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**UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING
CHEYENNE DIVISION
No. 1:24-cv-164**

DR. FREDERICK WILLIAM "ERIC"
CUBIN III,

Plaintiff,

v.

MARK GORDON, in both his personal
and official capacities as Governor of
Wyoming,

Defendant.

**PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

***REQUEST FOR ORAL ARGUMENT
AT THE COURT'S DISCRETION
PURSUANT TO LOCAL RULE 7.1(a)**

Plaintiff Dr. Eric Cubin files this motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65(a) and Local Rule 7.1(b)(2), against Defendant Governor Mark Gordon.

In support of this Motion, Dr. Cubin relies upon the: (1) Complaint, ECF No. 1, and supporting exhibits (ECF No.'s 1-1 through 1-3); (2) Brief pursuant to Local Rule 7.1(b)(2)(A) filed contemporaneously herewith; (3) Declaration of Dr. Cubin filed with this Motion; and the entire record in this case.

As more fully set forth in his Brief, Plaintiff Dr. Eric Cubin states as follows:

1. Dr. Cubin is an accomplished Wyoming-licensed physician who also served on the Wyoming Board of Medicine until April of this year. In February, Dr. Cubin sent an email as a private citizen to all members of the Wyoming House of Representatives, in which he expressed his personal views in support of a proposed bill known as “Chloe’s Law.”

2. In his email to the legislators, Dr. Cubin criticized the Wyoming Medical Society’s public position against Chloe’s Law. And the Wyoming legislature agreed with Dr. Cubin’s position on the proposed bill: Chloe’s Law overwhelmingly passed, and the Governor signed it into law.

3. But then shortly thereafter, Defendant Governor Mark Gordon—despite signing Chloe’s Law after it passed—removed Dr. Cubin from the Wyoming Board of Medicine because of his email that he sent to the House of Representatives in support of Chloe’s Law.

4. In removing Dr. Cubin from the Wyoming Board of Medicine for expressing

his personal views to the House of Representatives on a matter of public concern—Chloe’s Law—Governor Gordon unlawfully retaliated against Dr. Cubin in violation of his First Amendment free speech rights and right to petition the government. *Trant v. Oklahoma*, 754 F.3d 1158, 1165 (10th Cir. 2014); *Garcetti v. Ceballos*, 547 U.S. 422 (2006); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Van Deelen v. Johnson*, 497 F.3d 1151, 1155-56 (10th Cir. 2007).

5. Governor Gordon’s unconstitutional actions injured Dr. Cubin in ways that are continuous and ongoing.

6. Dr. Cubin suffered irreparable injury as a result of his removal from the Board, including the loss of his First Amendment rights.

7. A preliminary injunction is warranted to restore Dr. Cubin to the Wyoming Board of Medicine before the Governor’s unconstitutional actions, which was the “last peaceable uncontested status existing between the parties before the dispute developed.” *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005).

8. And the Court should exercise its discretion and waive the bond requirement under Fed. R. Civ. P. 65(c). *See Winnebago Tribe v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). Moreover, pursuant to Local Rule 7.1(a) at the Court’s discretion, Dr. Cubin requests leave to present oral argument in support of his Motion.

REQUEST FOR RELIEF

WHEREFORE, Dr. Cubin respectfully requests that the Court issue a preliminary injunction ordering Governor Gordon to restore him to his position on the Wyoming Board of Medicine pending the outcome of trial.

Dated: October 1, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document and attachment were filed electronically with the Court's Case Management/Electronic Case Filing (CM/ECF) system. The Court and/or Clerk of Court may serve and give notice to Defendant's counsel by CM/ECF electronic transmission.

The 1st day of October 2024.

/s/ D. Stephen Melchior
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MARK GORDON, in both his personal
and official capacities as Governor of
Wyoming,

Defendant.

**BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Plaintiff Dr. Eric Cubin is an accomplished Wyoming-licensed physician who also served on the Wyoming Board of Medicine until April of this year. In February, Dr. Cubin sent an email as a private citizen to all members of the Wyoming House of Representatives, in which he expressed his personal views in support of a proposed bill known as “Chloe’s Law.” In his email to the legislators, Dr. Cubin criticized the Wyoming Medical Society’s public position against Chloe’s Law. And the Wyoming legislature agreed with Dr. Cubin’s position on the proposed bill: Chloe’s Law overwhelmingly passed, and the Governor signed it into law.

But then shortly thereafter, Defendant Governor Mark Gordon—despite signing Chloe’s Law after it passed—had his Chief of Staff telephone Dr. Cubin informing him the Governor was removing him from the Board. The Governor then sent Dr. Cubin a letter. In his letter, Governor Gordon reiterated he was removing Dr. Cubin from the Board because he emailed the legislature to support Chloe’s Law.

In removing Dr. Cubin from the Wyoming Board of Medicine for expressing his personal views to the House of Representatives on a matter of public concern—Chloe’s Law—Governor Gordon unlawfully retaliated against Dr. Cubin in violation of his First Amendment free-speech rights and right to petition. This lawsuit seeks to vindicate Dr. Cubin’s free speech rights and right to petition the government under the First Amendment of the U.S. Constitution. Governor Gordon’s retaliatory actions violated Dr. Cubin’s fundamental Constitutional rights in at least two ways.

