

SEP 21 2023

FILED

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

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

Plaintiffs,

v.

WASHINGTON MEDICAL COMMISSION,
a Washington State Agency

Defendant.

CASE NO.: 23-2-01316-03

**MOTION FOR RECONSIDERATION
OF ORDER STAYING PLAINTIFFS'
MOTION FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Come now Plaintiffs by and through their counsel, S. Peter Serrano, and Karen Osborne of Silent Majority Foundation, and HEREBY MOVE THIS Court under Civil Rule 59 to RECONSIDER its Opinion and Order on Plaintiffs' Motion for Declaratory and Injunctive Relief ("Order"), which was entered and signed by Judge Joseph M. Burrowes on September 11, 2023.

See: Serrano Dec., Exh. A.

ARGUMENT FOR RECONSIDERATION

The court has stayed the Plaintiffs' request brought through a Motion for Declaratory and Injunctive Relief. *Order*, at 3. In pertinent part, the Court held that "no 'Final Order' has been issued by the Commission in any of the Plaintiffs cases" pursuant to RCW 34.05.461, RCW 34.05.570, and RCW 34.05.534 of the Administrative Procedures Act ("APA"). *Order*, at 2, ¶ 6.

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1 RCW 34.05.461 addresses the entry of a final order of an Adjudicative Proceeding; however,
2 Plaintiffs are not appealing an adjudicative proceeding, and that Section of the APA is
3 inapplicable. Here, Plaintiffs challenge the Washington Medical Commission’s (“WMC”)
4 adoption of its COVID-19 Misinformation Position Statement (the “Position Statement”), which
5 was adopted outside of the requirements of the Administrative Procedures Act (*i.e.*, with no
6 notice or comment, publication in the Washington State Registrar, etc.), and is violative of
7 Plaintiffs First Amendment rights. *See*: Complaint, at ¶¶ 30, 32, 51-55 and *Plaintiffs’*
8 *Memorandum in Support of Motion*, at 8-10. RCW 35.05.570(2-4).

9 As the Court relied on RCW 34.05.461, rather than RCW 34.05.570, without
10 consideration of the constitutional violations alleged, Plaintiffs seek reconsideration of the Stay
11 of this matter and request that the Court GRANT Declaratory and Injunctive Relief and seek an
12 order from this Court STAYING Defendant’s enforcement of the Position Statement.

13 STANDARD

14 The standard for issuing a preliminary injunction involves three factors: (1) the
15 complaining party has a clear legal or equitable right, (2) the complaining party has a well-
16 grounded fear of immediate invasion of that right, and (3) that the acts complained of are either
17 resulting in or will result in actual and substantial injury to the complaining party.” *Kucera v.*
18 *DOT*, 140 Wash. 2d 200, 209, 995 P.2d 63, 68 (2000). “[S]ince injunctions are addressed to the
19 equitable powers of the court, the listed criteria must be examined in light of equity including
20 balancing the relative interests of the parties and, if appropriate, the interests of the public.” *Id.*
21 In considering a preliminary injunction, a court must consider all factors relevant to the
22 preliminary injunction standard, the most important of which is the likelihood of success on the
23 merits, which is used to demonstrate the clear legal or equitable right. *Baird v. Bonta*, No. 23-

1 15016, 2023 U.S. App. LEXIS 23760, at *6 (9th Cir. Sep. 7, 2023); *Kucera*, 69. A court “may
2 not deny a preliminary injunction motion and thereby allow constitutional violations to continue
3 simply because a remedy would involve intrusion into an agency’s administration of state law.”
4 *Baird* at *8 (omitting internal quotation marks). “In cases involving a constitutional claim, a
5 likelihood of success on the merits usually establishes irreparable harm, and strongly tips the
6 balance of equities and public interest in favor of granting a preliminary injunction.” *Id.* at *25.

7 *New Case Law from the Ninth Circuit Court of Appeals Requires This Court to Analyze All*
8 *Summary Judgment Factors with an Emphasis on Plaintiffs’ Likelihood of Success when a*
9 *Constitutional Right is at Risk, as it is, Here.*

10 The court failed to analyze the summary judgment factors, particularly the likelihood of
11 success on the merits, which requires special attention as a constitutional violation/injury is
12 alleged; this position was articulated by the Ninth Circuit Court of Appeals *after* the hearing on
13 this matter occurred, but prior to the issuance of the Court’s Order. *See: Baird v. Bonta*, No. 23-
14 15016, 2023 U.S. App. LEXIS 23760 (9th Cir. Sep. 7, 2023). “Because of how a finding that a
15 plaintiff is likely to succeed on the merits of a constitutional claim impacts the other factors, a
16 district court necessarily abuses its discretion when it skips analyzing the likelihood of success
17 factor in a case involving such a claim.” *Id.* at *8.

