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 MOTION SEEKING STAY PENDING REVIEW (RAP 8.1(b) AND RAP 8.3)

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

Pursuant to Rule of Appellate Procedure 8.3, Petitioner Richard S. Wilkinson ("Petitioner") seeks a stay from this court on a Findings of Fact, Conclusions of Law and Final Order ("Order") issued by Defendants on August 12, 2023. The challenged Order requires Petitioner's compliance and is the subject of the broader appeal in this matter where Petitioner's opening brief is imminently forthcoming. A stay of this Order will allow the Court to determine the propriety of the Order and enforcement of the same without subjecting Petitioner to unconstitutional discipline, including, but not limited to: (1) a compliance assessment through the Physician Assessment and Clinical Education ("PACE") program at the University of California San Diego School of Medicine ; (2) the payment of a $15,000 fee; (3) reporting and educational requirements; and (4) personal appearances before

Respondent Washington Medical Commission ("Respondent"). The Order and its issuance were the result of an unconstitutional agency action, and Petitioner challenges the Order in whole and seeks a stay of **all** compliance requirements throughout the pendency of this appeal.

II. IDENTITY OF THE MOVING PARTY

Petitioner Richard S. Wilkinson, MD seeks relief from this Court requested in Section III.

III. RELIEF SOUGHT

Pursuant to Rules of Appellate Procedure ("RAP") 8.1(b) and 8.3, Petitioner seeks the stay of all compliance requirements within the Order. Absent a stay, Petitioner's compliance renders this Court's review meaningless as Petitioner will have completed the challenged activities. *Dick Enters., Inc. v. King County*, 83 Wn. App. 566, 573, 922 P.2d

184, 187 (1996) ("When a court can no longer provide effective relief, the controversy is moot."). AR 566, 571.

RAP 8.1(b) permits a party to seek to stay enforcement of any trial court civil decision, whether that decision is a money judgment, one affecting property, or *any other type*. RAP 8.1(b); emphasis added. RAP 8.1(b)(3) allows a court to grant a stay when the moving party "can demonstrate that debatable issues are presented," and "compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3). RAP 8.3 permits an appellate court to issue orders and grant injunctive or other relief to ensure effective and equitable review. RAP 8.3's purpose "is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent the

destruction of the fruits of a successful appeal." *Cronin v. Cent. Valley Sch. Dist.*, 12 Wn. App. 2d 123, 129-30, 456 P.3d 857, 860-61 (2020) (quoting: *Wash. Fed'n of State Emps. v. State*, 99 Wn.2d 878, 883, 665 P.2d 1337 (1983) (hereinafter "*WFSE*")). An emergency stay is necessary here to "preserve[] the status quo in order to insure effective and equitable review." *WFSE*, at 883.

IV. FACTS RELEVANT TO MOTION

Petitioner has been licensed as an M.D. since 1977 with limited disciplinary history throughout his forty-five years of practice. AR at 00003. On September 22, 2021, Respondent adopted a standard of care to regulate the practice of medicine through its COVID-19 Misinformation Position Statement ("Statement"); since the adoption of the Statement, Petitioner has had significant disciplinary action, which is the basis of

this appeal and provides the emergency nature of this stay. AR 000072; 004849. Respondent's enforcement of its Statement against Petitioner based on his speech regarding COVID-19 policy and treatment and retaliation for the same. Respondent infringed Petitioner's right to free speech protected by the First Amendment of the United States Constitution and Washington Constitution, Article 1 Section V.

A summary of events follows:

A. On June 9, 2022, Respondent issued the Statement of Charges ("SOC") against Petitioner. AR 000001-25.

B. Respondent filed a Motion to Dismiss, February 21, 2023, requesting dismissal of all allegations and claims based on speech, specifically paragraphs 1.7-1.9. AR 000071-87.

C. On March 31, 2023, the presiding officer denied Petitioner's Motion to Dismiss stating he could not rule the constitutionality of a statute. AR 004972-73.

D. A hearing was held April 3-7, 2023.

E. On August 15, 2023, Respondent was served the Findings of Fact, Conclusions of Law and Final Order ("Order"), dated August 12, 2023.

F. The Order provides:

> 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.

