The Court of Appeals
of the
State of Washington
Division III

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RICHARD J. EGGLESTON, M.D., Appellant/Petitioner, v. WASHINGTON MEDICAL COMMISSION, Respondent.	No. 39731-9-III COMMISSIONER'S RULING

This matter is before the court to determine appealability and, if not appealable, then to decide whether to accept discretionary review of an order denying Dr. Richard Eggleston's motion to preliminarily enjoin the Washington Medical Commission from proceeding with an administrative disciplinary hearing concerning his medical license. For the reasons stated herein, the order denying the motion for preliminary injunction is not appealable as a matter of right. However, the court grants discretionary review of the superior court's decision.

FACTS

THE WASHINGTON MEDICAL COMMISSION'S GUIDANCE POLICY ON DISCIPLINING A LICENSED PHYSICIAN'S DISSEMINATION OF COVID-19 MISINFORMATION

According to Dr. Eggleston's verified complaint, the Washington Medical Commission is a member of the Federation of State Medical Boards. The Federation released a statement on July

21, 2021, warning physicians that they risked discipline if they generate and spread COVID-19 vaccine misinformation or disinformation:

> Physicians who generate and spread COVID-19 vaccine misinformation or disinformation are risking disciplinary action by state medical boards, including the suspension or revocation of their medical license. Due to their specialized knowledge and training, licensed physicians possess a high degree of public trust and therefore have a powerful platform in society, whether they recognize it or not. They also have an ethical and professional responsibility to practice medicine in the best interests of their patients and must share information that is factually, scientifically grounded and consensus driven for the betterment of public health. Spreading inaccurate COVID-19 vaccine information contradicts that responsibility, threatens to further erode public trust in the medical profession and thus puts all patients at risk.

Mot. for Discretionary Review/Memo on Appealability, Attach. A at 3 ("Motion"). Dr. Eggleston alleges that the Washington Medical Commission adopted a similar but broader guidance policy on September 21, 2021.

THE WASHINGTON MEDICAL COMMISSION'S STATEMENT OF CHARGES AGAINST DR. EGGLESTON

Purportedly against the backdrop of its COVID-19 misinformation guidance policy, the Washington Medical Commission filed a Statement of Charges against Dr. Eggleston on August 9, 2022. The Statement of Charges alleges that Dr. Eggleston, a retired but licensed physician, committed COVID-19-related unprofessional conduct under RCW 18.130.180(1), (13), and (22). These statutory sections define unprofessional conduct as "any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession," misrepresentation in any aspect of the conduct of the profession, and interference with an investigation by willful misrepresentation of facts before the Commission:

> [T]he following conduct, acts, or conditions constitute unprofessional conduct for any license holder under the jurisdiction of this chapter:
>
> (1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;
>
> …
>
> (13) Misrepresentation or fraud in any aspect of the conduct of the business or profession;
>
> . . .
>
> (22) Interference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action, or by the use of financial inducements to any patient or witness to prevent or attempt to prevent him or her from providing evidence in a disciplinary proceeding[.]

RCW 18.130.180.

The Commission's unprofessional conduct charges fall into two categories. The first category alleges that Dr. Eggleston committed unprofessional conduct by publishing misinformation about COVID-19 in several newspaper columns. The second category alleges that he willfully misrepresented facts about COVID-19 to the Commission during its investigation of the first category of charges.

Regarding the first category of charges, the Statement alleges that Dr. Eggleston wrote a periodic newspaper column published in a regional newspaper for southeast Washington and north central Idaho between January 24, 2021, and November 28, 2021; that he closed each column using "M.D." after his name and an email address that identifies him as a physician; and that he made multiple false statements regarding medical issues and promulgated misinformation regarding the SARS-CoV-2 virus and its treatment.

To support its allegations of misconduct, the Commission's Statement of Charges focuses on certain written statements within Dr. Eggleston's newspaper columns. It asserts that the following statement about COVID-19 deaths, written in Dr. Eggleston's July 11, 2021, column, harms the public by minimizing the mortal danger of COVID-19:

> The Centers for Disease Control and Prevention state that 94 percent of 591,265 supposed COVID-19 death[s] had underlying causes. Therefore, 6 percent – or 35,475 – were actual COVID-19 deaths.

Dec. of Kristin G. Brewer in Support of Mem. in Opp. To Pet'r's Emergency Mot. for Injunction Pursuant to RAP 8.3, Ex. 1 at 2 (May 22, 2023) ("Brewer Dec."). The Commission disputes the accuracy of another written statement within the same column, which contemplates future distribution of mRNA vaccines that alter human DNA; however, the Commission does not allege that this statement harms the public:

> "In October 2019, [Bill] Gates sponsored the Vaccine Safety Net Workshop, a precursor to Immunization Agenda 2030, which will direct further mass injections with mRNA vaccines (biologics) altering our DNA by changing genes called P53 and BRAC1."

Id. at 3.

The Commission alleges Dr. Eggleston wrote the following statements in his March 17, 2021, column, which criticizes using polymerase chain reaction tests to diagnose COVID-19:

> "The test most used to determine if a person is COVID-19 antibody positive is based on polymerase chain reaction [PCR]. Kory Mullis, the Nobel Prize winner for inventing the PCR, and Dr. Mike Yeaden, have stated that the PCR is not an appropriate tool for diagnosing COVID-19 infections, especially when done inaccurately, causing the PCR to [be] '95 percent erroneous for COVID-19.'
>
> Even the New York Times stated that the PCR is '79 percent false positive.'"

Id. at 3 (alteration added). The Statement of Charges alleges that these particular statements question the accuracy of the PCR diagnostic modality, which harms the public by suggesting that symptomatic persons should not test by PCR and should not assume they are contagious or need care if they test positive. The Statement alleges the PCR test has been "extensively evaluated" and "shown to be accurate" and cites two medical articles for support – one published before Dr. Eggleston's column and one published after his column. *Id*. at 3.

The Commission's Statement of Charges further alleges that, in two columns, Dr. Eggleston's statements that COVID-19 vaccines provide only short-term immunity and have resulted in 6,000 deaths harm the public by creating "distrust and fear" of vaccines that reduce the risk of acquiring SARS-CoV-2 and prevent serious illness and death caused by COVID-19:

- As with the evil of Stockholm syndrome, signs of submission to COVID-19 fear include:
  . . .
  Taking vaccines that only provide short-term immunity and don't stop transmission of COVID-19, but at least 6,000 vaccine deaths have occurred.