First, Governor Gordon deprived Dr. Cubin of his free speech rights under the First Amendment. Dr. Cubin simply expressed his personal opinions as a private citizen on Chloe's Law to the members of the Wyoming House of Representatives. Doing so was not part of his official duties on the Board. Nor did his email to the legislature disrupt the Board's work. Thus, the Governor's actions violated well-settled Supreme Court precedent under the First Amendment protecting a public employee's right to speak as a private citizen on matters of public concern.

Second, Governor Gordon retaliated against Dr. Cubin because he exercised his First Amendment right to petition the Wyoming House of Representatives by expressing his ideas, hopes, and concerns about Chloe's Law. The right of citizens to petition the government is a basic fundamental right under the First Amendment. Indeed, citizens freely expressing their ideas, hopes, and concerns to their government and elected representatives is the cornerstone of our Constitutional Republic. Governor Gordon's actions are particularly egregious because he himself was elected to office by Wyoming citizens. But he punished Dr. Cubin for speaking as a Wyoming citizen about a bill to the Wyoming House of Representatives.

Governor Gordon's actions injured Dr. Cubin in ways that are continuous and ongoing. Dr. Cubin suffered irreparable injury as a result of his removal from the Board, including the loss of his First Amendment rights. A preliminary injunction is warranted to restore Dr. Cubin to the Wyoming Board of Medicine and the parties to their respective positions before the Governor's unconstitutional actions.

Therefore, Dr. Cubin respectfully requests that the Court issue a preliminary injunction.

STATEMENT OF FACTS

Wyoming Board of Medicine

The Wyoming Board of Medicine (“Board”) is comprised of 8 members, including 5 physicians, and is responsible for issuing and renewing licenses for physicians and other medical practitioners in Wyoming. Wyo. Stat. Ann. § 33-26-202. The Board oversees medical regulation, compliance, and discipline of physicians. *See* Declaration of Dr. Cubin (“Cubin Decl.”) at ¶¶ 5, 6. The Board is responsible for ensuring that physicians adhere to state laws governing medical practice, investigating complaints against medical professionals, conducting hearings, and taking disciplinary actions such as revoking or suspending medical licenses. *Id.*

Board members are compensated for their service and are appointed by the Governor of Wyoming with the advice and consent of the State senate. Wyo. Stat. Ann. § 33-26-201; Cubin Decl. at ¶ 8. Board members “shall serve at the pleasure of the governor.” Wyo. Stat. Ann. § 33-26-201. Governor Gordon appointed Dr. Cubin to the Board for a second term in or around February of 2024, and he was unanimously confirmed by the Wyoming Senate for both of his appointments. Cubin Decl. at ¶ 3. “Board members shall serve four (4) year terms. No board member shall serve more than three (3) consecutive terms.” Wyo. Stat Ann. § 33-26-201(b). Dr. Cubin’s second term on the Board was to run through 2028 in accordance with Wyoming law. Cubin Decl. at ¶ 3.

Chloe's Law

In early 2024, the Wyoming legislature was considering Senate File 99, also known as “Chloe’s Law,” which would prohibit certain gender-affirming procedures for minors in Wyoming. *See* Complaint (“Compl.”), ECF No. 1 at ¶ 22; Cubin Decl. at ¶ 11. Chloe’s Law was named after Chloe Cole, an 18-year-old who began taking cross-sex hormones at 13 and underwent a double mastectomy at 15 in an attempt to transition from female to male.¹ Compl., ECF No. 1 at ¶ 23. Chloe has since detransitioned and is deeply regretful of the “gender-affirming” care that medical professionals recommended to her family.² Compl., ECF No. 1 at ¶ 24. Chloe testified before the Wyoming legislature, urging Wyoming to take a stand against such surgeries, stating, “I didn’t deserve this,” and “No child in Wyoming deserves to be put through these cruelties or hardships.”³ Compl., ECF No. 1 at ¶ 25.

The Wyoming Medical Society (“WMS”), a voluntary organization that physicians are not required to join, publicly opposed Chloe’s Law, and WMS representatives testified before the legislature. Compl., ECF No. 1 at ¶¶ 27, 28; Cubin Decl. at ¶ 12. WMS publicly touts itself as a professional organization that

¹ Leo Wolfson, *National Activist Chloe Cole Testifies Against Transgender Treatments For Minors In Wyoming*, Cowboy State Daily (Feb. 21, 2024), available at <https://cowboystatedaily.com/2024/02/21/chloes-law-namesake-testifies-for-a-wyoming-ban-on-transgender-treatments-for-minors/> (last visited Oct. 1, 2024). Compl., ECF No. 1 n. 1.

² *Id.* n. 2.

³ *Id.* n. 3.

serves the interests of Wyoming medical practitioners and lobbies at the state and national level.⁴ Compl., ECF No. 1 at ¶ 29; Cubin Decl. at ¶ 10.

Dr. Cubin's Email to the Wyoming House of Representatives

Dr. Cubin, himself a member of WMS, disagreed with the organization's public opposition to Chloe's Law. Cubin Decl. at ¶¶ 9, 13. In a series of email exchanges, Dr. Cubin emailed WMS officials expressing his concerns about WMS's position and testimony before the legislature on Chloe's Law, including that WMS did not fairly represent Wyoming's physicians. Cubin Decl. at ¶¶ 13-15. Dr. Cubin thought it unlikely that WMS's stance reflected the views of the vast majority of its members, and asked whether WMS could present physicians' views on both sides of the issue but did not receive a satisfactory response. Cubin Decl. at ¶ 15.