- "Much of the information that the Respondent spread via his blog was not factual, scientifically grounded, or consensus driven." *Id.*
- Physicians "must share information that is factual, scientifically grounded, and consensus-driven for the betterment of the public" without definition or without substantiation. *Id.*
- Petitioner "presented an extremely unbalanced look at COVID-19, downplaying the seriousness of COVID-19" without supporting the claim. AR 005003.
- Petitioner "clearly violated commonly accepted standards of honesty. All of this behavior raises concerns that the Respondent may use his professional position as a physician to harm members of the public." AR 005004.

- Petitioner "knew (or as a reasonably prudent physician, should have known) that much of the information he was presenting about COVID-19 was a misrepresentation of the true facts." AR 005005.

Respondent's witnesses testified to the contrary, including patient testimony that they fully understood the low risk verses possible benefit of ivermectin. AR 7942-7943

The SOC fails to provide Petitioner notice with a claim that he was "unable to practice with reasonable skill and safety to consumers by reason of any mental or physical condition," nor does it mention RCW 18.130.170. RCW 18.130.170.

With conclusory statements, and without providing Petitioner adequate notice of charges and findings, Respondent determined that it had "proved by clear and convincing evidence that the Respondent has committed

unprofessional conduct under RCW 18.130.180(4)." AR 005004. Respondent failed to prove its allegations by 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 Respondent's claims was proven by a preponderance of evidence, let alone clear and convincing evidence.

G. Petitioner filed a timely appeal in the Yakima County Superior Court on September 13, 2023. CP 1-15.

H. Petitioner filed a timely Motion to Stay in the Superior Court on October 12, 2023. CP 100-119.

I. The Parties stipulated to transfer the matter to this Court, and the Order was signed on October 20, 2023.

J. Petitioner filed an Opening Brief in this Court, including a motion to Stay on January 11, 2024, and withdrew the same on January 19, 2024.

K. The Clerk's Papers (from the Yakima Superior Court) and the Administrative Record (from the Department of Health) were filed with this court on March 11, 2024, and March 18, 2024, respectively.

L. Petitioner files this timely Motion to Stay.

V. GROUNDS FOR RELIEF AND ARGUMENT

A. Standard Of Proof.

As an appeal from an agency action, the Administrative Procedures Act controls, and "a party may file a motion in the reviewing court seeking a stay or other temporary remedy." RCW 34.05.550. An agency action which is based on health,

safety, or welfare grounds may be stayed if it meets the following four factors:

> (a) The applicant 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)(a)-(d). j

All factors will be addressed herein.

B. Analysis.

1. Debatable issues are present pursuant to RAP 8.1(b)(3).

Debatable issues exist, including:

- Whether Respondent violated Petitioner's right to free speech;
- Whether such violations injure Petitioner;
- Whether Respondent's punishment of Petitioner constitutes retaliation;

- Whether Respondent's COVID-19 Misinformation Position Statement constitutes a prior restraint; and
- Whether Petitioner was afforded due process in his punishment.

Each issue will be answered in the affirmative in this section, rendering a stay proper.

2. A Stay is necessary to preserve Petitioner's appeal as he is likely to prevail.

A stay is "intended to preserve the status quo and prevent irreparable loss of rights before the judgment." 2021 WA ENV LEXIS 27, *7-8 (Wash. Env't & Land Use Hearings Off. July 29, 2021) (*citing Kucera v. DOT*, 140 Wash. 2d 200, 209 (2000)). While all stay factors are considered, the most important factor is Petitioner's likelihood of success on the merits, particularly in cases involving constitutional issues. *Baird v. Bonta*, 81 F.4th 1036, 1044 (9th Cir. 2023); *Kucera*, 222. A court "may not deny a preliminary injunction motion

and thereby 'allow constitutional violations to continue simply because a remedy would involve intrusion into' an agency's administration of state law." *Id.* at 1041 (omitting internal quotation marks). "In cases involving a constitutional claim, a likelihood of success on the merits usually establishes irreparable harm, and strongly tips the balance of equities and public interest in favor of granting a preliminary injunction." *Id.* at 1044, 1048.

a. Respondent's Order violates Petitioner's free speech rights under the US and Washington Constitutions.

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First 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). Washington's Constitutional corollary provides, "Every person may freely speak, write, and publish

on all subjects, being responsible for the abuse of that right." WA Const. art. 1, § 5. The Washington Constitution often affords speech greater protection. *State v. Reece,* 110 Wn.2d 766, 757 P.2d 947 (Wash. 1988).

