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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

RICHARD S. WILKINSON, et al.,

Plaintiffs,
v.

SCOTT RODGERS, et al.,

Defendants.

CASE NO.: 1:23-cv-03035

PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER

April 10, 2023
Without Oral Arguments

PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER
1:23-cv-03035

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1 **I. INTRODUCTION AND REQUESTED RELIEF**

2 On September 22, 2021, through a special meeting with limited notice and no
3 opportunity for comment,¹ the Washington Medical Commission (“WMC”) adopted
4 a Position Statement on *COVID-19 Misinformation* (“Statement”). *See*: Compl.,
5 Exh. 1. Through the Statement, the WMC adopted the following standard of care as:
6 “Treatments and recommendations regarding this disease that fall below standard of
7 care as established by medical experts, federal authorities and legitimate medical
8 research are potentially subject to disciplinary action.” *Id.* In adopting the Statement,
9 the WMC failed to identify: (1) a standard; (2) the experts; (3) the federal authorities;
10 and (4) “legitimate” medical research.

11 Since its adoption, the WMC has weaponized the Statement to curtail the medical
12 professionals’ speech and treatment of COVID-19, targeting speech related to, or
13 prescriptions of Ivermectin. The WMC claims that it enforces the Statement through
14 *Unprofessional Conduct*, Revised Code of Washington (“RCW”) § 18.130.180;
15 however, the RCW offers **no** basis to regulate the proscribed speech or treatment.

16 While the WMC has rejected this notion in Plaintiff Wilkinson’s licensure case,
17 arguing that the Statement “is an advisory statement intended to help licensees steer
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25 1 WMC Special Meeting to adopt Position Statement, September 21, 2021.
26 Available at: <https://www.youtube.com/watch?v=P5qDoNWfdhI>. Last accessed:
27 March 10, 2023.
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1 clear of the pitfalls of COVID misinformation into which Respondent fell,”² the
2 WMC clearly enforces a standard of care through the Statement as there is no
3 alternative basis for such enforcement. The WMC cannot limit a medical
4 professional’s speech or treatment protocols without properly laying the groundwork
5 through defined regulation, although such regulation would also be subject to First
6 Amendment challenges. As the Statement fails to meet these threshold matters, it is
7 facially unconstitutional and as applied to the Plaintiffs (and any other disciplined
8 professional); enforcement of the Statement or any other effort to curb
9 “dis/misinformation” or treatment of COVID-19 with Ivermectin must be restrained
10 as the WMC lacks legal basis for such enforcement. Enforcement of Plaintiffs’
11 Statements of Charges should STAYED and a Temporary Restraining Order should
12 be GRANTED pending review of the preliminary injunction.
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17 **II. STATEMENT OF FACTS**

18 **A. The Washington Medical Commission’s Adoption of the Statement.**

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20 The Statement **is** a Policy Statement, a “written description of the current
21 approach of an agency to implementation of a statute or other provision of law, of a
22 court decision, or of an agency order, including where appropriate the agency’s
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25 _____
26 *2 In Matter of License to Practice as a Physician and Surgeon of: Richard S.*

27 *Wilkinson, MD, License No. MD.MD.00016229, Commission’s Opposition to*
28 *Respondent’s Motion to Dismiss Charges, 1.7-1.9. Filed March 6, 2023.*

1 current practice, procedure, or method of action based upon that approach.”³ Policy
2 Statements provide “[c]urrent interpretive and policy statements are advisory only;”
3 the APA requires the publication of interpretive or policy statements in the
4 Washington State Register, and the challenged Statement was not so published.⁴