On February 28, 2024, after receiving no satisfactory response from WMS leadership, Dr. Cubin sent an email from his personal email account to the entire Wyoming House of Representatives expressing his personal views in support of Chloe's Law and criticizing WMS's public position against it. Cubin Decl. at ¶¶ 16-17. A true and accurate copy of Dr. Cubin's email to the Wyoming House of Representatives is attached to the Complaint as **Exhibit 1**. Cubin Decl. at ¶ 17; Compl., ECF No. 1-1.

Dr. Cubin made clear in his email that he was representing himself, not WMS or the Wyoming Board of Medicine. Cubin Decl. at ¶ 17; Compl., ECF No. 1-1.

⁴ See Wyoming Medical Society, *About Wyoming Medical Society*, <https://www.wyomed.org/about/> (last visited Oct. 1, 2024). Compl., ECF No. 1 n. 5.

Dr. Cubin stated in his email that he was writing “from the perspective of a Wyoming doctor who actually practices medicine at the very hospital where he was born.” Cubin Decl. at ¶ 17; Compl., ECF No. 1-1. In his email, Dr. Cubin stated that he believed WMS did not accurately represent the views of most Wyoming physicians. Cubin Decl. at ¶ 16; Compl., ECF No. 1-1. Dr. Cubin did not claim in his email to be speaking on behalf of the Wyoming Board of Medicine. Cubin Decl. at ¶ 17; Compl., ECF No. 1-1. Chloe’s Law, Senate File 99, overwhelmingly passed, was signed by Governor Gordon, and became law. *See* S.F. 99, 67th Leg., Budget Sess. (2024) (enacted).

Governor Gordon’s Response to Dr. Cubin’s Speech

On April 22, 2024, Dr. Cubin received a phone call from the Governor’s Chief of Staff, Drew Perkins. Cubin Decl. at ¶ 20. Mr. Perkins informed Dr. Cubin that, because of the email he sent to members of the House of Representatives and the positions he had taken, the Governor had decided to remove Dr. Cubin from the Board. Cubin Decl. at ¶ 20. Dr. Cubin was not given an opportunity to explain his actions or his email that he sent to the legislature. Cubin Decl. at ¶ 20.

Immediately after Perkins’s phone call to Dr. Cubin, Governor Gordon sent a letter to Dr. Cubin via email stating that Gordon was removing Cubin from the Wyoming Board of Medicine. Cubin Decl. at ¶ 20. Attached as **Exhibit 2** to the Complaint is a true and correct copy of Governor Gordon’s letter to Dr. Cubin. Cubin Decl. at ¶ 20; Compl., ECF No. 1-2.

In his letter, Governor Gordon explicitly cited Dr. Cubin’s “email to the members of the House of Representatives during this last legislative session regarding SF0099” as the reason for Dr. Cubin’s removal from the Board. Compl., ECF No. 1-2. Governor Gordon stated that Dr. Cubin’s comments “could give doctors, who are licensed by the Board of Medicine, a reason to be concerned that you might use your position to advocate for a particular position when considering matters that should be considered absent an agenda or prejudice.” Cubin Decl. at ¶ 20; Compl., ECF No. 1-2. Governor Gordon wrote that “as an individual member of the Board, you would not be entitled to speak for the Board unilaterally.” Compl., ECF No. 1-2.

Dr. Cubin Spoke as a Private Citizen on Chloe’s Law

Contrary to Governor Gordon’s letter’s suggestion, Dr. Cubin had not claimed to speak for the Board in his email to the Wyoming House of Representatives. Cubin Decl. at ¶ 17; Compl., ECF No. 1-1. As part of his official duties as a member of the Board, Dr. Cubin is not required to, and does not, communicate by email, or otherwise, with the Wyoming House of Representatives. Cubin Decl. at ¶ 7. Dr. Cubin’s email to the Wyoming House of Representatives as a private citizen did not cause any disruption to the normal functioning of the Board in carrying out its official duties and obligations under Wyoming law. Cubin Decl. at ¶ 18. And Dr. Cubin’s email to the House advocating for Chloe’s Law did not result in the inefficient operation of the Board. Cubin Decl. at ¶ 18.

Past Board members have gone so far as to testify before the Wyoming legislature on controversial medical issues, and the Governor did not remove these Board members for their personal advocacy activities. Compl., ECF No. 1 at ¶¶ 51-52. Indeed, former Board member Rene Hinkle testified before the Wyoming legislature against giving life-saving care to infants born alive, and was afterward reappointed by the Governor to the Board. Compl., ECF No. 1 at ¶ 52.

Dr. Cubin's Removal from the Board

But for his email to the House of Representatives expressing his personal views on Chloe's Law, Dr. Cubin would still be a member of the Wyoming Board of Medicine. Compl., ECF No. 1-1; Cubin Decl. at ¶¶ 20-21. As a member of the Board, Dr. Cubin always fulfilled his duties and obligations of overseeing medical professionals' licensure in a professional, unbiased, and clinical manner based on the merits alone. Cubin Decl. at ¶ 4. Governor Gordon's removal of Dr. Cubin from the Board of Medicine has caused Dr. Cubin economic injury and harm to his professional reputation. Cubin Decl. at ¶ 22.