Respondent has suppressed Petitioner's speech, which "as an effective police measure is an old, old device, outlawed by our Constitution." *Watts v. United States*, 394 U.S. 705, 712 (1969). Nonetheless, Respondent targeted the content of Petitioner's speech, even though content-based speech regulations "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*"); *Sheehan v. Gregoire*, No. C02-1112C, at *1 (W.D. Wash. May 22, 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)). A compelling government interest is of the highest order and must be higher than a mere significant government interest. *Id.*

Respondent may not punish Petitioner for his speech, nor may it deem him a threat to public health and safety because it disapproves of his speech content. Rather, discussion of regulations affecting health and welfare are most deserving of free speech protections. *NIFLA,* at 2374. Regulation of speech within the context of a licensing authority may occur only if it is incidental to actions it may regulate – here, treatment of a 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."); *See NIFLA*, 138 S. Ct. at 2374 ("Speech is not unprotected merely because it is uttered by 'professionals.'"); *Lowe*, 472 U.S. at 231 ("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."). Even as it concerns discussions

between doctor and patient, if the discussions do not directly implicate care of that patient, the speech is protected. *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002). 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) (the Supreme Court struck down the Stolen Valor Act, which made it a crime to lie about receiving the Congressional Medal of Honor holding that the Act was a content-based restriction barred by the First Amendment even though the criminalized speech involved a lie.).

"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." *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 753, 871 P.2d 1050, 1052 (1994). A prior restraint is an administrative or judicial order forbidding communications prior to their occurrence, prohibiting future speech. *Id.* Thus, outside of the narrow circumstances of treating a patient, doctors are public speakers, receiving robust protection under the Washington and United States Constitutions.

On September 22, 2021, Respondent determined to regulate speech by unanimously adopting its COVID-19 Statement, which reads in pertinent part:

- COVID-19 is a disease process like other disease processes, and as such, treatment and advice provided by physicians and physician assistants will be assessed in the same manner as any other disease process.

Treatments and recommendations regarding this disease that fall below standard of care as established by medical experts, federal authorities and legitimate medical research are potentially subject to disciplinary action.

- [Respondent] supports the position taken by the Federation of State Medical Boards (FSMB) regarding COVID-19 vaccine misinformation. Respondent does not limit this perspective to vaccines but broadly applies this standard to all misinformation regarding COVID-19 treatments and preventive measures such as masking. Physicians . . ., who generate and spread COVID-19 misinformation, or disinformation, erode the public trust in the medical profession and endanger patients.

- [Respondent] relies on the U.S Food and Drug Administration approval of medications to treat COVID-19 to be the standard of care. While not an exhaustive list, the public and practitioners should take note:

  - Ivermectin is not FDA approved for use in treating or preventing COVID-19
  - Hydroxychloroquine (Chloroquine) is not FDA approved for use in treating or preventing COVID-19

  AR 004849.

The statement explicitly addresses speech as "misinformation" and "disinformation" without clear definition, and limits doctors to sharing information coincident with "established experts, federal authorities and legitimate medical research." Through the Statement, Respondent determines what speech doctors may utter, violating the US and Washington Constitutions.

Respondent's regulation of Petitioner's speech is preeminent in the SOC. Petitioner's public statements that subjected him to investigation were not incidental to his care of a patient. AR 4-5, SOC, ¶¶ 1.7-1.9. Paragraph 1.7 applies the Statement, noting that doctors have specialized knowledge and training, which earns a "high degree of public trust and therefore have a powerful platform in society." Respondent noted the individual physician's mandate to rely on "information that is factual, scientifically grounded, and consensus-driven for the betterment of public health."

Paragraph 1.8 addressed Petitioner's public blog between June 2020 through and "at least" May 2022. Respondent claimed that Petitioner "made numerous false and misleading statements in his blog regarding the COVID-19 pandemic, COVID-19 vaccines, and public health officials."

Paragraph 1.9 claims that Petitioner had a "negative impact on the health and well-being of our communities" and that Petitioner's "public false and misleading statements regarding the COVID-19 pandemic, COVID-19 vaccines, and public health officials are harmful and dangerous to individual patients, generate mistrust in the medical profession and in public health, and have a wide-spread negative impact on the health and well-being of our communities."

Respondent punished Petitioner for his speech. Petitioner objected to such regulation through a Motion to Dismiss Charges 1.7-1.9 prior to the hearing. AR 000071-87. The presiding officer determined that the matter was not within Respondent's expertise and declined to dismiss those charges. AR 004972-74.