18 It is well-established that the first factor is especially important when a plaintiff
19 alleges a constitutional violation and injury. If a plaintiff in such a case shows he is
20 likely to prevail on the merits, that showing usually demonstrates he is suffering
21 irreparable harm no matter how brief the violation. *Id.* at *6-7.

22 *Baird* further provides that “[t]he government cannot reasonably assert that it is harmed in any
23 legally cognizable sense by being enjoined from constitutional violations.” *Id.* at *11. *Baird* hits
24 squarely on point as Plaintiffs’ free speech and property interest (*i.e.*, their licenses) are limited,
25 regulated, and placed at risk through the Position Statement. Under these circumstances,

1 Plaintiffs respectfully request that the Court reconsider its ruling after analyzing the Preliminary
2 Injunction factors with a focus on the irreparable harm to Plaintiffs.

3 **ANALYSIS**

4 *The Court Should Have Relied on RCW 34.05.570 in its Analysis.*

5 RCW 34.05.570 places the burden of demonstrating the invalidity of agency action on the
6 challenging party, here, Plaintiffs, with the Court applying the standard of review that applied at
7 the time of the adoption of the challenged action. RCW 34.05.570(1)(a) and (b). The court is
8 directed to “make a separate and distinct ruling on each material issue on which the court’s
9 decision is based. RCW 34.05.570(1)(c). Where a rule is challenged, the court shall “declare the
10 rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the
11 statutory authority of the agency; the rule was adopted without compliance with statutory rule-
12 making procedures; or the rule is arbitrary and capricious.” RCW 34.05.570(2)(c). In addressing
13 agency orders in adjudicative proceedings, the Court shall declare the Order invalid if “[t]he
14 order, or the statute or rule on which the order is based, is in violation of constitutional
15 provisions on its face or as applied.” RCW 34.05.570(3)(a). The court may declare an order
16 invalid where it is “outside the statutory authority...” or where the “agency has engaged in
17 unlawful procedure or decision-making process...” and where the order is “arbitrary and
18 capricious.” RCW 34.05.570(3)(b), (c), and (i).

19 Where RCW34.05.570(2) and (3) don’t apply, (4) addresses “all agency action not
20 reviewable under subsection (2) or (3)...” *Id.* Under RCW34.05.570(4)(c), the court may declare
21 a rule invalid if it is: Unconstitutional; outside the statutory authority of the agency or the
22 authority conferred by a provision of law; or arbitrary or capricious. *Id.*

1 Here, Plaintiffs have challenged the Position Statement under RCW 34.05.570(2)
2 and (3), although (4) may also apply. As RCW 34.05.570 and the First Amendment of the
3 United States Constitution are the basis for the challenge, Plaintiffs seek reconsideration
4 under the analysis required by RCW34.05.570(2) or (4), neither of which requires an
5 agency “final order.” Furthermore, requiring exhaustion of administrative remedies would
6 cause Plaintiff’s irreparable harm further invading Plaintiffs’ constitutional rights.

7 *The Position Statement was Improperly Adopted, Violating RCW 34.05.570(2), (3), and (4).*

8 In this case, the WMC has brought statements of charges against three of the four
9 Plaintiffs based on the Position Statement. Plaintiffs’ challenge to the Statement of Charges is
10 limited to its implementation and enforcement of the Position Statement (*i.e.*, the as-applied
11 challenge to the Position Statement). *Plaintiffs’ Memorandum*, at 10. Plaintiffs also assert a facial
12 challenge to the Position Statement as an invalidly adopted Rule, which falls within the ambit of
13 a challenge under RCW 34.05.570(2) and (4). *Id.* at 10, 16.

14 The Position Statement was promulgated outside of the required Rule-Making
15 procedures; thus, it bears no validity against the Doctors and all action taken based on it is void
16 *ab initio*. *Complaint*, at 3; *Plaintiffs’ Memorandum*, at 9. *See*: RCW 34.05.375. Despite the
17 Position Statement’s invalidity, the WMC has applied it against Plaintiffs and many other doctors
18 throughout Washington and beyond. Plaintiffs’ rights have been violated by the application of
19 the Statement to their medical licenses, a property right. *Complaint*, at 18; *Plaintiffs’*
20 *Memorandum*, at 14-15. Plaintiffs’ speech has been unconstitutionally chilled *and* punished, a
21 violation of a constitutionally protected right. *Plaintiff’s Memorandum*, at 15. *Citing: Elrod v.*
22 *Burns*, 427 U.S. 347,373, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547,565 (1976) (“The loss of First
23 Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable

