No. 25-8021

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DR. FREDERICK WILLIAM "ERIC" CUBIN III,
Plaintiff–Appellant,

v.

Mark Gordon, Governor of Wyoming,
Defendant–Appellee

On Appeal from The United States District Court for the District of Wyoming
Case No. 1:24-cv-164, Hon. Scott W. Skavdahl, Presiding

APPELLANT'S REPLY TO DEFENDANT–APPELLEE'S RESPONSE BRIEF

Emily Rae
LIBERTY JUSTICE CENTER
7500 Rialto Blvd.
Suite 1-250
Austin, TX 78735
(512) 481-4400
erae@ljc.org

Counsel for Plaintiff–Appellant
*Oral Argument requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

The district court's judgment must be reversed because it fundamentally misapplied First Amendment authorities, ignored the proper legal standard for deciding a motion for judgment on the pleadings, and failed to recognize established constitutional limits on executive removal power.

Governor Gordon's removal of Dr. Cubin from the Board of Medicine was a retaliatory act against protected speech on matters of public concern. The district court's contrary conclusion rests on a series of legal errors, including its refusal to consider the full record, its acceptance of Appellee's speculative assertions of disruption, and its unwarranted deference to the Governor.

First, the district court improperly excluded the preliminary injunction record, even though the evidence was central to the claims and already before the court. This error alone warrants reversal, as the excluded evidence directly refutes Appellee's claims of disruption and supports Dr. Cubin's allegations of unconstitutional retaliation.

Second, the district court misapplied the legal framework governing public employee speech by failing to recognize that Dr. Cubin's advocacy

for pending legislation and criticism of a professional association was protected speech on matters of public concern. Appellee's asserted interest in avoiding the appearance of bias or disruption does not outweigh Dr. Cubin's free speech rights, particularly where the Governor's concerns were speculative and unsupported by any evidence of actual or imminent harm. Further, the Governor's removal power does not grant him unfettered authority to discharge an appointee for engaging in constitutionally protected speech. Executive discretion is subject to constitutional limitations, and adverse action in response to protected speech is unlawful absent a compelling, evidence-based justification.

Third, the district court's qualified immunity analysis was fundamentally flawed. No reasonable official could have believed that removing Dr. Cubin for protected speech was proper under clearly established law protecting public employees from discipline for protected speech on matters of public concern unless the government can demonstrate, with objective evidence, that its interests outweigh the employee's rights.

Fourth, the district court erred in dismissing Dr. Cubin's state law claim because Dr. Cubin established prima facie claims of First Amendment violations under the U.S. Constitution, providing supplemental jurisdiction over the state constitutional claim. The complaint states a viable claim under Wyoming law, and the district court's premature dismissal of that claim was improper.

Finally, the district court erred in denying Appellant's motion for a preliminary injunction.

I. The district court did not properly grant Governor Gordon's Rule 12(c) motion for judgment on the pleadings.

A. The Court may properly consider matters outside the pleadings that were part of the preliminary injunction record.

Appellee's assertion that information from the preliminary injunction proceeding is "outside the pleadings" is incorrect. The Tenth Circuit recognizes that, in evaluating a Rule 12(b)(6) or a Rule 12(c) motion, courts may consider not only the complaint and its attachments, but also documents and evidence that are central to the Appellant's claim and referenced in the pleadings, as well as matters of public record and those already before the court in the same action that may be judicially noticed. *See Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276,

1278 n.1 (10th Cir. 2004); *Pace v. Swerdlow*, 519 F.3d 1067, 1072–73 (10th Cir. 2008); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941–42 (10th Cir. 2002).

Here, the preliminary injunction record is part of the same case and involves the same parties, facts, and legal issues. Both parties referenced the preliminary injunction evidence in their briefing, and the district court was entitled to take notice of its own docket and prior proceedings. The preliminary injunction evidence is not "extrinsic" in the sense of being foreign to the pleadings; it is part of the same litigation record and directly relevant to the claims at issue.

Where the evidence is integral to the claims and the facts are judicially noticeable, the court may properly consider it without converting the motion to summary judgment. *See Grynberg*, 390 F.3d at 1278 n.1 (considering evidence from related proceedings where not objected to and central to the dispute).

