescription for Patient A's ivermectin was for scabies, rather than for COVID-19 prophylaxis." App. at 0087. It appears that Apter's speech is regulated for its commercial/treatment value

and because it is directly related to the treatment of a patient, and not because it is an opinion the Commission disagrees with. Again, we have a differing situation from the Commission's regulation of Appellant's speech, which is based on its content and the Commission's disagreement with that content.

As the Commission is regulating Appellant's non-commercial, opinion-based speech more harshly, than other Drs.' commercial speech, such regulation flies afoul of *NIFLA* and *Conant*, which protect the licensee's speech when addressing medical issues. *NIFLA*, at 2361; *Conant*, at 634. And *NIFLA* is clear that the protection extends to speech that is merely incidental to the Drs. conduct. *Id*. Finally, even if Appellant's speech were deemed commercial, it would lose First Amendment protection on if it was deemed "inherently misleading, which is defined . . . as more likely to deceive the

public than to inform it." *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 66-67 (D.D.C. 1998).

However, the "fear that speech might persuade provides no lawful basis for quieting it." *Sorrell*, 564 U.S. at 522. In *Sorrell*, the State of Vermont passed a statute that proscribed drug detailers from using "secret and manipulative activities of marketers," from "manipulating doctors," from covering up "information that is not in the best of light of their drug and to highlight information that makes them look good," and highlighting scientific information that helped their claims of safety and effectiveness. *Id.* at 597. In other words, the State was attempting to prevent drug marketers from speaking what the Vermont legislature considered disinformation, including discussing the scientific literature available.

Likewise, the Commission is regulating protected speech and retaliating against doctors who dare to speak in

ways they do not approve. Dr. Wilkinson informed the public of the scientific basis for his claims and used information to support his claims. As in *Sorrell*, the Commission is proscribing his speech and disciplining regulated professionals for other related issues because the Commissions disagree with the speech -- nothing more. *Id.* at 576-79 ("The State's interest in burdening the speech of detailers instead turns on nothing more than a difference of opinion."). No allegations that Doctor Wilkinson was speaking falsely can withstand scrutiny under a *Sorrell* standard. Therefore, Appellant cannot be subjected to discipline taken against his speech.

F. If the requested relief is not granted, the Court should issue an immediate stay of the Order while the Court considers this matter.

Appellant further seeks additional relief available under the Administrative Procedures Act, Revised Code of

Washington ("RCW") Section 34.05, *et seq.* and requests that this Court to stay the challenged Order. Specifically, under RCW 34.05.550, a stay may be granted, and, where the "agency action [is] based on public health, safety, or welfare grounds," the Court must look to four factors prior to issuing a stay. RCW 34.05.550(3). Those four elements are:

(a) Appellant "is likely to prevail when the court finally disposes of the matter;"

(b) Without relief the applicant will suffer irreparable injury;

(c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances. RCW 34.05.550(3).

Appellant challenges the notion that "public health grounds" exist as the pandemic has been declared as over and because he seeks a stay on the infringement of his speech, which has no impact on public health. Nonetheless, Appellant asserts that he meets the elements of the "public health, safety, or welfare" analysis as it is the higher threshold. Finally, the Order violates not only Appellant's constitutional rights, but also violates the rights of everyone who desires to hear what he has to say.

The Order claims that Appellant violated RCW 18.130.180(1), (4), and (13) as its basis for punishing Appellant for his speech. App. at 0023 – 0026. Under these sections of the Code, the Order finds that Dr. Wilkison's speech resulted in "moral turpitude, dishonesty, or corruption relating to the practice of the person's profession," (RCW

18.130.180(1)), and "Misrepresentation or fraud." (RCW 18.130.180(13). But, Appellant's protected speech cannot be punished under these statutes, especially as the Commission failed to consider how Appellant's speech harmed the patients or created an unreasonable risk of harm. As the Order does not fall under the Commission's public health authority, the factors under RCW 34.05.550(3) clearly weigh in favor of a stay, and Appellant's request for a stay should be granted.

The purpose of a stay is to preserve the status quo during the pendency of appeal so as not to render the outcome of the appeal fruitless. *See Kucera v. Dep't. of Transportation*, 140 Wn.2d 200, 995 P.2d 63 (2000). Upon seeking judicial review of an agency action, "a party may file a motion in the reviewing court seeking a stay or other temporary remedy." RCW 34.05.550. As a general rule, all four factors are to be

considered, when the government is the opposing party, the last two factors merge. *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023). Appellate courts should stay a judgment to preserve its remedies. *State v. Cirkovich*, 41 Wash. App. 275, 280, 703 P.2d 1075, 1078 (1985).

1. Without a stay of the Order, Appellant will continue to suffer irreparable harm.

Appellant will suffer ongoing irreparable harm, making a stay necessary. The movant bears the burden of proving irreparable harm. *Kucera*, 140 Wash. 2d at 221. If a movant shows he is likely to prevail on the merits of a constitutional claim, "that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation." *Baird*, No. 23-15016, 2023 U.S. App. LEXIS 23760, at *10. "[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.

Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion). Additionally, irreparable harm occurs if an injury is impossible to remedy after it has already occurred. *Axon Enter. v. FTC*, 143 S. Ct. 890, 897 (2023).