1 injury.”). Plaintiffs’ ability to care for their patients has been arbitrarily and capriciously
2 curtailed, their medical judgement has been called into question, and they have suffered
3 reputational damages and losses the unlawful application of the Position Statement by the WMC
4 and publication of such application. Thus, though the Position Statement was not formally
5 adopted as a rule within the requirements of the APA, it is being *applied* as a rule to punish
6 Plaintiffs unlawfully, and this Court has authority to declare such action invalid under RCW
7 34.05.570(2), (3), and/or (4). Here, the WMC’s unlawful punishment of doctors it disagrees
8 with, which falls outside of the WMC’s authority, is being appealed, not a final decision of an
9 adjudicative process, and the court should reconsider its Order in light of that fact. Such
10 enforcement necessitates a stay of the WMC’s enforcement of the Position Statement; without
11 such a stay Plaintiffs will continue to suffer a loss of first amendment rights and their property
12 rights--their medical licenses.

13 Furthermore, though this case does not require the exhaustion of any administrative
14 remedies, Dr. Wilkinson has exhausted his administrative remedies and appealed the WMC’s
15 Final Order related to his licensure case. This appeal was filed in the Yakima County Superior
16 Court on September 13, 2023, and was filed as Case No.: 23-2-202237-39. *See*: Serrano Dec.,
17 Exh. B. Dr. Wilkinson received the final order just prior to the hearing by this Court and now is
18 faced with punishment for his speech, a fine and required to submit to a physical, mental, and
19 psychological examination. Clearly, the WMC has unlawfully applied the Position Statement
20 against Dr. Wilkinson, leaving a challenge to that Final Order appealable under RCW
21 34.05.570(3) in addition to (2) and (4).

22 A Court may “relieve a petitioner of the requirement to exhaust any or all administrative
23 remedies from having to exhaust administrative remedies would clearly outweigh the public

1 policy requiring exhaustion of administrative remedies.” RCW 35.05.534(3)(c). The loss of
2 speech rights is irreparable. *See Elrod v. Burns*, 427 U.S. 347,373, 96 S. Ct. 2673, 2690, 49
3 L.Ed.2d 547,565 (1976). Protection of the Plaintiffs’ constitutional rights is paramount. “It is
4 always in the public interest to prevent the violation of a party's constitutional rights.” *Index*
5 *Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 838 (9th Cir. 2020) (quoting
6 *Padilla v. Immigration & Customs Enforcement*, 953 F.3d 1134, 1147-48 (9th Cir. 2020).

7 Dr. Wilkinson’s speech has been punished, Dr. Cole’s speech is at issue in his impending
8 hearing, Dr. Moon’s speech has been chilled, Dr. Turner’s speech has been scrutinized, and all
9 Plaintiffs’ property rights in their licenses are at risk. This is enough, that even if there were
10 administrative remedies that have not been exhausted, to excuse such exhaustion under RCW
11 35.05.534(3)(c).

12 While Plaintiffs do not allege that the Position Statement was a properly adopted Rule, as
13 it was adopted outside of the parameters of the APA for rule-making purposes, Plaintiffs have
14 alleged, and continue to allege that the Position Statement has full force and impact of a rule.
15 Thus, a challenge under RCW 34.05.570(2) or (4) is properly before this court. Such a challenge
16 leads this Court to the single logical conclusion: the Position Statement was not properly adopted
17 under the Administrative Procedures Act as the WMC offered no notice and comment prior to the
18 adoption of the Position Statement. Moreover, the Position Statement was not published in the
19 WSR prior to or after its adoption. Thus, enforcement of the Position Statement violates the
20 Administrative Procedures Act, the United States Constitution, and the Washington Constitution.

21 *Caselaw Case from the Washington Court of Appeals, Division III Issued **After** the Order was*
22 *Issued in this is Instructive.*

23 On September 14, 2023, the Washington Court of Appeals, Division III issued an order in
24 *City of Tacoma v. Dep’t of Ecology*, No. 39494-8-III, 2023 Wash. App. LEXIS 1748 (Ct. App.

1 Sep. 14, 2023). In *City of Tacoma*, the petitioners challenged a Department of Ecology
2 (“Ecology”) letter denying a petition for rulemaking in which Ecology made commitments to the
3 regulated community. *Id.* at *16. The Court held, in almost identical verbiage as Plaintiffs’
4 Complaint, “this appeal is not about whether Ecology should be using the SSM to inform
5 regulation or whether it is accurate and reliable. This appeal is about whether Ecology violated
6 the APA by adopting rules without allowing for public comment...” *Id.* at *9; Complaint, at pg. 2,
7 ¶30, and Cause of Action, Count 1. Plaintiffs, here, are not presently challenging the authority of
8 the WMC to create a standard of care, but are challenging how the Position Statement was
9 adopted similar to the Plaintiffs’ challenge to the Ecology action challenged in *City of Tacoma*.
10 Complaint, at 2.