- The SARS-Cov-1 and SARS-CoV-2 genomes are 80 percent similar, and 17 years after exposure to SARS-CoV-1, immunity still

> exists. This is because of long-lasting and specific cellular immunity by T-2 [sic] immune cells and bone marrow plasma cells, both not strengthened by booster jabs. And therefore, the booster can't help long-term immunity.

Id. at 5 (alteration original).

The Statement of Charges goes on to allege that Dr. Eggleston's written statements regarding ivermectin in three columns harm the public because people "may decline vaccination against Covid-19" or "may delay or avoid receiving effective therapy for Covid-19 and seek or take ivermectin instead" and assume "it will protect them"[1]:

> - I believe that soon, ivermectin, the inhaled steroid budesonide and others will be the standard of care for prevention of and treatment of SARSCov2 [sic] (COVID-19).
>
> - Ivermectin has four decades of safe use, with almost 4 billion doses for several medical conditions. It has been re-purposed for COVID-19 prophylaxis and treatment and is inexpensive.
>   . . .
>   Other [i]vermectin disinformation sources should be the most trusted. Medical journals, such as the [Journal of the American Medical Association], Lancet, Nature and Chest are supported by pharmaceutical ads. They all rejected the largest 600-patient prospective RCT from Egypt showing hospital rates with [i]vermectin of 1 percent vs. 22 percent standard of care and mortality rates of 2 percent vs. 22 percent respectively.
>
> - My previous opinions stated that ivermectin and hydroxychloroquine are very effective and safe, and should be used along with vitamins C and D, melatonin, zinc, and quercertin.

Id. at 5-6 (alterations original).

[1] *Id.* at 6-7.

With respect to the Commission's second category of allegations, the Statement of Charges says Dr. Eggleston "willfully misrepresented facts" about SARS-CoV-2 and its vaccines when he stated in response to the Commission's inquiries:

- "There is no absolute proof that the SARS-CoV-2 exists."
- "Why would it be important to differentiate Covid [sic] from influenza? Because influenza cases nearly disappeared in 2020 as influenza was relabeled 'Covid' [sic] due to faulty testing."
- "Life insurance companies are paying out death benefits in the 18-45 year old range, 40% higher than last year. This high rate is expected as a 1 in 200 year event. Insurance companies cannot sustain this type of actuarial outlier payouts. What has changed {sic} this actuarial nightmare? The injection of millions of young people with an experimental biologic agent. Very dangerous toxins, graphene with its variant oxide and hydroxide is in a [sic] unknown percent of vials, and the spike protein."
- "The CDC has stopped taking additional reports of deaths and complications whether life-threatening or elsewhere, to update the VAERS (Vaccine Adverse Event Reporting System). The CDC's own Harvard Lazarus study about the accuracy of deaths and complications showed only one percent of side effects and 10 percent of deaths were accurately reported. Therefore at least 45,000 and likely 200,000 deaths have following Covid [sic] vaccinations and 500,000 adverse events. . . . There have been multiple more deaths in less than two years from the Covid [sic] vaccines, than in the previous 30 years from all other vaccines combined. The previous mRNA vaccine attempt was withdrawn after 20 deaths."

Id. at 7-8 (third alteration added; remaining alterations original).

The Commission's Statement of Charges concludes by asserting that Dr. Eggleston's alleged violations provide grounds for imposing sanctions under RCW 18.130.160. Available sanctions include license revocation or suspension and completion of a specific program of remedial education. RCW 18.130.160.

<u>THE PRESIDING OFFICER OF THE DEPARTMENT OF HEALTH DENIES DR. EGGLESTON'S MOTION TO DISMISS THE STATEMENT OF CHARGES AS A MATTER OF LAW AND ON FIRST AMENDMENT GROUNDS IN A PREHEARING ORDER</u>

Dr. Eggleston moved to dismiss the Commission's Statement of Charges, arguing that its allegations fail to state claims of unprofessional conduct as a matter of law and punish him for his speech in violation of the First Amendment. In a prehearing order dated May 18, 2023, Department of Health Review Judge Jessica Blye denied the motion on the ground that she lacked authority under RCW 18.130.050(10) to decide a motion that results in dismissal of any allegation in a Statement of Charges and because "the case requires clinical expertise to make a final determination" on "the allegations of moral turpitude, dishonesty, or misrepresentation." Brewer Dec., Ex. 6 at 7-8 (Prehearing Order No. 3: Order Defining Conduct of Hearing) ("Prehearing Order No. 3"). In a footnote, Review Judge Blye further supported her denial of the motion on the ground that the Commission itself lacked authority to declare any statute or portion thereof invalid and, therefore, had no legal authority to grant relief:

> It is true that the motion could be provided to a Commission panel if there was a legal basis for a panel to grant the motion. However, there is not a legal basis in this case as the law is clear in Washington that administrative agencies have only the authority granted to them by the legislature. This authority does not include the authority to declare any statute or portion of a statute invalid. *Haines-Marchel v. Washington State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 744, 406 P.3d 1199, 1217 (2017); WAC 246-11-480(3)(c).

Id. at 8, n.1. The presiding officer set the matter for a three-day hearing in late May 2023.

<u>Dr. Eggleston Seeks Interlocutory Review of Prehearing Order No. 3 and Injunctive and Declaratory Relief from the Commission's Administrative Disciplinary Proceedings in Superior Court on State Constitutional Free Speech Grounds</u>

Before Review Judge Blye's decision was reduced to written order (Prehearing Order No. 3), Dr. Eggleston filed a complaint in superior court seeking declaratory and injunctive relief from the Commission's disciplinary proceedings on state constitutional free speech grounds. He further alleged that the lawsuit is a permissible interlocutory appeal of Review Judge Blye's denial of his motion to dismiss and that it is exempt from the exhaustion requirement pursuant to RCW 34.05.534(3)(a), (b), and (c). He then challenged the Commission's application of its statutory authority to investigate, prosecute, and sanction a licensed physician based on its allegedly unconstitutional efforts to sanction his speech published in newspaper articles on matters of public interest.