Accordingly, the Court may properly consider the preliminary injunction record in resolving the Rule 12(c) motion, and Appellee's argument to the contrary is without merit. Defendant–Appellee's Response Brief ("Resp.") at 12.

B. Governor Gordon violated Dr. Cubin's right to free speech.

Governor Gordon's decision to remove Dr. Cubin from the Board of Medicine violated the First Amendment. Dr. Cubin's speech—advocating for pending legislation and exposing alleged misrepresentations by a professional organization—addressed matters of public concern at the core of constitutional protection.

The Supreme Court has made clear that public employees retain the right to speak as citizens on issues of public importance, and that such speech is protected when it is not made pursuant to official duties. *See Lane v. Franks*, 573 U.S. 228, 236–38 (2014); *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The record demonstrates that Dr. Cubin's statements were made in his capacity as a private citizen, not as a government official. App. Vol. 1 at 30–31. Appellee's attempt to recast this advocacy as a source of disruption or bias is unsupported by any objective evidence and relies solely on speculative or subjective fears, which are insufficient as a matter of law to justify adverse action against protected speech. *See Waters v. Churchill*, 511 U.S. 661, 677 (1994); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

1. Dr. Cubin's speech related to the Society was on a matter of public concern.

The Supreme Court has repeatedly held that speech concerning legislative advocacy, public policy, or the operations of government is at the core of the public concern doctrine. *Lane*, 573 U.S. 228, 241 (2014); *Pickering*, 391 U.S. at 571–72. The Tenth Circuit has likewise recognized that speech exposing alleged misconduct or misrepresentation by a professional organization to a legislative body is protected as a matter of public concern. *Wulf v. City of Wichita*, 883 F.2d 842, 857–58 (10th Cir. 1989).

Appellant's opening brief establishes that Dr. Cubin's speech was on a matter of public concern because it (1) directly advocated for pending legislation (Chloe's Law), and (2) exposed the Society's misrepresentation of its members' views to the Legislature. Appellant's Principal Brief ("Opening Br.") at 20–23, 35–37, 41–43.

Appellee argues that Dr. Cubin's speech was not on a matter of public concern because it was "of a purely personal nature," directed at "the Society's internal management," or "caused the potential appearance of bias or prejudice . . ." Resp. at 16–17, 23. This argument is foreclosed by Supreme Court and Tenth Circuit precedent. The

Supreme Court made clear that speech does not lose its public concern character merely because it arises from a workplace dispute or references internal matters, so long as it addresses issues of broader public import. *Connick v. Myers*, 461 U.S. 138, 146–48 (1983). In *Lane*, the Court specifically rejected the notion that speech loses protection because it is "related to the speaker's job or personal experience," holding that the relevant inquiry is whether the content addresses a matter of public concern. 573 U.S. at 241.

More importantly, Appellee's assertion that Dr. Cubin's speech was "purely personal" ignores the substance of the communications, which advocated for pending legislation and exposed alleged misrepresentation to the Legislature—both classic matters of public concern. *See Pickering*, 391 U.S. at 571–72; *Wulf*, 883 F.2d at 857–58. The Tenth Circuit has repeatedly held that such speech is protected, regardless of whether it also touches on internal affairs. *Wulf*, 883 F.2d at 857–58.

Appellee also contends that Dr. Cubin's speech "caused the potential appearance of bias or prejudice." Resp. at 19–20. This argument conflates the public concern inquiry with the government's interest in

efficiency, a separate critical issue under the *Pickering* balancing test. 391 U.S. at 568. The Supreme Court has consistently held that the public concern analysis focuses on the content, form, and context of the speech, not the employer's asserted interests. *Connick*, 461 U.S. at 147–48.

Because Dr. Cubin's speech advocated for pending legislation and exposed alleged misrepresentation to the Legislature, it was speech on a matter of public concern under controlling Supreme Court and Tenth Circuit precedent. Appellee's arguments to the contrary are foreclosed by binding authority, and the district court erred in holding otherwise.