11 In *City of Tacoma*, the Court reviewed the basic definition of a “rule,” and concluded that
12 the APA requires a two-step process rulemaking process; this analysis is instructive, here:

13 First, the court determines whether the purported rule is an “order, directive, or
14 regulation of general applicability.” *Nw. Pulp*, 200 Wn.2d at 672 (quoting RCW
15 34.05.010(16)). Second, the court determines whether the purported rule “fall[s]
16 into one of the five enumerated categories” in RCW 34.05.010(16). *Id.* at 672-73.
17 If the purported rule fails the first part of the inquiry, “we need not address whether
18 [it] falls within one of the enumerated categories in satisfaction of the second
19 element.” *Id.* at 676. *Id.* at *20.

20 Plaintiffs have alleged that the Position Statement meets these criteria. Complaint, ¶¶ 46-48.

21 After considering how Ecology implemented the commitments it made in the letter, Division III
22 held that the Ecology’s commitments were generally applicable to the regulated community, and
23 that Ecology had therefore created a rule. *Id.*, at 27, 31. Additionally, the Court held that
24 “Ecology directed its staff to include new requirements in both the individual permits and the
25 general permit. The record indicates these requirements were nondiscretionary and were part and
26 parcel of the commitments Ecology made to NWEA.” *Id.* at 35. Finally, the Court held that,

1 “issuance of an NPDES permit is a privilege conferred by law because without an NPDES
2 permit, no person or entity may discharge any substance into Puget Sound.” RCW 90.48.160,
3 .162. *Id.* at 37.

4 Division III relied on similar factual and legal issues as those before this Court. Here
5 Plaintiffs challenge the Position Statement, which adopted a standard of care. That standard is
6 enforceable, and the WMC has implemented and enforced the Position Statement against three of
7 the four Plaintiffs, impacting their property rights in their licenses with the fourth Plaintiff, Dr.
8 Moon, having relinquished her license in fear of action that was likely to be taken against her
9 license. Additionally, as part of the standard of care, the WMC takes upon itself the role of
10 regulating the physicians’ lawful speech. This Court should follow Division III and “conclude
11 that the new requirements...are unlawful.” *Id.* at 38 (cleaned up). And, like Ecology if the WMC
12 “desires to keep” its Position Statement, “it must do so through the rulemaking procedures of the
13 APA.” *Id.* Accordingly, the Court should grant reconsideration and should enjoin and stay the
14 WMC’s enforcement of the Position Statement and should direct the WMC to properly adopt or
15 rescind the Position Statement.

16 CONCLUSION

17 This Court should reconsider its decision and apply only RCW 34.05.570(2) and (4) to
18 the review of the questions presented. If the Court applies RCW 34.05.570(3), it should
19 acknowledge that Dr. Wilkinson has exhausted his administrative remedies and relieve the other
20 Plaintiffs from having to exhaust administrative remedies as it is in the public interest to prevent
21 the violation of their constitutional rights. Under such analysis, the Court should STAY the WMC
22 proceedings against Plaintiffs and Declare enforcement of the Position Statement
23 unconstitutional and void *ab initio*. The Court should further declare that the Position Statement

1 is a rule, which the WMC adopted outside of the Administrative Procedures Act and Order the
2 WMC to adopt the Position Statement in accordance with the Administrative Procedures Act and
3 further declare that the WMC cease enforcement of the Position Statement until such a time it
4 has adopted the Position Statement in compliance with the Administrative Procedures Act and
5 the United States and Washington Constitutions.

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7 Dated this 21st day of September 2023.

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22

1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify, under penalty of perjury under the laws of the state of Washington, that
4 on this date a true and correct copy of this Motion for Reconsideration of Order Staying
5 Plaintiffs’ Motion for Declaratory and Injunctive Relief was served as follows:

6
7 BY: Email per E-Service Agreement to:

- 8 Agriculture & Health Division AHDOlyEF@atg.wa.gov
- 9 Heather Carter Heather.Carter@atg.wa.gov
- 10 Kristi Knieps Kristi.Knieps@atg.wa.gov
- 11 Makenzie Clark Makenzie.Clark@atg.wa.gov
- 12 Khrys Kane Khrys.Kayne@atg.wa.gov
- 13 Krystle Berry Krystle.Berry@atg.wa.gov

14
15 AND TO Benton County Superior Court, as follows:

16
17 Reconsideration-Revision@co.benton.wa.us

18
19
20 **DATED** this of 21st day of September 2023, at Pasco, Washington.

21
22
23
24 */s/Simon Peter Serrano*
25 Simon Peter Serrano, WSBA No. 54769

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