6 B. Plaintiff Wilkinson’s Charges by the WMC.

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8 Wilkinson was issued Statement of Charges No. M2022-196 on June 7, 2022,
9 alleging that he “made numerous false and misleading statements on his public web
10 site regarding the COVID-19 pandemic, COVID-19 vaccines, and public health
11 officials that were harmful and dangerous to individual patients, generated mistrust
12 in the medical profession and in public health, and had a wide-spread negative
13 impact on the health and well-being of our communities.” M2022-196, at 1. The
14 WMC charged Wilkinson with “negligent care” for “prescrib[ing] medications that
15 are not indicated for a COVID-19 infection” and further alleged that he “failed to
16 properly document adequate justification for the treatment in the medical record,
17 failed to take a history or perform a physical examination, and failed to obtain
18 appropriate informed consent.” *Id.* Wilkinson has a 5-day hearing to protect his
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3 WMC Website, *Policies & Rules*. Available at: [https://wmc.wa.gov/policies-](https://wmc.wa.gov/policies-rules#Rules%20/%20Policies%20/%20Procedures%20/%20Guidelines%20/%20IS)
25 [rules#Rules%20/%20Policies%20/%20Procedures%20/%20Guidelines%20/%20IS](https://wmc.wa.gov/policies-rules#Rules%20/%20Policies%20/%20Procedures%20/%20Guidelines%20/%20IS)
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27 Last accessed: February 23, 2023.

28 4 RCW 34.05.230(1), (4).

1 medical license scheduled for April 3 – 7, 2023, necessitating this TRO.

2 C. Plaintiff Cole’s Charges by the WMC.

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4 Plaintiff Cole was issued Statement of Charges No. M2022-207 on January
5 10, 2023, alleging that he “made numerous false and misleading statements during
6 public presentations regarding the coronavirus disease 2019 (COVID-19) pandemic,
7 COVID-19 vaccines, the use of ivermectin to treat COVID-19, and the effectiveness
8 of masks that were harmful and dangerous to individual patients, generated mistrust
9 in the medical profession and in public health, had a wide-spread negative impact
10 on the health and well-being of our communities, and that Cole has made
11 “demonstrably false” statements since March 2021.” SOC: M2022-207, at 1, 3. The
12 WMC made no showing of the “demonstrable falsity” of Cole’s statements.

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14 D. Plaintiff Eggleston’s Charges by the WMC.

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17 Eggleston was issued Statement of Charges No.: M2022-204 on August 3,
18 2022, for opinion pieces that appeared in a regional southeastern Washington
19 newspaper between January 24, 2021, and November 28, 2021. SOC: M2022-204,
20 at 1. The WMC claimed that publications include “false statements regarding
21 medical issues and promulgated misinformation regarding the SARS-CoV-2 virus
22 and treatments for the virus.” *Id.*, at 2. The WMC further claimed that, during the
23 investigation of his license, “Respondent willfully misrepresented facts with regard
24 to the SARS-CoV-2 virus and denied that it existed” and that “Respondent’s
25 commitment to misinformation regarding COVID-19 was further evidenced in
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1 multiple statements made to the WMC in response to its investigation.” *Id.*, at 7.
2 Eggleston is no longer actively practicing medicine; the WMC is clearly targeting
3 his speech. Eggleston has a 3-day hearing scheduled for his license May 24 - 26.
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6 **III. ISSUES PRESENTED**

7 1. Should the Court issue a TRO enjoining Defendants from enforcing the
8 Statement or any other effort to limit medical professionals’ speech or treatment of
9 COVID-19 with Ivermectin in violation of medical professionals’ First Amendment
10 rights and patient right to informed consent? YES.
11

12 2. Should the Court stay enforcement of Plaintiffs’ Statement of Charges? Yes.
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14 **IV. STANDARD OF RELIEF**

15 A TRO preserves the status quo and prevent irreparable harm before a
16 preliminary injunction hearing is held. *Zirkle Fruit Co. v. United States Dep’t of*
17 *Labor*, 2019 U.S. Dist. LEXIS 226382, at *11 (E.D. Wash. Sep. 11, 2019); *Citing:*
18 *Hawai’i v. Trump*, 241 F.Supp. 3d 1119, 1133 (D. Haw. 2017). The analysis to grant
19 a TRO or a preliminary injunction is “substantially identical” aside from the notice
20 component. *Stuhlberg Int’l Sales Co., Inc. v. John D. Bruch & Co.*, 240 F.3d 832,
21 839 n.7 (9th Cir. 2001). Such relief is granted to prevent “immediate and irreparable
22 injury.” Fed. R. Civ. P. 65 (b)(1)(A). Obtaining a preliminary injunction or a TRO
23 requires Plaintiffs’ showing of four factors: (1) a likelihood of success on the merits;
24 (2) a likelihood of irreparable harm; (3) that the balance of harm tips in the movant’s
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1 favor; and (4) that the injunction is in the public interest. *Winter v. Nat. Res. Def.*
2 *Council, Inc.*, 555 U.S. 7, 20 (2008); *All. for the Wild Rockies v. Cottrell*, 632 F.3d
3 1127, 1131 (9th Cir. 2011). “In the Ninth Circuit, when the balance of equities tips
4 ‘sharply’ in the plaintiff’s favor, preliminary injunctive relief is appropriate if there
5 are ‘serious questions going to the merits,’ even if the plaintiff cannot necessarily
6 establish a likelihood of success. *Id.*, at *11-12; *citing: Alliance*, at 1135. Plaintiffs
7 have plead clear violations of First Amendment rights and reach serious questions
8 going to the merits; these violations tip the balance in Plaintiffs’ favor.
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12 **V. ARGUMENT**

