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DISTRICT OF WYOMING
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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

DR. FREDERICK WILLIAM "ERIC" CUBIN III,

Plaintiff,

v.

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

Defendant.

Case No. 24-CV-164-SWS

ORDER DENYING PRELIMINARY INJUNCTION

The Wyoming Board of Medicine (Board) is a state agency responsible for licensing and disciplining medical practitioners. *See* Wyo. Stat. §§ 33-26-201 *et seq.* Members of the Board are appointed by the Wyoming Governor with the consent of the Wyoming Senate, and they "serve at the pleasure of the governor." Wyo. Stat. § 33-26-201(a).

Wyoming Governor Mark Gordon nominated Dr. Eric Cubin to a position on the Board, and Dr. Cubin was unanimously confirmed to the position by the Wyoming Senate. Dr. Cubin is also a voluntary member of the Wyoming Medical Society (WMS), a professional organization for Wyoming doctors that advocates on behalf of Wyoming doctors through legislative lobbying, public outreach, and other methods. At the preliminary-injunction hearing, Dr. Cubin testified the WMS is the most influential and largest physician's organization in the state.

In February 2024, Dr. Cubin sent an email to the entire Wyoming House of Representatives expressing his support for a bill then under consideration. Dr. Cubin's email was not limited to voicing his position on the bill, though. It also informed the Wyoming House of his personal dispute with WMS and its current leadership because WMS had expressed

opposition to the same bill. Dr. Cubin asserted the WMS had "been essentially hijacked by the far left." Dr. Cubin continued by alleging a specific doctor, "presumably" in conjunction with WMS leadership, "ignored and suppressed" relevant information contrary to WMS' public position on the bill.

The bill eventually passed both chambers of the Wyoming Legislature and was signed into law by Governor Gordon. In late April 2024, though, Governor Gordon removed Dr. Cubin from the Board, informing Dr. Cubin that his comments in his email could cause certain doctors who may have to appear before the Board with their medical license and livelihood on the line to question the impartiality and fairness of the Board proceeding.

In late August 2024, Dr. Cubin filed this lawsuit, asserting Governor Gordon had unlawfully retaliated against him for exercising his First Amendment rights to free speech and to petition the government.[1] He seeks to be restored to his position on the Board and the recovery of monetary damages. In the instant motion, Dr. Cubin asks for a preliminary injunction ordering Governor Gordon to restore him to his position on the Board during the pendency of this proceeding. Having considered the parties' evidence and arguments on the matter, the Court finds and concludes Dr. Cubin has not carried his burden of establishing his right to the extraordinary relief of a preliminary injunction.

PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is intended to preserve the relative positions of the parties until their legal dispute can be resolved on its merits. *DTC Energy Group v. Hirschfeld*, 912 F.3d 1263, 1269 (10th Cir. 2018). "A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Free the Nipple–Fort Collins v. City of Fort Collins, Colo.*, 916

[1] Dr. Cubin also asserted a cause of action alleging violation of the Wyoming State Constitution, but he does not rely on that claim to advance this motion for preliminary injunction. (*See* ECF 12 p. 17.)

F.3d 792, 797 (10th Cir. 2019) (quotations omitted).

> Under Rule 65 of the Federal Rules of Civil Procedure, a party seeking a preliminary injunction must show: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable injury if the injunction is denied; (3) the movant's threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.

DTC Energy Group, 912 F.3d at 1269–70 (internal citations and quotation marks omitted). "The first two factors of the traditional standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The movant must "show a 'clear and unequivocal' right to the requested preliminary injunction." *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 758 (10th Cir. 2024) (quoting *Shrier v. Univ. of Colorado*, 427 F.3d 1253, 1258 (10th Cir. 2005)). Whether to issue a preliminary injunction rests within the Court's discretion. *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019).

In some cases, the movant seeks a "disfavored injunction." "Disfavored preliminary injunctions don't merely preserve the parties' relative positions pending trial." *Free the Nipple-Fort Collins*, 916 F.3d at 797. "Instead, a disfavored injunction may exhibit any of three characteristics: (1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Id.* A disfavored injunction "must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Schrier*, 427 F.3d at 1259 (quotations omitted). "To get a disfavored injunction, the moving party faces a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors: She must make a 'strong showing' that these tilt in her favor." *Free the Nipple-Fort Collins*, 916 F.3d at 797.