Regulation of speech is outside Respondent's expertise *and* its authority to regulate conduct as Respondent may only regulate practitioners' speech where it is merely incidental to regulated conduct (i.e., patient examination/treatment, informed consent,) or advertising of services – neither case is present, here. *NIFLA*, 138 S. Ct. at 2373-74; *Tingley v. Ferguson,* 47 F.4th 1055, 1074 (9th Cir. 2022); *Conant*, 309 F.3d at 635.

Regulation of speech incidental to conduct cannot "impose[] more than an incidental burden on protected expression" and cannot burden speech based on "the identity of the speaker." *Sorrell.*, 564 U.S. at 566-67. Regulation of Petitioner's blog infringes speech unrelated to conduct as the blog is not related to patient care. Petitioner's blog consists of general information and Petitioner's facts and opinions on

government policy and scientific claims, not patient treatment, which Respondent cannot regulate or limit. Lastly, the Statement clearly demonstrates that a doctor's speech cannot challenge the medical community or the government without the risk of regulation as occurred, here.

The regulation of speech did not stop at merely issuing a SOC but resulted in sanctions. In the Order under the heading "Public Statements," paragraphs 1.6 – 1.8.5, Petitioner's public speech is singled out for censure. Respondent determined that Petitioner's blog:

1. Constituted the practice of medicine without explanation;
2. Was a danger to individual patients without stating which patients and how;

3. Generated mistrust in the medical profession without providing any evidence of a single person who mistrusted the medical profession based upon reading Petitioner's blog;
4. Had a widespread negative impact on the health and well-being of the community without offering evidence.

Lacking authority to regulate Petitioner's speech, Respondent did so contrary to constitutional prohibitions.

Respondent claims that doctors' speech must be "consensus driven," violating constitutional protections. Only allowing consensus-based speech is content-based regulation that must be narrowly tailored to meet a compelling purpose or alternatively, under the Washington Constitution is *prohibited* as a prior restraint. Because Respondent failed to

define the consensus-based limitations the regulation is not narrowly tailored to meet a compelling purpose. More importantly, the Statement and its enforcement severely chills Doctor's speech, thus effecting a prohibited prior restraint.

Protecting the public from mis/disinformation is not a compelling interest. "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Sorrell*, at 577. It is not the government's place to decide the value of speech; that is the hearer's purview. Nor may the government suppress divergent views on a topic. *Id.,* at 578-79. Information on early treatments for COVID-19, including studies and evidence for such treatments cannot be proscribed, nor can discussion of a new vaccine that lacks long term safety data, even if Respondent deems such speech

"unbalanced." AR 005003-04. Likewise, discussion of mask use, whether policies are tyrannical, or the accuracy of testing cannot be proscribed. AR 004988. Speech cannot be considered dangerous. AR 004987. Information is not dangerous; rather, proscribing dissemination of disfavored speech is dangerous, and it is not a narrowly tailored method of protecting the public. Respondent's regulation of Petitioner's speech violates the US and Washington Constitutions – Petitioner cannot be punished for speech.

a. Respondent retaliated against Petitioner because of his speech.

"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 provided

a three-pronged test to determine whether the injury was suffered due to the retaliatory action:

> (1) [Petitioner] was engaged in a constitutionally protected activity,
>
> (2) [Respondent'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 [Respondent's] conduct. *Id.*

This matter meets all three criteria making the issue ripe for this Court's analysis, necessitating a stay of the Order.

Petitioner's constitutionally protected speech was a substantial factor in Respondent's issuance of the Order. AR

000003-05 and 004986-87. The remaining factor is: whether disciplining a doctor for speech would chill a person of ordinary firmness.

Few circumstances chill speech more than the possibility of losing a professional license. Respondent's determination of mis/disinformation without open debate under the threat of discipline is such a circumstance. Appropriateness of medical professionals' speech now hinges on whether Respondent deems speech "misinformation" or "disinformation" or whether it is aligned with "factual, scientifically grounded and consensus-driven for the betterment of public health." AR 004849. Enforcement of this standard subjects doctors to intrusive investigations and discipline for engaging in scientific discussion and debate. Such enforcement will cause any person of ordinary firmness to refrain from speaking,

Therefore, the Respondent's actions satisfy all three factors for retaliation and Petitioner is likely to prevail.