Dr. Eggleston's complaint asserts a constitutional right to be free from the Commission's administrative disciplinary proceedings and any sanctions for his pure/soapbox speech. Because the state Constitution's free speech protections are broader than those of the First Amendment to the federal Constitution, the complaint alleges that First Amendment jurisprudence applies to the administrative proceedings and prohibits professional boards in Washington from disciplining licensees for pure/soapbox speech. Despite his constitutional right and this legal precedent, Dr. Eggleston asserts, "[h]e is currently the subject of a Medical Commission administrative proceeding which is set for hearing on May 24-26, 2023." Motion, Attach. A at 2. And, while acknowledging administrative remedies have not been exhausted, the complaint insists Dr. Eggleston is entitled to "a declaration that the Commission's prosecution of [Dr. Eggleston] . . . is

a violation of the Washington Constitution's free speech protections" and to preliminary and permanent injunctions that prohibit the administrative hearing from occurring. *Id.* at 11.

DR. EGGLESTON MOVES FOR A PRELIMINARY INJUNCTION

To support his request to the superior court for a preliminary injunction, Dr. Eggleston asserted that the Commission's disciplinary proceedings are based on the Commission's disagreement with the conservative content and viewpoints expressed in his newspaper articles. He professed a state constitutional right to "freely speak, write and publish on all subjects" and contended that the Commission's disciplinary proceedings invade that right. Motion, Attach. D at 6.

Dr. Eggleston again relied on federal case law to argue that the Commission's efforts to sanction the written expression of his views published in newspaper columns violates his free speech rights. For example, a Ninth Circuit case he cites states that a doctor's public dialogue is entitled to the greatest First Amendment protection: "a doctor who publicly advocated a treatment that the medical establishment considers outside the mainstream, *or even dangerous*, is entitled to robust protection under the First Amendment – just as any person is – even though the state has the power to regulate medicine." Motion, Attach. D at 8 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227-28 (9th Cir. 2014), *abrogated on other grounds by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018)) (emphasis original). By way of further example, Dr. Eggleston quoted a concurring opinion in a U.S. Supreme Court case that the Ninth Circuit in *Pickup* relied upon, which proclaims that government cannot regulate speech that is not accompanied by or exercising judgment on behalf of a particular doctor-patient relationship:

> 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."

Id. (quoting *Pickup*, 740 F.3d at 1227) (quoting *Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.3d.2d 130 (1985) (White, J., concurring)). Based on Justice White's concurrence, *Pickup* similarly concluded that, "outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment." *Id*. at 9 (quoting *Pickup*, 740 F.3d at 1227-28). Finally, Dr. Eggleston noted the Supreme Court has held that even knowingly false speech is protected by the First Amendment. *Id*. at 11 (citing *United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012)).

Dr. Eggleston next relied upon Administrative Procedure Act (APA), chapter 34.05 RCW, exceptions to the administrative exhaustion requirement to contend that the superior court could enjoin the Commission's disciplinary proceedings against him. He argued that exhaustion of administrative remedies is not required because it would be futile, a post-hearing appeal would be patently inadequate to remedy the invasion of his First Amendment right, and grave irreparable harm would result from having to endure the Commission's disciplinary hearing. Expounding on these three exceptions to the exhaustion requirement, he noted that regulations prohibit a presiding officer from making a pre-hearing ruling on the constitutionality of the administrative proceedings; that the disciplinary proceedings chill all physician's rights to speak critically of the government's

response to COVID-19 in a public forum; and that interference with a person's First Amendment rights, even briefly, constitutes irreparable injury: "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for purposes of the issuance of a preliminary injunction.'" *Id.* at 13 (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)) (alteration original).

THE SUPERIOR COURT DENIES DR. EGGLESTON'S MOTION FOR A PRELIMINARY INJUNCTION

The superior court denied Dr. Eggleston's motion for a preliminary injunction on the grounds that (1) he failed to establish a likelihood of success on his declaratory judgment claim; (2) he failed to establish irreparable injury; and (3) judicial review is available for only final orders:

> Plaintiff has not met the requirements for a preliminary injunction. Plaintiff has not established that he is likely to prevail on the merits because The Uniform Declaratory Judgment Act under which Plaintiff seeks relief "does not apply to state agency action reviewable under chapter 34.05.RCW." RCW 7.24.146. The Commission's disciplinary proceeding is governed by the Administrative Procedures Act, chapter 34.05. Also, judicial review is only available for final orders and there is no final order for this Court to review. RCW 34.05.570(3); 34.05.010(11).
> //
> The court further finds that Plaintiff has not established that he will be irreparably injured by participating in the administrative hearing scheduled to proceed in approximately two weeks. On this record the Court cannot find that Dr. Eggleston's interest in judicial intervention into the legislatively decreed administrative process outweighs the Commission's duty to regulate the practice of medicine and to protect the public and the standing of the medical profession.

Motion, Attach. B at 1-2.[2] Dr. Eggleston asks this court to review the superior court's order as a matter of right or, alternatively, under RAP 2.3(b)(1) and (b)(2).

[2] No verbatim report of proceedings of the court's oral ruling has been provided.

ANALYSIS

1. THE ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION IS NOT APPEALABLE

Dr. Eggleston first contends that the order denying his motion for a preliminary injunction is reviewable as a matter of right pursuant to RAP 2.2(a)(3). RAP 2.2 is one of the original Rules of Appellate Procedure adopted in 1976. A task force proposed RAP 2.2 to the Supreme Court, commenting that an order denying a motion for temporary injunction was intentionally omitted from RAP 2.2(a) and should be subject to only discretionary review:

> The Task Force, however, has determined that review of these orders should more appropriately be discretionary. Accordingly, the following orders are omitted from Rule 2.2(a):
> CAROA 14(3): An order granting or denying a motion for temporary injunction.

2A Wash. Prac., Rules Practice RAP 2.2 (9th ed.) (2023).

This division recently reaffirmed the principle that an order denying a temporary injunction is not appealable. *Sydow v. Douglass Prop. LLC*, Unpub. op'n no. 38888-3-III, 2023 WL 3317370 at *1, *3 (Wa. Ct. App. May 9, 2023). While Dr. Egglston cites *Sheats v. City of East Wenatchee*, for support, it does not hold otherwise. 6 Wn. App. 2d 623, 431 P.3d 489 (2018). A temporary injunction was granted by the trial court in *Sheats*. *Id*. at 531 ("Officer Sheats presented his ex parte motion to the court and the court issued a TRO"). Thus, there was no appeal of the TRO. Instead, *Sheats* arose from an order denying a *permanent* injunction (a final decision), not a temporary or preliminary injunction. *See id*. at 532-33. Appealability was not at issue in *Sheats*.