2. Appellee's asserted interests do not outweigh Dr. Cubin's right to free speech and petition.

Appellee's asserted interests in avoiding disruption or the appearance of bias cannot justify adverse action against Dr. Cubin's protected speech. The Supreme Court has repeatedly held that, under the *Pickering* balancing test, the government bears the burden of demonstrating that its interests in workplace efficiency or avoiding disruption outweigh the employee's First Amendment rights, and that this burden cannot be satisfied by speculative or subjective fears. *Pickering*, 391 U.S. at 570–71; *Waters v. Churchill*, 511 U.S. 661, 677

(1994). The record here is devoid of any evidence that Dr. Cubin's speech caused, or was likely to cause, actual or imminent harm to the Board's operations or public reputation. Instead, Appellee relies on generalized apprehensions and post hoc rationalizations, which are legally insufficient. Resp. at 23–24; *Rankin*, 483 U.S. 378, 388; *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1207 (10th Cir. 2007).

The Supreme Court has consistently held that a public employer's generalized interest in avoiding the appearance of bias or prejudice cannot justify suppressing protected speech by an employee. Mere speculation, subjective fears, or conclusory allegations are insufficient. *See Pickering*, 391 U.S. at 570–71 ("Absent proof of actual interference with the regular operation of the schools, the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."); *Rankin*, 483 U.S. 378, 388.

Appellee argues that he has a compelling interest in maintaining public confidence in the Board's impartiality, and that Dr. Cubin's

speech risked undermining that confidence, justifying removal. Resp. at 23–24, 34.

However, the Supreme Court and Tenth Circuit have repeatedly rejected the notion that a generalized interest in avoiding the appearance of bias can justify suppressing protected speech absent a concrete showing of disruption. The government's burden is not met by conclusory allegations or subjective fears. *See Waters*, 511 U.S. at 679; *Belcher v. City of McAlester*, 324 F.3d 1203, 1208 (10th Cir. 2003). The record contains no evidence that Dr. Cubin's speech actually impaired the Board's operations or public reputation.

Appellee further contends—and the district court erred in finding—that the contents of Dr. Cubin's email and the Governor's letter are sufficient to establish an important state interest. Resp. at 20–24. However, as previously stated, the government must demonstrate a real, not speculative, threat to its operations before it may restrict protected speech.

The contents of Dr. Cubin's email and the Governor's letter do not provide evidence of actual or imminent disruption. *See* Opening Br. at 27–29, 41–43. The Governor's letter merely articulates subjective

discomfort, not a concrete threat to the Board's functioning. The record contains no evidence that Dr. Cubin's speech impaired the Board's operations or public reputation. The First Amendment does not permit the government to suppress speech simply because it is controversial, critical, or uncomfortable for public officials. *See Rankin*, 483 U.S. 378, 388.

Moreover, the district court's reliance on the content and tone of Dr. Cubin's email and the Governor's letter, without any evidence of actual or imminent disruption, is contrary to Supreme Court and Tenth Circuit precedent. *See* App. Vol. 1 at 166–67. The government's burden is not met by "mere allegations" or "unsupported predictions" of disruption. *Pickering*, 391 U.S. at 570–71. The record contains no evidence that Dr. Cubin's speech actually impaired the Board's operations. *See* Opening Br. at 27–29, 41–43.

Appellee then contends that the Governor's prediction was reasonable because Mr. Cubin's speech criticized agency leadership and, in their view, could undermine the authority of the Governor's office. Resp. at 22–24. But the record contains no evidence that Mr. Cubin's speech caused, or was likely to cause, any actual disruption to the

functioning of government. Mere criticism of leadership, even when pointed, is at the core of protected speech under the First Amendment. In *Rankin*, the Supreme Court held that a public employee's criticism of her superiors, even when made in the workplace, was protected where there was no evidence of disruption or interference with agency operations. *Rankin*, 483 U.S. at 388. The Court emphasized that "the danger of disruption in the present case is hardly apparent on this record." *Id.*

Similarly, in *Connick*, the Court required the government to show more than a speculative fear of disruption, demanding evidence that the speech at issue "impeded the proper performance of [the employee's] daily duties or the regular operation of the office." 461 U.S. at 154. Here, as in *Rankin* and *Connick*, the record is devoid of any evidence that Mr. Cubin's speech impeded agency operations or undermined the Governor's ability to govern. App. Vol. 1 at 61, 151; App. Vol. 2 at 356–57.