After being forced by Governor Gordon to resign from the Board, Dr. Cubin verbally resigned, which Governor Gordon accepted and made effective as of April 22, 2024, the same day as Gordon's letter to Dr. Cubin removing him from the Board. Cubin Decl. at ¶ 21. Attached as **Exhibit 3** to the Complaint is a copy of Governor Gordon's acceptance letter. Cubin Decl. at ¶ 21; Compl., ECF No. 1-3. Dr. Cubin would never have resigned if he had not received the Governor's binding

letter in hand stating that he had been removed from the Board of Medicine because of his email to the House of Representatives. Cubin Decl. at ¶ 21.

LEGAL STANDARD

To obtain a preliminary injunction pursuant to Fed. R. Civ. P. 65, a plaintiff must “establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see *Schrier v. Univ. of Colo.*, 427 F.3d 1253 (10th Cir. 2005). The third and fourth factors—balance of equities and the public interest—merge when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

A. This Court should issue a preliminary injunction and order the Governor to restore Dr. Cubin to his position on the Wyoming Board of Medicine pending the outcome of trial.

Dr. Cubin has made a clear showing that he is entitled to a preliminary injunction, and this Court should issue one ordering Governor Gordon to restore him to his position on the Board. The record shows that Dr. Cubin spoke as a private citizen on Chloe’s Law, that his speech did not interfere with the Board’s work, and that the Governor’s motivation for his removal from the Board was to retaliate against Dr. Cubin for his protected speech and email to the Wyoming House of Representatives.

“The main purpose of a preliminary injunction is simply to preserve the status quo pending the outcome of the case.” *Penn. v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975). “In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits.” *Tri-State Generation & Transmission Asso. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986).

The status quo is “the last uncontested status between the parties which preceded the controversy” or the “last peaceable uncontested status existing between the parties before the dispute developed.” *Schrier*, 427 F.3d at 1260 (quoting *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001)). “In determining the status quo for preliminary injunctions, this court looks to the reality of the existing status and relationship between the parties.” *Schrier*, 427 F.3d at 1260.

“[A] preliminary injunction can [] act to restore, rather than merely preserve, the status quo, even when the nonmoving party has disturbed it.” *Di Biase v. SPX Corp.*, 872 F.3d 224, 231 (4th Cir. 2017). And sometimes it is necessary “to require a party who has recently disturbed the status quo to reverse its actions” to restore the status quo ante. *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F. 3d 355, 378 (4th Cir. 2012) (cleaned up).

That is precisely what this Court should do: order the Governor “to reverse [his] actions” after he “disturbed the status quo” and wrongfully removed Dr. Cubin from the Board for his protected speech that he expressed to the Wyoming House of

Representatives. *See id.* Governor Gordon injured Dr. Cubin when he deprived him of his rights under the U.S. Constitution by infringing upon his free speech and right to petition the government. The Governor retaliated against Dr. Cubin for his reasonable exercise of his fundamental federal Constitutional rights. And his injuries are ongoing: Dr. Cubin suffers ongoing harm arising from the loss of his First Amendment rights and reputational harm as a result of the Governor's debacle and unjustified retaliation.

The Governor failed to provide a reasonable alternative justification for Dr. Cubin's removal from the Board other than his email to the Wyoming legislature. And the Governor's actions were not motivated by concerns about Dr. Cubin's fitness to serve on the Board. Governor Gordon's letter failed to cite any examples of specific Wyoming physicians who reasonably believed Dr. Cubin would be biased performing his duties on the Board based on his email. Compl., ECF No. 1-2.

The Governor has put forth no evidence that Dr. Cubin would be biased in his duties on the Board because he supported Chloe's Law. If anything, the fact that he supported Chloe's Law, which was later codified into law by the legislature and Governor Gordon simply makes Dr. Cubin well-qualified to uphold the laws of the State of Wyoming as a member of the Board.

This Court can and should issue a preliminary injunction and restore the parties to their respective positions before Governor Gordon removed Dr. Cubin from the Board. Ordering the Governor to reinstate Dr. Cubin to the Board protects Dr. Cubin from the irreparable harm he has suffered and will continue to suffer from

the loss of his First Amendment rights, and preserving federal Constitutional rights serves the public interest.

Dr. Cubin has shown that he has met the standard for the Court to issue a preliminary injunction: he is likely to succeed on the merits of his Section 1983 claims pursuant to the First Amendment, he will be irreparably harmed absent an injunction due to the loss of his First Amendment rights, the balance of equities tip in his favor warranting an injunction, and an injunction serves the public interest.

Critically, the Governor's decision to remove Dr. Cubin from the Board in retaliation for expressing his personal opinions to legislators was plainly wrong as a matter of law under the First Amendment. And that egregious decision to suspend a dedicated physician from the Board of Medicine for expressing his opinions to the lawmakers of his home state on Chloe's Law, which the Governor eventually signed into law, defies all logic and common sense.

1. Dr. Cubin is likely to succeed on the merits of his federal Constitutional claims.

Under the first preliminary injunction factor, Dr. Cubin is likely to succeed on the merits of both his First Amendment (a) free speech, and (b) right to petition claims. *See Winter*, 555 U.S. at 20.

The Tenth Circuit subscribes to the liberal definition of the "probability of success" requirement. When the other three requirements for a preliminary injunction are satisfied, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to

make them a fair ground for litigation and thus for more deliberate investigation.”
Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782 (10th Cir. 1964)
(citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953));
see *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980); *Otero Sav. & Loan Asso.*
v. Fed. Res. Bank, 665 F.2d 275, 278-279 (10th Cir. 1981).

a. The Governor retaliated against Dr. Cubin and deprived him of his free speech rights under the First Amendment.