RAP 2.2(a)(3) does not apply in any event. Subsection (a)(3) permits an appeal from "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues an action." RAP 2.2(a)(3). The order denying

preliminary injunction, which Dr. Eggleston designates for review, does not determine the superior court action, prevent a final judgment, or discontinue the action. Even if, as Dr. Eggleston argues, his injunctive relief claim in superior court cannot be litigated to completion before an administrative hearing is held on the Commission's misconduct claims against him, his argument does not change the non-final nature of an order denying a preliminary injunction. The order denying Dr. Eggleston's request for a temporary injunction is not a final appealable decision. It is subject to discretionary review only.

2. DISCRETIONARY REVIEW IS WARRANTED UNDER RAP 2.3(B)(1) AND (B)(2)

Dr. Eggleston alternatively requests discretionary review of the denial of his motion for preliminary injunction. Discretionary review is disfavored and ordinarily avoided in the interest of speedily and economically disposing of judicial business. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010). However, it may be allowed where an alleged error is reasonably certain and its impact is manifest. *Id*.

Dr. Eggleston seeks review under RAP 2.3(b)(1) and (b)(2). This court may accept interlocutory review of a decision under RAP 2.3(b)(1) if "[t]he superior court has committed an obvious error which would render further proceedings useless" and under RAP 2.3(b)(2) if "[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act."

a. Obvious/Probable Error

Dr. Eggleston argues that the trial court committed multiple obvious or probable errors in denying him a preliminary injunction. Those arguments are analyzed after a brief review of the law relevant to RAP 2.3(b)(1) and (b)(2)'s error standards and to preliminary injunction decisions.

RAP 2.3(b)(1)'s "obvious error" standard has been established where a trial court fails to follow controlling precedent. *Macias v. Mine Safety Appliances Co.*, 158 Wn. App. 931, 244 P.3d 978 (2010), *rev'd on other grounds by Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 282 P.3d 1069 (2012). RAP 2.3(b)(2)'s "probable error" standard applies to a broad range of interlocutory orders but "applies primarily to orders pertaining to injunctions." Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545 (1986). Demonstrating "probable error" is difficult when the superior court's decision is reviewed for an abuse of discretion, like the denial of a preliminary injunction. *See In re Matter of Lewis' Welfare*, 89 Wn.2d 113, 569 P.2d 1158 (1977) (analyzing probable error standard); *Speelman v. Bellingham/Whatcom Cnty. Hous. Authorities*, 167 Wn. App. 624, 630, 273 P.3d 1035 (2012) (stating that denial of preliminary injunction is reviewed for abuse of discretion). A superior court abuses its discretion when it applies the wrong legal standard to an issue or fails to exercise discretion. *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App. 2d 621, 626, 439 P.3d 676 (2019).

Dr. Eggleston must demonstrate that the superior court's order denying his motion for a preliminary injunction contains an "obvious error" or a "probable error." It is, therefore, helpful to keep in mind the standard for obtaining a preliminary injunction. "A party seeking a preliminary injunction must show (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion of that right, and (3) the acts complained of have or will result in actual and substantial injury." *Speelman v. Bellingham/Whatcom Cnty. Hous. Authorities*, 167 Wn. App. 624, 630, 273 P.3d 1035 (2012). "The first criterion requires a court to examine the likelihood that the moving party will prevail on the merits of its claim." *Id*. at 631.

The superior court decided Dr. Eggleston failed to satisfy the first criterion for a preliminary injunction, failed to seek review of a final administrative order, and failed to establish the irreparable harm exception to the APA's exhaustion requirement:

> Plaintiff has not met the requirements for a preliminary injunction. *Plaintiff has not established that he is likely to prevail on the merits* because The Uniform Declaratory Judgment Act under which Plaintiff seeks relief "does not apply to state agency action reviewable under chapter 34.05.RCW." RCW 7.24.146. The Commission's disciplinary proceeding is governed by the Administrative Procedures Act, chapter 34.05. Also, *judicial review is only available for final orders and there is no final order for this Court to review*. RCW 34.05.570(3); 34.05.010(11).
> //
> The court further finds that *Plaintiff has not established that he will be irreparably injured* by participating in the administrative hearing scheduled to proceed in approximately two weeks. On this record the Court cannot find that Dr. Eggleston's interest in judicial intervention into the legislatively decreed administrative process outweighs the Commission's duty to regulate the practice of medicine and to protect the public and the standing of the medical profession.

Motion, Attach. B at 1-2 (emphasis added) ("Order Denying Preliminary Injunction").

i. *The superior court did not obviously or probably err by "elevating administrative code and statute above constitution."*

Dr. Eggleston first contends the superior court obviously erred by "elevating administrative code and statute above [the] constitution." Motion at 17. In other words, as this court understands it, he argues that the superior court failed to interpret the APA in a manner consistent with the supremacy of his constitutional rights. In support of this contention, Dr. Eggleston relies on the analysis and holding of the Ninth Circuit's *Pickup* opinion. 740 F.3d 1208. As mentioned earlier, *Pickup* quoted with favor U.S. Supreme Court Justice White's concurrence in *Lowe v. SEC*, which explains that, when a speaking professional is not exercising judgment on any particular

individual's behalf and no professional-client relationship exists, the government's regulation of professional practice is subject to the First Amendment's prohibition against abridging a professional's freedom of speech or the press:

> 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."

Motion, Att. D at 8 (quoting *Pickup*, 740 F.3d at 1227) (quoting *Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.3d.2d 130 (1985) (White, J., concurring)). Based on Justice White's concurrence, *Pickup* concluded, "[O]utside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment." *Id*. at 9 (quoting *Pickup*, 740 F.3d at 1227-28).