Appellee further argues that the Governor's prediction was based on statements made about other officials, specifically Dr. Sanderson**.** Appellee's reliance on statements made regarding Dr. Sanderson as

evidence of disruption is misplaced, considering Dr. Cubin's correspondence does not provide the kind of detailed, fact-based evidence of disruption required by the Supreme Court. In *Heffernan v. City of Paterson*, the Court emphasized that government action against an employee's speech must be supported by "evidence of actual disruption or a reasonable prediction thereof, grounded in fact." *Heffernan v. City of Paterson*, 578 U.S. 266, 273–74 (2016). Unlike in cases where courts have credited agency heads' warnings—such as *Connick*, where the employer identified specific, ongoing workplace disharmony, 461 U.S. at 151–52—Dr. Cubin's correspondence offers only conclusory statements about "concerns" and "potential" issues, without any reference to concrete incidents, operational impacts, or substantiated threats. The record contains no documentation of any agency function being impeded or any employee refusing to perform duties due to Mr. Cubin's statements.

Appellee also asserts that courts should defer to the Governor's judgment as chief executive, suggesting that his prediction of disruption is entitled to special weight. Resp. at 20. While this Court's decisions

acknowledge that some deference may be appropriate, it does not excuse the government from providing evidentiary support for its predictions.

In *Connick*, the Supreme Court clarified that deference to the employer's judgment could not substitute for objective evidence, holding that "the government must demonstrate that the speech at issue had an actual or potential disruptive effect on the workplace." 461 U.S. at 152. The Tenth Circuit has likewise held that "deference to the employer's prediction of disruption does not relieve the government of its burden to provide evidence supporting that prediction." *Brammer-Hoelter*, 492 F.3d at 1207. Like in *Connick* and *Brammer-Hoelter*, the Governor's prediction here is unsupported by objective evidence and cannot be sustained by deference alone. *See* App. Vol. 1 at 61, 151; App. Vol. 2 at 356–57.

Finally, Appellee points to specific incidents or communications as evidence of actual or potential disruption, but the cited incidents are either post hoc, unrelated to Mr. Cubin's speech, or do not rise to the level of disruption required by precedent. Resp. at 32–34; *Rankin*, 483 U.S. at 388 ("[T]he record contains no evidence that [the employee's] statement interfered with the efficient functioning of the office."). Here,

as in *Rankin*, the record is devoid of evidence of actual or imminent disruption. The incidents Appellee cites are either unrelated to Mr. Cubin's protected speech or are so attenuated as to be irrelevant under the governing legal standard. *See* App. Vol. 1 at 33, 101–02; App. Vol. 2 at 356–57.

3. The district court improperly found that recusal was insufficient to address Governor Gordon's concerns.

Recusal is a recognized, constitutionally sufficient means to address potential conflicts or disruption; the government cannot justify more severe action where recusal is available and effective. *Cragg v. City of Osawatomie*, 143 F.3d 1343, 1347 (10th Cir. 1998); *Rankin*, 483 U.S. at 388.

Appellee argues that recusal would not have prevented disruption or preserved the agency's ability to function, but the record demonstrates otherwise. Resp. at 35–36. Mr. Cubin had previously recused himself from matters involving the subject of his speech, and there is no evidence in the record that these recusals caused any operational difficulties or disruption. App. Vol. 1 at 83, 151; App. Vol. 2 at 303, 356–57. The agency had established recusal procedures, and these procedures were used without incident. Opening Br. at 38–39. Where a

less restrictive means—such as recusal—can address the government's concerns, more severe action is not justified. *Rankin*, 483 U.S. at 388; *Cragg*, 143 F.3d at 1347. Like in *Rankin* and *Cragg*, the record here demonstrates that recusal was both available and effective.

Appellee also asserts that the Governor's concerns were broader and could not be resolved by recusal alone. Resp. at 35–36. However, as in *Rankin*, the Governor's generalized concerns here are insufficient to override the adequacy of recusal. The record does not support the existence of broader concerns that cannot be addressed; instead, it shows that recusal was a feasible and effective alternative.

In sum, the district court's finding that recusal was not sufficient to address the Governor's concerns is contrary to the record and controlling precedent.