Dr. Cubin is likely to succeed on the merits of his free speech claim because Governor Gordon retaliated against him for expressing his views on Chloe’s Law to the Wyoming House of Representatives.

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech.” U. S. Const. amend. I. This fundamental right means that the government cannot “chill” citizens’ constitutionally protected speech. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

To determine whether a government employee’s speech is protected by the First Amendment, courts in the Tenth Circuit apply the *Garcetti/Pickering* five-step framework. *Trant v. Oklahoma*, 754 F.3d 1158, 1165 (10th Cir. 2014); *Garcetti v. Ceballos*, 547 U.S. 422 (2006); *Pickering v. Board of Education*, 391 U.S. 563 (1968). This framework analyzes 1) whether the speech occurred within the scope of employment and 2) was about a matter of public concern, 3) the government’s interest in efficiency weighed against the employee’s free speech rights, 4) whether the plaintiff’s speech was a motivating factor in the adverse employment action. and

5) whether the same employment decision would have been reached absent the protected speech. *Trant*, 754 F.3d at 1165.

The “ultimate question” in determining whether an individual’s speech was within the scope of his employment is “whether the employee speaks as a citizen or instead as a government employee—an individual acting ‘in his or her professional capacity.’” *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1198 (10th Cir. 2007) (quoting *Garcetti*, 547 U.S. at 422). A government employer cannot “restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” *Garcetti*, 547 U.S. at 422. And public employees “must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.” *Id.*

Here, Dr. Cubin’s email to the Wyoming House of Representatives was protected speech under the First Amendment. Dr. Cubin’s speech that he expressed in his email did not occur within the scope of his Board duties and was made in his capacity as a private citizen. It was about a matter of public concern—Chloe’s Law. The Board’s interest in efficiency did not weigh against Dr. Cubin’s free speech rights because there was no disruption to the Board’s work as a result of his email. And his speech was a motivating factor in the Governor’s adverse employment action removing Dr. Cubin from the Board; Governor Gordon would not have removed Dr. Cubin from the Board absent his email to the Wyoming House of Representatives. *See Trant*, 754 F.3d at 1165.

- i. Dr. Cubin expressed only his personal opinions in his email about Chloe’s Law for the legislators’ consideration, and his email was not part of any official Board duties.**

The first step of the *Garcetti/Pickering* framework is to consider whether the individual’s speech occurred within the scope of employment. *Id.* at 1165. In his communication to the House of Representatives, Dr. Cubin repeatedly identified himself as a Wyoming physician and WMS member. His email did not relate to Board specific duties or opinions, nor his responsibilities as a Board member. As a member of the Board, Dr. Cubin’s duties did not include advising the Board on pending legislation such as Chloe’s Law.

Furthermore, Dr. Cubin’s email did not purport to represent the Board’s official position on Chloe’s Law, nor did it provide guidance to the legislature on this pending legislation on behalf of the Board. Dr. Cubin explicitly stated that he was speaking “on his own behalf” and “from the perspective of a Wyoming doctor.” His criticism was directed specifically at the stance taken by WMS, a voluntary organization that is entirely separate from the Board.

Therefore, Dr. Cubin’s email to the Wyoming House of Representatives was speech made as a private citizen, wholly separate from any official duties that he undertakes as a member of the Board of Medicine.

- ii. Dr. Cubin’s comments on Chloe’s Law addressed a matter of obvious public concern.**

The second step of the *Garcetti/Pickering* framework considers whether the speech addressed a matter of public concern. *Trant*, 754 F.3d at 1165; *Brammer-*

Hoelter, 492 F.3d at 1192 (“If the speech is not a matter of public concern, then the speech is unprotected, and the inquiry ends.”). Speech regarding “matters of public concern” receives strong First Amendment protection. *Connick v. Myers*, 461 U.S. 138, 146 (1983). Matters of public concern include “those of interest to the community, whether for social, political, or other reasons.” *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1224 (10th Cir. 2000).

The Supreme Court, the Tenth Circuit, and other circuits have consistently recognized a First Amendment right of government employees to speak on matters of public concern and a right to express concerns to elected government officials. This includes speech that can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or that addresses “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (citations and quotations omitted).

In *Dixon v. Kirkpatrick*, the court held that the subject of dogfighting qualified as a matter of public concern because a “dogfighting investigation was the subject of extensive reporting in a major local daily newspaper.” 553 F.3d 1294, 1303-04 (10th Cir. 2009). The state employee’s sharing of her concerns about the dogfighting investigation was deemed a matter of public concern where the comments were directed to a veterinarian who was 1) “a member of the legislative committee ... which engaged in public advocacy on the subject of veterinary regulation” and 2) later discussed the information at a legislative committee meeting. *Id.* at 1303. The

court contrasted this with the employee's other comments concerning interpersonal complaints about coworkers and noted that personnel issues were "trivial in nature" as they concerned issues that did not generate any press coverage and were unrelated to any legislative concerns. *Id.* at 1303.

Here, the "gender-affirming care" for minors addressed in Chloe's Law generates far more press coverage than dogfighting and is a matter of legislative concern. Countless articles, op-eds, and public discussions have explored the implications of transgender care. *See generally* Compl, ECF No. 1. As the Tenth Circuit suggested in *Dixon*, issues that are the subject of "legislative concern" and public policy debates are matters of public concern. 553 F.3d at 1304. The widespread public discourse, legal battles, medical considerations, and social and cultural impact of transgender care for minors, undoubtedly make this "interest to the community, whether for social, political, or other reasons." *Lighton*, 209 F.3d at 1224.