The superior court's decision does not mention the Constitution; it references only sections of the APA and a section of the Uniform Declaratory Judgments Act (UDJA)[3] in its examination of the likelihood that Dr. Eggleston will prevail on the merits of his claim for declaratory judgment. The decision concludes that, because the APA governs the Commission's disciplinary proceedings, the UDJA does not apply, making it unlikely that Dr. Eggleston's complaint will succeed on its merits:

> Plaintiff has not met the requirements for a preliminary injunction. Plaintiff has not established that he is likely to prevail on the merits because The Uniform Declaratory Judgment Act under which Plaintiff seeks relief "does not apply to state agency action

[3] Chapter 7.24 RCW.

> reviewable under chapter 34.05.RCW." RCW 7.24.146. The Commission's disciplinary proceeding is governed by the Administrative Procedures Act, chapter 34.05. Also, judicial review is only available for final orders and there is no final order for this Court to review. RCW 34.05.570(3); 34.05.010(11).

Motion, Attach. B at 1.

The Commission argues that the superior court did not err because it applied the plain language of the UDJA. It insists declaratory relief is available to Dr. Eggleston under the APA through judicial review of a decision disciplining him or denying his license.

In reply, Dr. Eggleston argues that the statutes cited by the Commission do not supersede the Constitution's free speech protections. He also argues that, because the Washington Administrative Code precludes the Commission from deciding the First Amendment issue he raised in his motion to dismiss – a motion denied by the administrative Review Judge, no state agency action on constitutional issues are, in fact, subject to judicial review under the APA.

This court is unable to find an obvious or probable error based on the arguments Dr. Eggleston offers here. No controlling authority holds that a superior court, which is faced with a prehearing order denying a motion to dismiss (not on its merits but for lack of authority), must "elevate" the Constitution over administrative code and statutes and be the first to decide whether to dismiss a disciplining authority's administrative action on the ground that it violates the Constitution. To the contrary, Division Two of this court has concluded, albeit in the unpublished portion of an opinion, that a superior court cannot *preemptively* decide an issue that is before an agency for decision: "If an agency action is subject to judicial review under the provisions of the APA, it may not be preemptively decided by petition to a superior court for declaratory judgment." *Alsager v. Bd. of Osteopathic Medicine and Surgery*, 196 Wn. App. 653, 384 P.3d 641 (2016)

(paragraph 44) (citing *NW. Ecosystem All. V. Washington Dep't of Ecology*, 104 Wn. App. 901, 919, 17 P.3d 697 (2001)[4], *rev'd in part, aff'd in part*, *Nw. Ecosystem All. V. Washington Forest Practices Bd.*, 149 Wn.2d 67, 66 P.3d 614 (2003)[5]). *Alsager* is persuasive on this point. Dr. Eggleston seemingly filed his motion to dismiss in the administrative action for the Commission to decide it on its merits. The question – who should decide the merits of the motion? – is in apparent dispute. *Compare* Prehearing Order No. 3[6] *and* Order Denying Preliminary Injunction[7] *and* WAC 246-11-390(3), (5)(e), (12)[8] *and* WAC 246-11-480(2)(e), (3), (4)[9] *and* RCW

[4] The Court of Appeals dismissed with prejudice UDJA claims seeking a declaratory judgment that certain forest practices regulations were invalid because the parties were allowed to proceed under the APA and, therefore, the UDJA did not apply. *Nw. Ecosystem All.*, 149 Wn.2d at 73.

[5] The Washington State Supreme Court did not discuss UDJA claims based on the conclusion that the APA provided the exclusive means for judicial review. *Id*. at 72, 82.

[6] Review Judge Blye decided that she, as Presiding Officer, cannot decide the motion and that only the Commission can decide the motion. In direct conflict with the former statement, Review Judge Blye then decided the Commission has no legal basis to grant the motion because it lacks authority to declare any statute or portion thereof invalid.

[7] Judge Burns concluded that the superior court cannot review Prehearing Order No. 3's decision on Dr. Eggleston's motion to dismiss because it is not a final order.

[8] WAC 246-11-390(3) says, "The presiding officer . . . shall issue rulings related to prehearing motions[.]" Subsection (5)(e) states, "[T]he presiding officer shall issue a written prehearing order which will . . . [r]ule on motions[.]" And subsection (12) contemplates judicial review of a prehearing order: "*In an appeal to superior court involving issues addressed in the prehearing order*, the record of the prehearing conference, written motions and responses, the prehearing order, and any orders issued by the presiding officer pursuant to WAC 246.11.380 are the record." (Emphasis added.)

[9] WAC 246-11-480 concerns the conduct of an adjudicative proceeding, which has yet to occur here. According to subsection (2)(e), "The presiding officer may take the following actions to the extent not already determined in a prehearing order: . . . [r]ule on . . . motions[.]" However, subsection (3) provides, "The presiding officer shall: (a) Apply as the first source of law governing an issue those statute and rules deemed applicable to the issue; (b) If there is not statute or rule governing the issue, resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington Constitutions, statutes, rules, and court

18.130.050(10)[10]. Until that dispute is addressed and resolved, the superior court cannot be said to have obviously or probably erred by not preemptively deciding the merits of a constitutional issue that neither the Reviewing Judge nor the Commission decided.

The court further disagrees with Dr. Eggleston's argument that the superior court must review the constitutional free speech issue under the UDJA because the Washington Administrative Code precludes the Commission from deciding it. Dr. Eggleston asked the superior court to review Prehearing Order No. 3, which denied his motion to dismiss. According to the Washington Administrative Code, prehearing orders appear to be subject to interlocutory judicial review by the superior court under the APA. *See* WAC 246-11-390(12) ("In an appeal to superior court involving issues addressed in the prehearing order, the record of the prehearing conference, written motions and responses, the prehearing order, and any orders issued by the presiding officer pursuant to WAC 246-11-380 are the record"); *see also Duggal v. Med. Quality Assurance Comm'n*, unpub. op'n no. 48258-4-II, 2016 WL 6876544 (Wa. Ct. App. Nov. 22, 2016) (reviewing and reversing prehearing order under RCW 34.05.570(3) prior to adjudicative hearing). Dr. Eggleston has not demonstrated that the superior court obviously or probably erred by concluding that judicial review of Prehearing Order No. 3 is not available under the UDJA.

ii. *The superior court obviously or probably erred by concluding that Dr. Eggleston did not establish irreparable injury, but Dr.*

decision; and (c) Not declare any statute or rule invalid." Subsection (4) states, "If the validity of any statute or rule is raised as an issue, the presiding officer may permit arguments to be made on the record concerning the issue for the purpose of subsequent review."