Here, Appellant has both a free speech claim and a due process claim, both of which he is likely to win on the merits. On March 31, 2023, the Administrative Law Judge declined to dismiss the parts of the complaint in Appellant's case that were based on his speech. App. at 0017 -0018. He did so without analyzing whether Appellant's speech was protected by the Washington and United States Constitutions, but instead declined claiming that it was within the power of the Washington Medical Commission because they had lodged a complaint that purportedly entailed their "clinical expertise." *Id.* Speech must be evaluated under a constitutional

framework, which is a matter of law under the court's expertise, not the agency's. *See Baird*, 2023 U.S. App. LEXIS 23760 at *8 (a court "must not shrink from [its] obligation to enforce [his] constitutional rights") (quoting *Porretti v. Dzurenda*, 11 F.4th 1037, 1047 (9th Cir. 2021)); *See also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. . . . the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."). Here, because Appellant's rights were not evaluated by a qualified Administrative Law Judge at the administrative level, the irreparable harm has already occurred.

The facts that Appellant's constitutional rights to speech have been, and continue to be, irreparably harmed, and that his right to due process has been significantly infringed, demonstrate the ongoing irreparable harm he is suffering. If no stay is granted, Appellant will also have to comply with an unlawful requirement and submit to a physical, cognitive and psychological exam with no underlying basis for them. This is irrefutably irreparable harm, as no amount of money can cure such a forced submission. Therefore, the remedies available to this court will no longer be available if the court reaches a decision on the merits without first issuing a stay.

2. The State is not harmed by an unlawful order being stayed and an unconstitutional order cannot be justified by health, safety, or welfare.

Appellant's likelihood of success on the merits of his constitutional claims "tips the merged third and fourth factors decisively in his favor." *Baird v. Bonta*, No. 23-15016, 2023

U.S. App. LEXIS 23760, at *10-11 (9th Cir. Sep. 7, 2023). The government also "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Baird*, No. 23-15016, 2023 U.S. App. LEXIS 23760, at *11 (quoting *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983)); *see also Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (holding that the government "cannot suffer harm from an injunction that merely ends an unlawful practice."). "It is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* (quoting *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022)).

Appellant's right to free speech and his due process rights have been violated. Therefore, the balance of equities and the public interest lean in his favor. The Commission is

not harmed by a stay and preventing the irreparable harm of an unconstitutional order cannot be justified by health, safety, or welfare.

3. The Commission improperly imposed Sanction 3.3, Clinical Competency Assessment without proper notice and an opportunity to be heard as required under RCW 180.130.170(1).

Appellant challenges the Commission's Order for its issuance of a competency sanction. RCW 180.130.170(1) requires the Commission, when it believes "a license holder may be unable to practice with reasonable skill and safety to consumers by reason of any mental or physical condition," to conduct a limited hearing, with a "sole issue of the capacity of the license holder to practice with reasonable skill and safety." *Id*. Here, the Commission issued such a sanction, without holding a hearing on the issue. In fact, the Commission did not address Appellant's competency during the hearing; rather the

Commission merely issued the sanction months after the hearing concluded.

The Commission failed its statutory notice and an opportunity to be heard on issues arising from Paragraph 3.3 of Appellant's Final Order as the Commission did not provide notice of this Sanction to Appellant, nor did it offer him the required opportunity to be heard on this single issue under RCW 18.130.170. App. at 0028 – 0030.

This Court "may reverse an administrative order (1) if it is based on an error of law, (3) if it is arbitrary or capricious, (4) if it violates the constitution, (5) if it is beyond statutory authority, or (6) when the agency employs improper procedure." *Neravetla*, 198 Wn. App. at 658 (citing: RCW 34.05.570(3)(a)-(e), (h), (i)). The court reviews issues of law in an administrative proceeding *de novo*. *Id.* Courts use the plain meaning of the language within a statute to determine intent. *Id.*, at 1036. If the

language is ambiguous, meaning "it is fairly susceptible to different, reasonable interpretations," the court may review legislative history to determine intent. *Id*. A decision is arbitrary and capricious if is "willful, unreasoning, and taken without regard to the attending facts and circumstances." *Ctr. for Envtl. Law & Policy v. Dep't of Ecology*, 196 Wn.2d 17, 20, 468 P.3d 1064, 1066 (2020).

Appellant has constitutional and statutory claims that require a stay to preserve his remedies. His free speech rights have been and continue to be violated through the Commission's Statement and through its Order. Additionally, the Commission failed to afford him due process before requiring him to undergo a physical, cognitive, and psychological examination, and the Commission used the wrong standard to determine he had committed unprofessional conduct under RCW 18.130.180(4). Because he is likely to

prevail, all four factors shift in his favor and a stay is required to prevent further irreparable harm.

V. CONCLUSION

This Court should reverse the **Findings of Fact, Conclusions of Law and Final Order** of 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. Should this Court not be moved to immediately act to overturn the Order, the Court should issue a stay of the Order in its entirety, or at least as to compliance with the PACE assessment, any limitations of Appellant's license, and with any associated fine. Without a stay, Appellant will continue to experience ongoing irreparable harm and the remedies available to this court presently will no longer be available, as undergoing a

physical, cognitive, and psychological exam cannot be undone. All four prongs of the test for stay are met, offering this Court the option to stay the matter during the pendency of this appeal should the Court elect not to immediately overturn the Commission's Order.

This document contains 8,084 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 11th day of January 2024.

*/s/ S. Peter Serrano*_____
Simon Peter Serrano, WSBA 54769
Karen L. Osborne, WSBA 51433
5238 Outlet Drive
Pasco, WA 99301
(509) 567-7086
pete@smfjb.org

CERTIFICATE OF SERVICE

I hereby certify that on 11th day of January 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 11th day of January 2024, at Pasco, Washington.

*/s/ S. Peter Serrano*_____

Simon Peter Serrano, WSBA 54769
Karen L. Osborne, WSBA 51433
Attorneys for the Appellants
5238 Outlet Drive
Pasco, WA 99301
(509) 567-7086
pete@smfjb.org

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