Dr. Cubin's email expressed his views on Chloe's Law, a piece of legislation regulating gender-affirming surgeries for minors, which is of significant concern to physicians, parents, and citizens across Wyoming. The Tenth Circuit has clarified that "Courts have focused on the motive of the speaker in analyzing whether the speech qualifies as a matter of public concern, i.e., whether the speech was calculated to disclose misconduct or dealt with only personal disputes and grievances with no relevance to the public interests." *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988). Dr. Cubin's email evidences a genuine concern for the policies espoused by the WMS on Chloe's law. Compl. ECF No. 1-1. Considering the

political, social, and legislative interests in the topic of gender-affirming care at the heart of Chloe's Law, Dr. Cubin's email communication to the House of Representatives concerning Chloe's Law falls squarely within the concept of a "matter of public concern."

iii. Dr. Cubin's speech did not interfere with the Board's work or its ability to function efficiently.

The third step of the *Garcetti/Pickering* framework is to consider whether the government's interests in promoting efficiency outweigh the plaintiff's free speech rights. *Trant*, 754 F.3d at 1165. Again, Dr. Cubin's email repeatedly identified him as a Wyoming physician and WMS member, and the communication did not relate to Board-specific duties or opinions, nor to his responsibilities as a Board member.

Further, the Governor put forth no reasonable evidence suggesting that Dr. Cubin's opinions on medical policy set forth in his email would negatively impact the Board's performance or ability to investigate and discipline physicians. To hold otherwise would be to suggest that Board physicians must be completely silent about all medical policy matters that go before the Wyoming legislature in order for the Board to operate efficiently; an assertion that would be inconsistent with the legislative activities of past Board members who faced no reprisal from the Governor. And again, the fact that Chloe's Law has been codified into law underscores that there is no Board inefficiency here arising from Dr. Cubin's email because his views that he previously articulated in his email to the Wyoming House

of Representatives align with the policy and law that Board members are now duty-bound to enforce when regulating physician conduct.

iv. Governor Gordon’s letter explicitly stated he was removing Dr. Cubin from the Board because of his email to the House of Representatives about Chloe’s Law.

The fourth *Garcetti/Pickering* factor concerns causation: whether the protected speech was a motivating factor in the adverse employment action. *Trant*, 754 F.3d at 1165. The Governor's letter explicitly cites Dr. Cubin's “comments” to the House as the reason for the disciplinary action. Compl, ECF No. 1-2.

Dr. Cubin’s removal from the Board in retaliation for engaging in protected political speech on Chloe’s Law violates his free speech rights under the First Amendment. In *Bass v. Richards*, the Tenth Circuit held that removing an individual from a government position due to political speech or affiliation violates the First Amendment. 308 F.3d 1081, 1091 (10th Cir. 2002). The court emphasized that a person’s “expression of his preference for one philosophy over another is the type of pure political opinion that has been long protected.” *Id.* at 1090. Similarly, in *Gardetto v. Mason*, the Tenth Circuit reaffirmed that political speech, including advocacy related to candidates or public officials, lies at the core of First Amendment protection. 100 F.3d 803, 812 (10th Cir. 1996).

- v. **But for Dr. Cubin’s speech and email to the Wyoming legislature, he would still have his position on the Board.**

The final *Garcetti/Pickering* factor is whether the defendant would have reached the same employment decision in the absence of the protected conduct. *Trant*, 754 F.3d at 1165. There is no indication here that Dr. Cubin was being disciplined for any other actions other than his email. Rather, the Governor’s letter clearly states that his comments were the sole reason for the employment decision. Compl, ECF No. 1-2.

- b. **Governor Gordon unlawfully retaliated against Dr. Cubin for exercising his First Amendment right to petition the government.**

To establish a claim of unlawful retaliation for exercising their First Amendment right to petition, a government employee must first show that “(a) he or she was engaged in constitutionally protected activity; (b) the defendant’s actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (c) the defendant’s adverse action was substantially motivated as a response to the plaintiff’s exercise of constitutionally protected conduct.” *Van Deelen v. Johnson*, 497 F.3d 1151, 1155-56 (10th Cir. 2007) (citing *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir.2000)).

- i. **Dr. Cubin expressed to the state legislature his ideas, hopes, and concerns about Chloe’s Law.**

The Supreme Court has stated that “Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition

allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). Petitions are protected when directed to local, state, or national government. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 889 (1982) (petition to county officials); *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010) (oral request to city councilperson); *Van Deelen*, 497 F.3d at 1158 (appeal of county property tax assessment).

Dr. Cubin’s email to the Wyoming House of Representatives expressing his ideas and hopes about Chloe’s Law and concerns about testimony opposing the bill is constitutionally protected activity. *See Guarnieri*, 564 U.S. at 388; Compl, ECF No. 1-1.

ii. Governor Gordon’s letter in response to Dr. Cubin reasonably chilled him from continuing to engage in such speech.

The second requirement for a government employee to establish a claim of unlawful retaliation for exercising their First Amendment right to petition is a showing that “the defendant’s actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity.” *Van Deelen*, 497 F.3d at 1155-56 (citing *Worrell*, 219 F.3d at 1212.)