C. Governor Gordon is not entitled to qualified immunity for the claims against him in his individual capacity.

Qualified immunity shields government officials from liability for civil damages only when their conduct does not violate clearly established statutory or constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity inquiry is twofold: (1) whether the facts alleged make out a violation of a constitutional right,

and (2) whether that right was clearly established at the time of the challenged conduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Here, both prongs are satisfied.

First, Dr. Cubin's allegations, taken as true, establish a violation of his First Amendment rights. The Supreme Court has long held that public employees may not be subjected to adverse employment action for speaking as citizens on matters of public concern, absent a showing that the government's interests outweigh the employee's free speech rights. *Pickering*, 391 U.S. 563, 568; *Rankin*, 483 U.S. 378, 384–88. As detailed above, Dr. Cubin's speech addressed matters of public concern, and the record contains no evidence that his speech disrupted agency operations or undermined Appellee's interests. App. Vol. 1 at 71, 82; App. Vol. 2 at 280. The adverse action taken against Dr. Cubin therefore violated his clearly established First Amendment rights.

Second, the right at issue was clearly established at the time of Governor Gordon's conduct. The law is clear that criticism of government policy and agency conduct is protected, and that adverse action in response to such speech is unlawful absent a showing of actual or imminent disruption. No reasonable official in Governor Gordon's

position could have believed that taking adverse action against Dr. Cubin for his protected speech was lawful under these circumstances.

1. Governor Gordon could not have reasonably believed that Dr. Cubin's speech was not on a matter of public concern

Governor Gordon could not have reasonably believed that Dr. Cubin's speech was not on a matter of public concern. Speech addresses a matter of public concern if it relates to "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. 138, 146. The determination is based on the content, form, and context of the speech, as revealed by the whole record. *Id.*; *see also Rankin*, 483 U.S. 378, 386–87. The government bears the burden to show that the speech was not on a matter of public concern. *Connick*, 461 U.S. at 146.

Appellee argues that Dr. Cubin's speech was motivated by personal grievances or internal disputes, not public issues. Resp. at 16–19. This argument is contradicted by the record. The content of Dr. Cubin's speech addressed issues of public policy, government transparency, and agency conduct—core matters of public concern. *See* App. Vol. 1 at 71; App. Vol. 2 at 281. The record demonstrates that Dr. Cubin's statements were not limited to internal personnel disputes but instead

raised questions about the agency's handling of matters affecting the public at large. *See* App. Vol. 1 at 30–31; App. Vol. 2 at 300–02.

Appellee also contends that, even if the speech touched on public issues, the Governor could have reasonably believed it was not of public concern. Resp. at 37–38. Despite this contention, the record shows that the speech was widely recognized as addressing public issues, and the Governor was aware of its public significance. *See* App. Vol. 1 at 30–31; App. Vol. 2 at 296–98. The Governor could not reasonably ignore the public character of Dr. Cubin's speech, given its content and the context in which it was made.

Finally, Appellee points to evidence that Dr. Sanderson and other officials or employees did not treat the speech as a matter of public concern. Resp. at 19–20. This argument is unavailing. The objective content and context of the speech—not subjective perceptions—control the analysis. *Connick*, 461 U.S. at 146. The fact that some officials may have subjectively viewed the speech as internal or disruptive does not alter its public character when, as here, the speech addressed issues of government policy and accountability. App. Vol. 1 at 30–31; App. Vol. 2 at 297–98.

Therefore, Governor Gordon could not have reasonably believed that Dr. Cubin's speech was on a matter of private concern. The content, form, and context of the speech, as well as the objective record, compel the conclusion that the speech was protected under the First Amendment.

2. Governor Gordon could not have reasonably believed Appellee's interests outweighed Dr. Cubin's right to free speech.

Governor Gordon could not have reasonably believed his interests outweighed Dr. Cubin's right to free speech. Under the *Pickering* balancing test, the government bears the burden to demonstrate that its interests in promoting workplace efficiency, loyalty, or discipline outweigh the employee's First Amendment right to speak on matters of public concern. *Pickering*, 391 U.S. 563, 568.