13 **A. Elements of a TRO.**

14 **1) The Statement clearly infringes on Plaintiffs’ constitutional rights giving** 15 **Plaintiffs a likelihood of success.**

16 “The loss of First Amendment freedoms, for even minimal periods of time,
17 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-
18 74, 96 S. Ct. 2673, 2690, 49 L.Ed.2d 547, 565-66 (1976). Plaintiffs’ Hobson’s
19 Choice is comply with the Statement and the WMC’s approved speech/treatment
20 methods or risk losing license; Defendants cannot defend this position by claiming
21 their position will be enforced only in a narrow or benign manner as they have
22 clearly taken quite an expansive approach to enforcement. *See, e.g., United States*
23 *v. Wunsch*, 84 F.3d 1110, 1118 (9th Cir. 1996). “If there is a bedrock principle
24 underlying the First Amendment, it is that the government may not prohibit the
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1 expression of an idea simply because society finds the idea itself offensive or
2 disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). “[P]eople lose when the
3 government is the one deciding which ideas should prevail.” *Nat’l Inst. of Family*
4 *& Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72, 2375 (2018) (“*NIFLA*”).
5 When First Amendment freedoms are at risk, the focus is on a single factor—
6 whether Plaintiffs are likely to succeed on the merits. This is so because even the
7 brief loss of First Amendment freedoms causes “irreparable injury” and tilts the
8 “the balance of hardships . . . sharply in [Plaintiffs’] favor and there is “a strong
9 public interest in avoiding constitutional violations.” *Yes on Prop B v. City & Cty.*
10 *of S.F.*, 440 F. Supp. 3d 1049, 1055 (N.D. Cal. 2020) *citing* *Am. Beverage Ass’n v.*
11 *City of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019).

12 “[I]t is always in the public interest to prevent the violation of a party’s
13 constitutional rights.” *Am. Beverage*, at 754; see also *Sammartano v. First Judicial*
14 *Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) (“Courts considering requests for
15 preliminary injunctions have consistently recognized the significant public interest
16 in upholding First Amendment principles”). Clearly, ill-defined, speech based
17 regulation infringes on Plaintiffs (and Plaintiffs’ patients) First Amendment rights
18 leaving them likely to succeed on the merits.

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25 **2) All Plaintiffs are subject to discipline by the WMC and have suffered/are**
26 **suffering, irreparable harm; the equities tip in Plaintiffs’ favor.**

27 As the WMC prohibits COVID-19 related speech against Plaintiffs, TRO factors
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1 2 and 3 merge. While these factors merge, “[w]hen an alleged deprivation of a
2 constitutional right is involved, such as the right to free speech or freedom of
3 religion, most courts hold that no further showing of irreparable injury is necessary.”
4 11A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d
5 ed. Apr. 2020 update). “[A]ny First Amendment infringement that occurs with each
6 passing day is irreparable.” *Neb. Press Ass’n v. Stuart*, 423 U.S. 1327, 1329 (1975);
7 see also *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (“loss
8 of First Amendment freedoms, for even minimal periods of time, unquestionably
9 constitutes irreparable injury” (*Citing: Elrod, supra.*) The “chill on ... free speech
10 rights—even if it results from a threat of enforcement rather than actual
11 enforcement—constitutes irreparable harm.” *Cuviello v. City of Vallejo*, 944 F.3d
12 816, 833 (9th Cir. 2019). The threat of suspension or license loss leaves “a potential
13 for extraordinary harm and serious chill upon protected speech.” *Doe v. Harris*, 772
14 F.3d 563, 583 (9th Cir. 2014).