Respondent violated Petitioner's due process rights.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of '. . . 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "A medical license is a constitutionally protected property interest which must be afforded due process." *Nguyen*, 144 Wn.2d at 523. "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." *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). 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).

Respondent's Order requires Petitioner to undergo a physical, cognitive, and psychological examination without the notice or right to defend required by RCW 18.130.170. AR 0050007-09. The statute requires notice before Respondent 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). Statutory 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.* 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). Such examinations are 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 the investigation is over, a license holder may be charged with the inability to practice due to lack of mental or physical capacity but Respondent must issue such charges 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. RCW 18.130.160(4).

Here, Petitioner was afforded none of the statutory due process requirements. While Petitioner was given an SOC, it never mentioned RCW 18.130.170 or an inability to practice due to mental or physical incapacity. He was also not allowed a hearing **solely** on the issue of capacity. Additionally, Respondent already completed the investigation, and a physical, cognitive, and psychological exam is untimely and improper as the sanction schedule does not require such examinations. Petitioner was not given notice of such examinations, or of his right to refute such examinations. The basis for the exam is unclear, the scope of the exam is not

narrowly tailored as it does not provide limitations of physical, cognitive, and psychological exams based on alleged incapacity. Thus, the requirement to undergo these examinations does not comport with the statutory due process required in the Uniform Disciplinary Act making it likely that Petitioner will win on the merits of this case.

b. The Washington Medical Commission used the wrong standard to find that Petitioner committed unprofessional conduct under RCW 18.130.180(4).

Respondent failed to use the correct standard for a finding of unprofessional conduct from practicing below the standard of care. Under RCW 18.130.180(4), it is not sufficient to find that the standard of care was breached. Respondent must also find that the breach "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.*

Here, Respondent failed to show Petitioner caused an unreasonable risk of harm to each patient. It 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).

While Respondent finds that Petitioner's actions were below the standard of care, and details which actions that includes, it does not relate those facts to how they constitute an unreasonable risk of harm, leaving Respondent's findings under RCW 18.130.180(4) insufficient as they rely on the wrong standard.

Respondent's violation of Petitioner's free speech, due process, and Respondent's use of the incorrect legal standard leave Petitioner likely to succeed on the merits, warranting a stay.

1. Without a stay of the order, Petitioner will suffer irreparable harm, and the fruits of the appeal will be harmed.

Petitioner will suffer ongoing irreparable harm, making a stay necessary to preserve Petitioner's rights. The movant bears the burden of proving irreparable harm. *Kucera*, 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*, 81 F.4th at 1040. "[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).

Petitioner may reasonably claim that his rights to free speech claim and due process were violated, leaving him likely to win on the merits. Moreover, the continuation of the violation of these rights supports this conclusion. If no stay is granted, Petitioner will have to comply with an unlawful compliance requirements with no underlying basis, which is

irrefutably irreparable harm, as no amount of money can cure such a forced submission.

2. Respondent is not harmed by the stay of an unlawful and unconstitutional order that is not justified by health, safety, or welfare.

Petitioner's likelihood of success on the merits of his constitutional claims tipping the merged factors "decisively in his favor." *Baird*, 1044. The government also "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Id.*, 1041 (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 government "cannot suffer harm from an injunction that merely ends an unlawful practice."). Moreover, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Id.*

Petitioner's right to free speech and his due process rights have been violated, balancing equities and the public interest lean in his favor. Respondent is not harmed by a stay that "ends an unlawful practice." Preventing irreparable harm of an unconstitutional order is in Petitioner's favor.

Further, while not justifying the Commission's violation of constitutional rights, even the COVID pandemic justification for enforcing the Order has ended. The state of emergency orders signed by the Governor expired October 31, 2022. *See* Press Release available at https://governor.wa.gov/news/2022/inslee-announces-end-remaining-covid-19-emergency-orders-and-state-emergency-october-31.

As there is no harm to the Commission, and no public health justification, the harm to Petitioner far outweighs the risk of harm to Respondent.

VI. CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the Court Stay the Order in its entirety; thus, preventing continued irreparable harm to Petitioner and preserving the remedies presently available to this Court. All prongs of the test for Stay are met, making it appropriate during the pendency of this appeal.

This document contains 4,947 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 12th day of April 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 12th day of April 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 12th day of April 2024, at Pasco, Washington.

/s/ S. Peter Serrano

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

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