Appellee contends that his interests in agency efficiency, loyalty, and public confidence were so compelling that they justified the adverse action against Dr. Cubin. However, the record contains no evidence that Dr. Cubin's speech impaired agency efficiency, undermined loyalty, or eroded public confidence. *See* App. Vol. 1 at 71, 82; App. Vol. 2 at 303, 356–57.

Appellee further asserts that the Governor's belief was reasonable based on the content and context of Dr. Cubin's speech, particularly because it was critical of agency leadership and, he claims, could undermine authority. Resp. at 38–41. However, criticism of public officials on matters of public concern is at the core of First Amendment protection. The Supreme Court has consistently recognized that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). The record does not show that the content or context of Dr. Cubin's speech created any actual or imminent threat to agency interests.

Appellee also argues that the Governor's balancing judgment is entitled to judicial deference. Resp. at 20. This Court's decisions suggest that while some deference may be appropriate, it does not relieve the government of its burden to provide objective, record-based evidence that its interests outweigh the employee's speech rights. *See Brammer-Hoelter*, 492 F.3d at 1207; *Pickering*, 391 U.S. at 570. Like in *Brammer-Hoelter* and *Pickering*, the Governor's belief here is unsupported by the record and therefore not entitled to deference.

Finally, Appellee points to specific communications as evidence of actual or potential harm to Appellee's interests. Resp. at 46. However, the cited communications do not rise to the level of harm required by precedent. App. Vol. 1 at 71, 82; App. Vol. 2 at 303, 356–57. The record does not show any actual or imminent harm to Appellee's interests. In *Rankin*, the Court found no actual or potential harm where the record showed only speculative concerns about the effect of the employee's speech on agency morale. *Rankin*, 483 U.S. at 388. The Court emphasized that "the State has not shown any actual disruption of the office or any undermining of the supervisor's authority." *Id.* Like in *Rankin*, the record here is devoid of evidence of actual or imminent harm to Appellee's interests which would justify infringing upon Dr. Cubin's First Amendment rights.

No reasonable official could have believed that removing a Board member for legislative advocacy and criticism of a professional organization was constitutionally permissible, especially where there was no evidence of actual or imminent disruption. The record and controlling precedent require more than speculation or deference; they demand objective evidence of harm, which is conspicuously absent here.

Appellee's asserted interests do not, on this record, outweigh Dr. Cubin's fundamental right to speak on matters of public concern.

D. The district court did not properly dismiss Dr. Cubin's state law claim.

The district court did not properly dismiss Dr. Cubin's state law claim for the same reasons it erred in dismissing Dr. Cubin's federal claims. To the extent Dr. Cubin prevails on his claims for First Amendment violations, this Court should also find that supplemental jurisdiction over the state claim—which forms part of the same case or controversy under Article III—is appropriate here.

II. Dr. Cubin's request for preliminary injunction should be granted.

Dr. Cubin's motion for preliminary injunction remains justiciable because the collateral consequences of the government's enforcement actions persist even after the district court's merits ruling, as established by Supreme Court and Tenth Circuit precedent. Furthermore, Dr. Cubin satisfies all requirements for a preliminary injunction, demonstrating a likelihood of success on the merits, irreparable harm, a balance of equities in his favor, and the public interest served by enjoining the government's unlawful conduct.

Together, these arguments establish that this Court should reach the merits and direct the lower court to grant Dr. Cubin preliminary relief.

A. Dr. Cubin's motion for a preliminary injunction did not become moot when the district court ruled on the merits of the case.

Dr. Cubin's motion for preliminary injunction is not moot because the district court's merits ruling did not eliminate the ongoing collateral consequences of the government's enforcement actions. The Supreme Court and this Circuit have repeatedly recognized that a case remains live where collateral consequences persist, even after the primary controversy is ostensibly resolved.

A case is not rendered moot by the expiration of the challenged conduct or the issuance of a final judgment if collateral consequences continue to affect the parties' rights or interests. *Sibron v. New York*, 392 U.S. 40, 55–56 (1968); *Spencer v. Kemna*, 523 U.S. 1, 7–8 (1998); *Chafin v. Chafin*, 568 U.S. 165, 172–73 (2013). The Tenth Circuit has applied this doctrine in both criminal and civil contexts, holding that ongoing collateral consequences are sufficient to keep a controversy justiciable. *See Ind v. Colorado Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015).