[10] RCW 18.130.050(10) authorizes the disciplinary authority (here, the Commission) "[t]o use a presiding officer . . . to conduct hearings. . . . [However,] Disciplining authorities identified in RCW 18.130.040(2)(b)[, which includes the Commission,] may not delegate. . . to a presiding officer . . . [for final decision] any motion that results in dismissal of any allegation contained in the statement of charges."

Eggleston demonstrates obvious or probable error related to irreparable injury but does not establish an obvious or probable jurisdictional error under Axon Enter., Inc.

Dr. Eggleston's next obvious/probable error argument – that the superior court erred by concluding that Dr. Eggleston must submit to an administrative hearing without constitutional protection and that later judicial review is sufficient – appears to challenge those parts of the trial court's decision that conclude judicial review is only available for final orders and Dr. Eggleston did not establish irreparable injury:

> Also, *judicial review is only available for final orders and there is no final order for this Court to review*. RCW 34.05.570(3); 34.05.010(11).
> //
> The court further finds that *Plaintiff has not established that he will be irreparably injured by participating in the administrative hearing* scheduled to proceed in approximately two weeks. On this record the Court cannot find that Dr. Eggleston's interest in judicial intervention into the legislatively decreed administrative process outweighs the Commission's duty to regulate the practice of medicine and to protect the public and the standing of the medical profession.

Motion, Attach. B at 1-2 (emphasis added). Dr. Eggleston contends that the U.S. Supreme Court's decisions in *Dombrowski v. Pfister*[11], *Elrod v. Burns*[12], and *Axon Enter., Inc. v. Fed. Trade Comm'n*[13], and the Ninth Circuit's opinion in *S.O.C., Inc. v. County of Clark*[14] demonstrate that the superior court obviously or probably erred when it concluded he will not be irreparably harmed by waiting until after the administrative hearing for judicial review.

[11] 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

[12] 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976).

[13] 598 U.S. 175, 143 S. Ct. 890, 215 L. Ed. 2d 151 (2023).

[14] 152 F.3d 1136, *amended*, 160 F.3d 541 (9th Cir. 1998).

The Commission, on the other hand, argues that the superior court did not erroneously conclude that "Dr. Eggleston failed to demonstrate actual and substantial injury," that *Dombrowski* and *Axon* are factually distinguishable from Dr. Eggleston's case, and that judicial review of "a final agency order" after an adjudicative hearing is an adequate remedy for Dr. Eggleston's constitutional challenges. Wash. Med. Comm'n's Opp'n to Dr. Eggleston's Mot. for Discretionary Review/Memo on Appealability at 24, 25 (June 26, 2023) ("Response").

Both parties' arguments take some liberty with the actual wording of the superior court's decision. The Order Denying Preliminary Injunction did not conclude that Dr. Eggleston is not entitled to constitutional protection at the administrative hearing as he contends; even if that is the effect of the Order Denying Preliminary Injunction, the superior court did not decide the merits of Dr. Eggleston's constitutional issue one way or the other. The superior court decided it would not apply the "irreparable harm" exception to the APA's exhaustion requirement. The Order Denying Preliminary Injunction also does not conclude that Dr. Eggleston failed to demonstrate actual and substantial injury as the Commission argues. The legal term "actual and substantial injury" refers to the third criterion that must be established to obtain a preliminary injunction. *See, e.g., Speelman*, 167 Wn. App. at 630 (listing criteria for preliminary injunction). Instead, the Order Denying Preliminary Injunction concludes Dr. Eggleston did not establish "that he will be *irreparably injured*." Motion, Attach. B at 2. When viewed in context, the order's use of the term "irreparably injured" most likely refers to the third statutory exception to the APA's exhaustion requirement. *See* RCW 34.05.534(3)(c) ("The court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that: . . . [t]he grave *irreparable harm* that would result from having to exhaust administrative remedies would clearly outweigh the

public policy requiring exhaustion of administrative remedies") (emphasis added). Having clarified what the Order Denying Preliminary Injunction does and does not say with respect to Dr. Eggleston's second contention of obvious and probable error, the court turns now to consider the cases upon which Dr. Eggleston bases the contention.

Dombrowski, *Elrod*, and *S.O.C., Inc.* are federal injunction cases. In its 1965 opinion in *Dombrowski*, the United States Supreme Court recounted the origins of a federal court's equitable injunctive power and its proper exercise, recalling that the Supreme Court had originally characterized the power broadly to allow injunctive relief "where state officers '*** threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." 380 U.S. at 483-84. That equitable power was later tempered by considerations of federalism, which led to the general assumption that "state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify disruption of orderly state proceedings." 380 U.S. at 484-85. Even with tempered power, the *Dombrowski* court found sufficient irreparable injury to justify injunctive relief based on the complaint's allegations that prosecutions initiated and threatened against the director and an officer of Southern Conference Educational Fund, Inc. (SCEF) – an entity that actively promoted civil rights for African Americans in Louisiana and other southern states – chilled their free expression where SCEF's director and officer had been subject to arrest, indictments, criminal charges, raids, and record seizures, which frightened off potential members and contributors, paralyzed operations, and threatened exposure of the identity of adherents to SCEF's cause. *Id*. at 487-89.

Then in 1976, the United States Supreme Court decided *Elrod v. Burns*, which concerned patronage dismissals of non-civil-service employees for their failure to affiliate with an elected official's political party. 427 U.S. at 349-50. The employees' initial request for preliminary injunctive relief was denied on the ground that the employees failed to establish irreparable injury. *Id*. at 350. But the Supreme Court concluded more broadly that, because it was "clear that First Amendment interests were either threatened or in fact being impaired at the time relief was sought[,] [t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id*. at 373.

Finally, the Ninth Circuit in *S.O.C., Inc.* relied on *Elrod*'s broad conclusion and held that the appellant there had "demonstrated the possibility of irreparable harm" based on an ordinance's apparently unreasonable time, place, and manner restrictions on fully protected speech. 152 F.3d at 1148 (quoting *Elrod*, 427 U.S. at 373).