Dr. Cubin received a phone call from the Governor’s Chief of Staff, Drew Perkins, informing him that he was being removed from the Board because of his

email to the House of Representatives. Cubin Decl. at ¶ 20. Then immediately thereafter, Governor Gordon explicitly stated in his Exhibit 2 letter that his adverse action of removing Dr. Cubin from the Board was motivated by Dr. Cubin's email petitioning the House of Representatives to vote in favor of Chloe's Law. Compl., ECF No. 1-2. Governor Gordon's act of having his Chief of Staff telephone Dr. Cubin to inform him he was being removed from the Board, and then sending his Exhibit 2 letter immediately thereafter to Dr. Cubin would cause a person on the Board of ordinary firmness to refrain from further speaking out in the future to the Wyoming House of Representatives as a private citizen on a matter of public concern, such as pending legislation like Chloe's Law.

iii. Governor Gordon's removal of Dr. Cubin was motivated by his email to the Wyoming House of Representatives.

The final requirement for a government employee to establish a claim of unlawful retaliation for exercising their First Amendment right to petition, is a showing that "the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct."

Van Deelen, 497 F.3d at 1155-56 (citing *Worrell*, 219 F.3d at 1212).

Again, in his letter, Governor Gordon explicitly wrote to Dr. Cubin that his "email to the members of the House of Representatives during this last legislative session regarding SF0099" was the reason why he removed Dr. Cubin from the Board of Medicine. No other plausible motivation has been offered by the Governor.

2. Dr. Cubin will be irreparably harmed absent a preliminary Injunction because he has lost his First Amendment rights.

Dr. Cubin suffered irreparable injury as a result of his removal from the Board, including the loss of his First Amendment rights. These harms are ongoing and continuous absent a preliminary injunction.

Because Dr. Cubin has established that he is likely to prevail on the merits of his First Amendment claims set forth above, he has thus also shown that his injury is irreparable without an injunction because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (plurality opinion) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

3. A preliminary injunction serves the public interest.

The third and fourth merged factors—balance of equities and the public interest—favor a preliminary injunction restoring Dr. Cubin to the Board. *See Nken*, 556 U.S. at 435.

Speech about public policy is at the core of the First Amendment’s protection. There is “a strong interest in debate on public issues,” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), and “the law should encourage the private individual to become involved in and express his or her views on the conduct of government affairs,” *Garcia v. Bd. of Educ.*, 777 F.2d 1403, 1410 (10th Cir. 1985).

B. It is appropriate to waive the bond requirement under Rule 65(c).

Courts have “wide discretion under Rule 65(c) in determining whether to require security.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (citing *Winnebago Tribe v. Stovall*, 341 F.3d 1202 (10th Cir. 2003)).

Because Dr. Cubin seeks injunctive relief for the loss of his First Amendment rights, and Governor Gordon has no risk of monetary injury or likelihood of harm if this Court issues a preliminary injunction, the Court may waive Rule 65(c)’s bond requirement. *See Winnebago Tribe*, 341 F.3d at 1206 (district court waived the bond requirement because there was “an absence of proof showing a likelihood of harm.”).

CONCLUSION

For these reasons, Dr. Cubin respectfully requests that the Court issue a preliminary injunction ordering Governor Gordon to restore Dr. Cubin to his position on the Board pending the outcome of trial.

[SIGNATURE OF COUNSEL ON FOLLOWING PAGE]

Dated: October 1, 2024

Respectfully submitted,

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** Pro hac vice admission forthcoming*

Attorneys for Plaintiff Dr. Eric Cubin

CERTIFICATE OF COMPLIANCE

This brief complies with Wyoming Local Civil Rule 7.1(b)(2)(B) because it contains 25 pages, not including the cover page, table of contents, table of authorities, certificate of service, and this certificate.

Dated: October 1, 2024

/s/ D. Stephen Melchior
D. Stephen Melchior

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically with the Court's Case Management/Electronic Case Filing (CM/ECF) system. The Court and/or Clerk of Court may serve and give notice to Defendant's counsel by CM/ECF electronic transmission.

The 1st day of October 2024.

/s/ D. Stephen Melchior
D. Stephen Melchior

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING
CHEYENNE DIVISION

DR. FREDERICK WILLIAM “ERIC”
CUBIN III,

Plaintiff,

v.

MARK GORDON, IN BOTH HIS PERSONAL
AND OFFICIAL CAPACITIES AS GOVERNOR
OF WYOMING,

Defendant.

Case No. 1:24-cv-164

**DECLARATION OF DR. ERIC CUBIN IN SUPPORT OF PLAINTIFF’S
MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to 28 U.S.C. § 1746, I, Dr. Frederick William “Eric” Cubin III, hereby declare as follows:

1. I am a resident of Casper, Wyoming. I have personal knowledge of the facts herein and, if called to give testimony, would testify as follows:
2. I am a physician practicing in Wyoming. I have been licensed since June 4, 2010. My medical practice specialty is Radiology.
3. I was appointed to the Wyoming Board of Medicine and served from March 1, 2023, thru April 22, 2024. I was initially nominated to the Board of Medicine by Governor Mark Gordon. I was nominated again by Governor Gordon for a full 4-year term in February 2024. Both times I was nominated, I was unanimously confirmed by the Wyoming Senate.

4. During my initial term on the Board, I received no complaints or disciplinary action regarding my official actions or performance of Board duties. I always fulfilled my duties and obligations of overseeing medical professionals' licensure in a professional, unbiased, and clinical manner based on the merits alone. If there was ever a situation in which I had a conflict of interest, or even a potential/perceived conflict of interest, I recused myself from that particular case. I recused myself on multiple cases during my time on the Board.