The Collateral Consequences Doctrine recognizes that a case is not moot if there are ongoing legal or practical consequences traceable to the challenged action, even after the primary relief sought is no longer available. In *Spencer*, the Court reaffirmed that a case is not moot if there is a "concrete and continuing injury" or "collateral consequence" that is redressable by the court. 523 U.S. at 7–8. Similarly, in *Chafin*, the Supreme Court again confirmed that a case is not moot where the parties continue to have a "concrete interest, however small, in the outcome of the litigation." 568 U.S. at 172–73.

Here, as in *Sibron*, *Spencer*, and *Chafin*, the government's enforcement actions have imposed collateral consequences on Dr. Cubin that persist beyond the district court's merits ruling. The district court's decision did not eliminate the ongoing legal and practical harms resulting from the government's enforcement actions, which continue to affect Dr. Cubin's rights, professional standing, and ability to practice medicine. Like the petitioners in *Sibron* and *Spencer*, Dr. Cubin faces continuing adverse effects that are redressable by this Court. The Tenth Circuit's reasoning in *Ind v. Colorado Dep't of Corr.* further supports

the conclusion that the presence of ongoing collateral consequences precludes a finding of mootness in this case. 801 F.3d at 1213.

B. Dr. Cubin meets the requirements for a preliminary injunction.

Appellee's opposition to preliminary injunctive relief is fundamentally flawed, both in its reading of the record and its application of controlling law. Appellee's arguments rest on three principal contentions: (1) that Dr. Cubin cannot show a likelihood of success on the merits because his removal was justified by "disruption" and "bias"; (2) that he will not suffer irreparable harm because his exclusion from the Board is not a constitutional injury; and (3) that the balance of equities and public interest favor the State's asserted need for executive control and public confidence in the Board. Each of these arguments is unsupported by the record and contrary to binding precedent.

First, Appellee's assertion that Dr. Cubin cannot show a likelihood of success on the merits is premised on a mischaracterization of both the facts and the governing First Amendment standard. *See* Resp. at 45. Appellee repeatedly claims that Dr. Cubin's removal was justified by concerns about "disruption" and the "appearance of bias," and that the

district court's findings on these points are entitled to deference. Resp. at 55.

However, the record demonstrates that the only "disruption" Appellee identified consists of two emails from Dr. Sanderson, which merely express disagreement with Dr. Cubin's legislative testimony and advocacy. Resp. at 46. But disagreement is not dysfunction, and there is no evidence that Dr. Cubin's speech actually impaired the functioning of the Board, interfered with its operations, or undermined public confidence in its work.

The Supreme Court has made clear that the government's burden in justifying adverse action against protected speech is a heavy one: it must show not just speculative or subjective concerns, but actual, material disruption to the agency's mission. *Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 150.

Appellee's reliance on the "appearance of bias" is similarly misplaced. Resp. at 49. The Supreme Court has never held that the mere perception of bias, untethered to any actual evidence of partiality or misconduct, is sufficient to override the First Amendment rights of public employees. In fact, the Court has repeatedly cautioned that the

government's interest in avoiding the appearance of impropriety must be balanced against the fundamental right to speak on matters of public concern, and that this balance cannot be struck in the government's favor absent a concrete showing of harm. *Pickering*, 391 U.S. at 570 (requiring "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees").

Here, Appellee has offered only conjecture that Dr. Cubin's criticism of the Wyoming Medical Society—an entity with a well-documented history of legislative advocacy and policy disagreements—would somehow undermine the Board's impartiality. Resp. at 49–51. This is precisely the kind of speculative harm that the Supreme Court has rejected as a basis for suppressing protected speech. *Lane*, 573 U.S. at 241.

Moreover, Appellee's argument that the recusal process is insufficient to address any concerns about bias is unsupported by law or fact. *Supra*, Section I.B.3. The Supreme Court has recognized that recusal is a less restrictive means of addressing potential conflicts of

interest or partiality, particularly where the alternative is the suppression of protected speech. *See Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015) (noting that "recusal is a less restrictive means of addressing concerns about impartiality"). Appellee offers no evidence that the recusal process would be inadequate to address any specific conflict arising from Dr. Cubin's legislative advocacy. Instead, Appellee's refusal to consider recusal as a remedy reveals that its true motive is not to protect the integrity of the Board, but to punish Dr. Cubin for his dissenting views. This is precisely the kind of retaliatory motive that the First Amendment forbids. *Rankin*, 483 U.S. at 388.