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20 Plaintiffs have been disciplined for speech, and their harm is ongoing. The risk
21 of license loss or suspension increases daily as Wilkinson and Eggleston’s hearings
22 approach, and because each Plaintiffs’ Statement of Charges infringes on their First
23 Amendment rights. Irreparable harm has occurred, tipping the scale in Plaintiffs’
24 favor. The Court should immediately enjoin enforcement of the Statement and
25 related COVID-19/Ivermectin treatment to prevent further harm and stay
26 enforcement of Plaintiffs’ Statements of Charges.
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PLAINTIFFS’ MOTION FOR TEMPORARY
RESTRAINING ORDER

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1 **3) The Statement is not in the Public Interest as it infringes on the free**
2 **course of dialogue between the physician and patient and eviscerates the**
3 **Patient’s ability to receive Informed Consent in COVID-19 treatment.**

4 The patient-doctor relationship requires a level of trust and communication
5 that allow doctors to provide patients the best advice and consultation to ensure that
6 a patient has informed consent with respect to treatment options. *Conant v. Walters*,
7 309 F.3d 629, 636 (9th Cir. 2002) (“An integral component of the practice of
8 medicine is the communication between a doctor and a patient. Physicians must be
9 able to speak frankly and openly to patients.”) The Statement and its enforcement
10 prohibit medical professionals from speaking freely or offering alternative treatment
11 to address scientific inquiry or medical advancement unless adopted by the
12 government’s “legitimate” researchers. Treatment of a novel disease is the last place
13 the government insert itself in the speech and treatment of the disease. This is
14 especially true as there is no consensus on the treatment of the virus, with the views
15 of public health authorities transforming with new information.
16

17 The Statement infringes on the First Amendment rights of the listeners or
18 recipients of information—here, patients. First Amendment protection extends not
19 just “to the communication,” but also “to its source and to its recipients both.” *Va.*
20 *State Bd. Of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976).
21 The practical effect of Statement is a single, government-approved narrative
22 regarding COVID-19 matters. Confining physicians to a government approved
23 message is not in the public interest, especially with respect to a novel and
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1 controversial disease such as COVID-19. “The Constitution embraces...a heated
2 exchange of views, even (perhaps especially) when they concern sensitive topics . .
3 . where the risk of conflict and insult is high.” *Rodriguez v. Maricopa County Cmty.*
4 *Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010); *See also Conant*, 309 F.3d at 634 (“In
5 the marketplace of ideas, few questions are more deserving of free-speech protection
6 than whether regulations affecting health and welfare are sound public policy.”). If
7 Defendants are concerned about what they perceive to be misinformation regarding
8 COVID- 19 or the vaccines, the solution is accurate and truthful speech, not the
9 suppression of dissenting information. “The remedy for speech that is false is speech
10 that is true. This is the ordinary course in a free society.” *United States v. Alvarez*,
11 576 U.S. 709, 727 (2012).

16 **VI. CONCLUSION AND RELIEF SOUGHT**

17
18 Plaintiff respectfully request this Court to ENTER a Temporary Restraining
19 Order to prevent Defendants from enforcing the Statement or other enforcement of
20 COVID-19 Ivermectin speech or treatment in violation of Plaintiffs’, other medical
21 professionals’, and Plaintiffs’ patients’ constitutional rights. Plaintiffs ask this Court
22 to STAY the enforcement of Plaintiffs’ Statement of Charges at least until the Court
23 decides Plaintiffs’ request for injunctive relief.
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DATED this 10th day of March 2023.

SILENT MAJORITY FOUNDATION

/s/ Simon Peter Serrano

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2023, I electronically filed the foregoing document with the Clerk of the United States District Court using the CM/ECF system which will send notification of such filing to all parties who are registered with the CM/ECF system.

DATED this 10th day of March 2023.

/s/Madeline Johnson
Madeline Johnson