In *Axon Enter., Inc.*, the U.S. Supreme Court resolved "whether the district courts have jurisdiction to hear . . . the parties' constitutional challenges" to an agency's constitutional authority to proceed in enforcement actions against the complaining parties. 598 U.S. at 180. Those district courts had dismissed the parties' complaints for lack of jurisdiction. In resolving the question before it, the Court recognized that district courts may be precluded from "exercising jurisdiction over challenges to federal agency actions" where Congress has codified a comprehensive review process unless (1) precluding district court jurisdiction forecloses all meaningful judicial review of a claim; (2) the claim is wholly collateral to the statute's review provisions; and (3) the claim is outside the agency's expertise. *Id*. at 185-86.

This court agrees that *Dombrowski* and *Elrod* support the conclusion that the superior court obviously or, at least, probably erred by concluding that Dr. Eggleston failed to establish irreparable harm. The Commission's Statement of Charges and its pending administrative hearing, which seek to discipline a retired physician's medical license based on the content of newspaper articles he wrote, make "clear that First Amendment interests were either threatened or in fact being impaired at the time relief was sought" by Dr. Eggleston in the superior court. *Elrod*, 427 U.S. at 373.

The court, however, is unable to conclude that *Axon* demonstrates obvious or probable error in the superior court's conclusion that "later judicial review is sufficient" as Dr. Eggleston contends. First, as noted earlier, it is not clear what part of the court's ruling this contention challenges – the ultimate decision denying preliminary injunctive relief or the specific conclusion that judicial review is available for only final orders. Second, *Axon* reviewed orders dismissing district court actions for lack of jurisdiction, but the superior court's decision denying a preliminary injunction did not dismiss Dr. Eggleston's action for lack of jurisdiction. Third, to the extent the contention challenges the superior court's conclusion that "judicial review is only available for final orders and there is no final order for this Court to review," Dr. Eggleston fails to sufficiently develop or analyze his argument under *Axon* (until his reply) for this court to decide whether obvious or probable error exists. Such argument comes too late to warrant consideration. *See Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998), *as amended* (May 22, 1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration").

iii. *The trial court did not obviously or probably err by failing to find Dr. Eggleston likely to prevail on the merits.*

Dr. Eggleston argues that the trial court obviously or probably erred by *failing* to find that he is likely to prevail on the merits. To support this argument, he relies upon a declaration of counsel, a California bill that was revised to avoid regulating a physician's protected speech, and "the fact that no other state has persisted in efforts to sanction (or attempt[] to sanction) physicians for their public speech." Mot. for Discretionary Review/Memo on Appealability at 18-19. This argument is insufficiently developed and not founded upon *controlling* case law or statutory precedent or even persuasive precedent; it, therefore, fails to satisfy RAP 2.3(b)(1) and (b)(2)'s error standards.

iv. *The trial court obviously or probably erred by failing to consider the three exceptions to the exhaustion requirement found in RCW 34.05.534(3)(a)-(c).*

Dr. Eggleston next contends that the trial court obviously or probably erred by failing to consider all three of RCW 34.05.534's exceptions to the APA's exhaustion requirement when his Complaint and memorandum supporting his motion for a preliminary injunction requested relief in the form of judicial review of Prehearing Order No. 3 pursuant to the three presumptions in RCW 34.05.534(3)(a)-(c).

RCW 34.05.534(3)(a)-(c) allows judicial review of an agency action without first exhausting administrative remedies if "(a) The remedies would be patently inadequate; (b) The exhaustion of remedies would be futile; or (c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies."

Dr. Eggleston's Complaint sought judicial review of Prehearing Order No. 3 under the APA in addition to the UDJA: "In addition [to the UDJA], notwithstanding the failure of the Plaintiff to exhaust administrative remedies, this Court has jurisdiction to grant all relief request[ed] herein under RCW 34.05.534(a), (b), and (c)." Motion, Attach. A at 3 (Paragraph 1.4) (alterations added for clarity). "[T]his lawsuit is a permissible interlocutory appeal of [the administrative Review Judge's] denial of [Dr. Eggleston's] motion to dismiss, permissible as an exception to the exhaustion requirement in RCW 34.05.534 per subsections (3)(a), (b), and (c), as otherwise permissible as a direct challenge for injunctive and declaratory relief." *Id*. at 7 (Paragraph 2.18) (alterations added for clarity).

Dr. Eggleston's memorandum filed in support of his motion for preliminary injunction further asked the superior court to conclude that judicial review of Prehearing Order No. 3 is appropriate without having to exhaust administrative remedies because all three of RCW 34.05.534's exceptions to the exhaustion requirement were satisfied:

> Plaintiff has satisfied all three independent grounds. The ALJ has denied Plaintiff's motion to dismiss the administrative hearing, most likely on the grounds that WAC 246-11-480(3)(c) prohibits the presiding officer from ruling on the constitutionally {sic} of a statute or rule. This satisfies RCW 34.05.534(3)(a) and (b) because there does not appear to be administrative redress for Plaintiff's constitutional challenges.
>
> The Commission is making a direct attack on Plaintiff's State Constitutional Free Speech rights. Plaintiff's prosecution by the Commission has an obvious chilling effect on him as well as all other physicians who wish to speak critically of the government's response to the pandemic. Although there is no direct Washington case law on point, but in the context of federal preliminary injunction actions to stop federal and state government entities from violating First Amendment rights, the federal court[s] have without exception held that the interference of First Amendment rights for even a brief period of time constitutes irreparable injury justifying

> extraordinary preliminary injunctive relief: "[t]he loss of First Amendment freedoms, for event minimal periods of time, unquestionably constitutes irreparable injury for purposes of the issuance of a preliminary injunction." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (establishing "probable success on the merits" of a First Amendment claim itself demonstrates irreparable harm).
>
> Based on the foregoing, the Court should find that all three grounds exist to hear this constitutional challenge despite failure to exhaust administrative remedies.

Id., Attach. D at 12-13.