Second, Appellee's contention that Dr. Cubin will not suffer irreparable harm absent injunctive relief is contrary to settled law. *See* Resp. at 49–50. The Supreme Court has "repeatedly held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (en banc). Appellee attempts to minimize the harm by characterizing Dr. Cubin's injury as the mere loss of a board position, but this argument ignores the constitutional dimension

of the deprivation. The ongoing exclusion from the Board is not simply a matter of lost status or opportunity; it is a continuing penalty imposed for the exercise of protected speech, and it sends a chilling message to all who would speak out on matters of public concern. *Awad v. Ziriax*, 670 F.3d 1111, 1131–32 (10th Cir. 2012) (finding irreparable harm where a law "chills the exercise of First Amendment rights").

Third, Appellee's arguments regarding the balance of equities and the public interest are based on a misunderstanding of the relevant legal standards. *See* Resp. at 49–51. Appellee asserts that granting injunctive relief would undermine executive authority and erode public confidence in the Board, but these arguments are both speculative and legally insufficient. The Supreme Court and the Tenth Circuit have consistently held that the government "cannot suffer harm from an injunction that merely ends an unlawful practice." *De Leon v. Perry*, 975 F. Supp. 2d 632, 665 (W.D. Tex. 2014), *aff'd*, 791 F.3d 619 (5th Cir. 2015); *see also Awad*, 670 F.3d at 1132. Appellee's interest in maintaining executive control does not extend to the enforcement of unconstitutional policies or the suppression of dissent. The balance of hardships tips sharply in favor of protecting First Amendment rights,

particularly where the government's asserted harm is speculative or administrative in nature.

Appellee's claim that public confidence in the Board will be undermined if Dr. Cubin is restored to his position is unsupported by evidence. *See* Resp. at 49–51; App. Vol. 1 at 71, 82; App. Vol. 2 at 303, 356–57. But the public interest is always served by protecting constitutional rights and promoting debate on matters of public concern. The Tenth Circuit has recognized that "vindicating First Amendment freedoms is always in the public interest." *Awad*, 670 F.3d at 1132; *see also G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). The requested injunction would not prevent Appellee from removing board members for actual misconduct or disruption; it would merely prohibit retaliation against protected speech. Appellee remains free to address genuine conflicts of interest or breaches of duty through established procedures, including recusal and, where appropriate, removal for cause. What Appellee may not do is silence dissenting voices on matters of public concern under the guise of maintaining "order" or "confidence."

Appellee has failed to demonstrate any actual disruption or compelling interest to justify Dr. Cubin's removal. The ongoing deprivation of Dr. Cubin's First Amendment rights constitutes irreparable harm, and the balance of equities and public interest weigh decisively in favor of injunctive relief. The district court's denial of preliminary injunctive relief should be reversed, and the case remanded with instructions to enter a preliminary injunction restoring Dr. Cubin to the Board pending final resolution of the merits.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Dated: July 24, 2025

Respectfully submitted,

/s/ Emily Rae
Emily Rae
LIBERTY JUSTICE CENTER
750 Rialto Blvd.
Suite 1-250
Austin, TX 78735
(512) 481-4400
erae@ljc.org

Counsel for Plaintiff–Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(g)(1) because it contains 5,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point proportionally spaced Century Schoolbook typeface using Microsoft Word.

Dated: July 24, 2025

/s/Emily Rae

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing brief that:

1. All required privacy redactions have been made per 10th Cir. R. 25.5;

2. Only if requested by the Court, within five days of the request, a hard copy of this brief will be submitted to the Court pursuant to 10th Cir. R. 31.5 and will be an exact copy of the version of the document submitted electronically via the Court's ECF system;

3. The brief has been scanned for viruses with Avast Free Antivirus for Windows 10 and no virus was detected.

Dated: July 24, 2025

/s/ Emily Rae

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2025, I electronically filed the foregoing brief using the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the Court's CM/ECF system.

/s/ Emily Rae