5. The Wyoming Board of Medicine is a state regulatory agency responsible for issuing and renewing licenses for physicians and other medical practitioners. Board members are appointed by the Governor. The Board consists of eight members including five physicians.

6. The Board also oversees medical regulation, compliance, and discipline of physicians. Board member duties include ensuring that physicians adhere to the Wyoming Medical Practice Act and any other state laws governing medical practice, investigating complaints against medical professionals, conducting hearings, and taking disciplinary actions such as fines, requiring additional education, and revoking or suspending medical licenses.

7. Board member duties do not include communication with the Wyoming House of Representatives.

8. Board members receive compensation for their service and are paid in the same manner and amount as members of the Wyoming Legislature.

9. I have been a member of the Wyoming Medical Society (“WMS”) since before I returned to the State of Wyoming to practice in 2010.

10. The WMS publicly touts itself as a professional organization that serves the interests of medical practitioners in Wyoming. Its functions include representing physicians and advocating for their interests at the state and national levels including lobbying for or against legislation that benefits the medical community and public health. Membership is voluntary, physicians are not required to join.

11. Chloe’s Law is a bill that regulates gender-affirming care for minors in Wyoming.

12. WMS representatives testified in opposition to Chloe’s Law.

13. On February 21, 2024, I emailed WMS representatives to express that I disagreed with the organization’s opposition to Chloe’s Law and felt they were misrepresenting the position of physicians and the medical evidence against gender-affirming care for minors. I requested that WMS present physician’ views on both sides of this issue.

14. The following day, Dr. Kristopher Schamber, President of the WMS Board of Trustees emailed me reiterating WMS’s position but failed to respond to my concerns that WMS did not fairly represent Wyoming’s physicians.

15. On February 25, 2024, I emailed Dr. Schamber and the WMS Board to express my disagreement and request that WMS poll its physician members on the

issue. In further email exchanges I requested that WMS adjust its position to a more neutral stance. I did not receive a satisfactory response.

16. On February 28, 2024, I sent an email to members of the Wyoming House of Representatives expressing my support for Chloe's Law. In the email I detailed my concerns regarding gender-affirming care and the misrepresentation of physicians by WMS. I expressed that I had lost confidence in WMS's ability to faithfully represent the physicians of Wyoming. The email was sent from my personal email account.

17. In my email to the Wyoming House of Representatives I identified myself as "a physician in Casper" and "a Wyoming doctor who actually practices medicine at the very hospital where he was born." I did not claim to speak for the Board. A true and correct copy of the email I sent is attached to the Complaint as **Exhibit 1**.

18. To my knowledge, my email to the Wyoming House of Representatives did not result in any complaints from other members of the Board or impact the Board's functioning in any way.

19. Chloe's Law was passed by a vote of the Wyoming House of Representatives and signed into law by Governor Gordon.

20. On April 22, 2024, I received a phone call from the Governor's Chief of Staff, Drew Perkins. Mr. Perkins informed me that, because of the email I sent to the Members of the House of Representatives and the positions I had taken, the Governor had decided to remove me from the Board. I was not given an opportunity to explain actions. Immediately after that phone call, I received a signed, binding

letter from Governor Gordon in the form of an email attachment which was sent from Gabi Farmer, a member of the Governor's staff. Governor Gordon's letter notified me that he was removing me from my position on the Board of Medicine. His letter stated that my "comments" to the House of Representatives regarding Chloe's Law "could give doctors, who are licensed by the Board of Medicine, a reason to be concerned that [I] might use [my] position to advocate for a particular position" and "even the appearance of bias can be disquieting." The letter went on to state: "I believe it is best to remove you from the Board of Medicine." A true and correct copy of the letter is attached to the Complaint as **Exhibit 2**.

21. Several hours after receiving the letter notifying me of my removal, I reached back out to Mr. Perkins and asked if the Governor would allow me to resign from the Board. I would never have resigned if I did not have a binding letter in hand stating that I had been removed. The following day, Mr. Perkins notified me that he and the Governor would accept my resignation. On April 26, 2024, I sent a one-line email to Mr. Perkins stating, "I hereby resign from the Wyoming State Board of Medicine effective immediately". My email was accepted by the Governor and made effective as of April 22, 2024. This effective date was established retroactively by the Governor because I did not submit a written letter of resignation until April 26, 2024. A true and correct copy of the acceptance letter is attached to the Complaint as **Exhibit 3**.

22. Since my removal I feel I have suffered reputational harm as news articles reporting on my removal have created the impression that I am biased

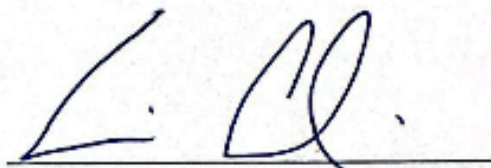
against the transgender community. The articles, and the Governor's own words call in to question my professionalism and ability to be objective. As a physician, objectivity and professionalism are critical.

23. I reviewed the Complaint that was filed in this case and verify that it is true and accurate to the best of my knowledge.

Under penalty of perjury, I certify that the foregoing is true and correct to the best of my knowledge.

Executed on September 28, 2024

Casper, Wyoming

A handwritten signature in black ink, consisting of a stylized 'F' followed by a cursive 'Cubin' and a Roman numeral 'III' at the end.

Dr. Frederick William "Eric" Cubin III