Despite Dr. Eggleston's request, the superior court's decision denying his motion for preliminary injunction addresses only RCW 34.05.534's irreparable harm exception and not the statute's futility or inadequate remedy exceptions:

> Plaintiff has not met the requirements for a preliminary injunction. Plaintiff has not established that he is likely to prevail on the merits because The Uniform Declaratory Judgment Act under which Plaintiff seeks relief "does not apply to state agency action reviewable under chapter 34.05.RCW." RCW 7.24.146. The Commission's disciplinary proceeding is governed by the Administrative Procedures Act, chapter 34.05. Also, judicial review is only available for final orders and there is no final order for this Court to review. RCW 34.05.570(3); 34.05.010(11).
>
> //
>
> The court further finds that Plaintiff has not established that he will be irreparably injured by participating in the administrative hearing scheduled to proceed in approximately two weeks. On this record the Court cannot find that Dr. Eggleston's interest in judicial intervention into the legislatively decreed administrative process outweighs the Commission's duty to regulate the practice of medicine and to protect the public and the standing of the medical profession.

Motion, Attach. B at 1-2. The superior court's failure to address all three of the APA's statutory exceptions to the exhaustion requirement as requested is an obvious and probable error. *State v. O'Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015) (citing *State v. Grayson*, 154 Wn.2d 333, 342,

111 P.3d 1183 (2005) (trial court's failure to consider exceptional sentence authorized by statute is reversible error)); *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App. 2d 621, 626, 439 P.3d 676 (2019) ("The failure to exercise discretion is an abuse of discretion").

v. *Dr. Eggleston does not demonstrate that the trial court obviously or probably misapplied preliminary injunction criteria by failing to consider all three of RCW 34.05.534's exceptions and by failing to consider the constitutional grounds for injunction.*

Dr. Eggleston contends, "The court misapplied the standard for a preliminary injunction by a) misapplying RCW 34.05 . . . and b) by then failing to consider the constitutional grounds for the injunction." Motion at 20. This contention does not identify which preliminary injunction criterion the superior court allegedly misapplied by failing to consider all three exceptions to the APA's exhaustion requirement or by failing to consider his constitutional basis for an injunction. Because it is conclusory, the court will not consider it. *See Holland*, 90 Wn. App. at 538 ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration").

b. RAP 2.3(b)(1) and (2) Harm Criteria

Having decided that the superior court committed obvious or probable error by (1) concluding Dr. Eggleston failed to establish he will be irreparably injured by participating in the administrative hearing and (2) failing to analyze all three exceptions to the APA's exhaustion requirement, the court considers whether he has satisfied RAP 2.3(b)(1) and (b)(2)'s harm standards. RAP 2.3(b)(1)'s standard of harm requires that Dr. Eggleston demonstrate that the superior court's obvious error "would render further proceedings useless." RAP 2.3(b)(1). Alternatively, under RAP 2.3(b)(2), Dr. Eggleston must show that the superior court's decision "substantially alters the status quo or substantially limits the freedom of a party to act." "RAP

2.3(b)(2) necessarily requires an immediate effect outside the courtroom to substantially alter the status quo." *In re Dependency of N.G.*, 199 Wn.2d 588, 596, 510 P.3d 335 (2022).

i. The superior court's obvious errors render further proceedings useless.

Dr. Eggleston's argues that the superior court's denial of his preliminary injunction request renders useless all further court proceedings that seek to enjoin the violation of his free speech rights because the injunction is effective only if the violation is prevented and preventing the violation will be impossible once the Commission's disciplinary hearing begins. The Order Denying Preliminary Injunction bears out the uselessness of further proceedings that seek pre-hearing injunctive relief from the administrative hearing before the Commission. Therein, the superior court expresses not only its lack of intent to intervene into the Commission's disciplinary proceeding and review Prehearing Order No. 3 but also impliedly concludes that Prehearing Order No. 3 cannot be reviewed on the ground that it is not a final order despite failing to analyze all three exceptions to the exhaustion requirement. Under these circumstances, further proceedings for pre-hearing relief are useless. Dr. Eggleston has satisfied RAP 2.3(b)(1)'s criteria for discretionary review. *See Oliver v. Am. Motors Corp.*, 70 Wn.2d 875, 878–79, 425 P.2d 647 (1967) (establishing what later became RAP 2.3(b)(1) standard and holding that litigant should not be put to hazard, delay, and expense of trial upon the merits as a prerequisite to the assertion of an independent right).

ii. The Order Denying Preliminary Injunction substantially alters the status quo.

The final question is whether the superior court's decision substantially alters the status quo. Dr. Eggleston contends the status quo is altered because the superior court's decision ensures

he will be deprived of constitutional protections to which he is entitled in the administrative proceeding. The court understands this contention to mean that Dr. Eggleston was entitled to constitutional protection before the superior court's decision and now he will be deprived of constitutional protection. The merits of Dr. Eggleston's motion to dismiss, i.e., whether Dr. Eggleston is entitled to constitutional protection from the Commission's disciplinary hearing, are undecided[15]; he may or may not be entitled to dismissal of the Commission's Statement of Charges on First Amendment free speech grounds. However, the effect of the superior court's decision is to change the status quo: the decision effectively denies Dr. Eggleston's prehearing request for constitutional protection without anyone deciding the merits of his motion to dismiss on constitutional grounds and, therefore, has an immediate effect upon Dr. Eggleston outside the courtroom. If, indeed, Dr. Eggleston is entitled to constitutional protection as he contends, the superior court's decision substantially alters that status quo by requiring him to defend the Commission's Statement of Charges at an administrative hearing without that protection and even without a decision on the merits of his constitutional question. Dr. Eggleston has satisfied RAP 2.3(b)(2)'s criteria for discretionary review.

[15] Dr. Eggleston's administrative motion to dismiss sought protection under the First Amendment from the administrative hearing. Prehearing Order No. 3 denied that protection, not on the merits of Dr. Eggleston's motion to dismiss but for lack of authority to decide the motion. Prehearing Order No. 3 also declined to provide the motion to the Commission for a decision, again not on the merits but on the ground that the Commission lacks "authority to declare any statute or portion of a statute invalid." Mot. for Discretionary Review, Attach. C at 8, n.1. Further, it is reasonable to infer that the superior court will not review Prehearing Order No. 3 from the superior court's conclusion that "there is no final order for this Court to review" even though judicial review of issues addressed in prehearing orders is contemplated by WAC 246-11-390(12).

Because Dr. Eggleston has satisfied both RAP 2.3(b)(1) and (b)(2), this court will grant interlocutory review of the superior court's Order Denying Preliminary Injunction.

Accordingly, IT IS ORDERED, petitioner's motion for discretionary review is granted. The clerk will issue a perfection schedule.

Hailey L. Landrus
COMMISSIONER