In this case, the Court agrees with Governor Gordon that Dr. Cubin's request to reinstate him to the Board pending these legal proceedings constitutes a disfavored mandatory injunction

that is subject to the heightened "strong showing" standard. *See Schrier*, 427 F.3d at 1260-61 (concluding the request there was a disfavored mandatory injunction because it would affirmatively require the university to restore the plaintiff to his former position as Chair of the Department of Medicine from which he had been removed, and such reinstatement was likely to place the court in a supervisory role to ensure the mandated reinstatement was done). Regardless, though, the Court finds Dr. Cubin has not carried his burden of showing a preliminary injunction is warranted even under the non-heightened, normal standard.

FACTUAL FINDINGS

The material facts are largely undisputed. Plaintiff Eric Cubin is a radiologist working and residing in Wyoming. (Cubin Decl. ¶¶ 1-2.[2]) Defendant Mark Gordon is the Governor of Wyoming. The Wyoming Board of Medicine is a statutorily-created state agency empowered with several duties, including two that are particularly relevant to this case: (1) determining whether an applicant is qualified and fit to practice medicine in Wyoming, and (2) overseeing the regulation, compliance, and disciplinary proceedings (including conducting contested case proceedings) of medical practitioners. Wyo. Stat. §§ 33-26-201 and -202. Board members are paid for their services in the same manner and amounts as members of the Wyoming Legislature. Wyo. Stat. § 33-26-203(c).

In early 2023, a vacancy occurred on the Board, and Governor Gordon nominated Dr. Cubin to complete the unexpired term. (Cubin Decl. ¶ 3.) Board members are appointed for four-year terms and may not serve more than three consecutive terms. Wyo. Stat. § 33-26-201(b). After completing that partial term, Governor Gordon appointed Dr. Cubin to the Board in February 2024 for a full four-year term. (Cubin Decl. ¶ 3.) Dr. Cubin was unanimously

[2] ECF 12-1.

confirmed to the Board by the Wyoming Senate both times he was appointed. (*Id.*) During his time on the Board, Dr. Cubin received no complaints or disciplinary action concerning the performance of his Board duties, and he recused himself from hearing multiple cases based on conflicts of interest or perceived conflicts of interest. (*Id.* ¶ 4.)

Dr. Cubin is also a voluntary member of the Wyoming Medical Society (WMS), which is a professional organization for Wyoming doctors that advocates on behalf of Wyoming doctors through legislative lobbying, public outreach, and other methods. (Cubin Decl. ¶¶ 9-10.)

In February 2024, the Wyoming Legislature considered Senate File 0099, formerly known as "Chloe's Law"[3] (SF0099). In sum, SF0099 prohibited healthcare providers from performing certain surgeries (e.g., sterilization or mastectomies) or offering certain treatments (e.g., puberty suppressors or high doses of hormones inconsistent with the child's biological sex) related to gender transitioning or gender reassignment. SF0099 also created sanctions for violators that puts their respective healthcare provider license at risk of suspension or revocation. SF0099 ultimately passed both chambers of the Wyoming Legislature and was signed into law by Governor Gordon. *See* Wyo. Stat. § 35-4-1001.

While under consideration by the Wyoming Legislature, WMS leadership debated the topics in SF0099 at a WMS board meeting, which all WMS members were welcome to attend. (Prelim. Injunct. Hrg. Ex. 13 p. 20.) Dr. Cubin did not attend or provide input at this WMS board meeting. In the end, WMS leadership instructed WMS Executive Director Sheila Bush to testify in opposition to SF0099. (*Id.* pp. 19-20.) WMS agreed that gender reassignment surgeries should not be done on minors, and were not being done in Wyoming even without the

[3] This refers to Chloe Cole, an activist from California who opposes gender transition surgeries and treatments after she received transgender surgeries and treatments as a minor and thereafter "detransitioned" because she later regretted her attempts to transition from being a girl to a boy. (*See* ECF 1 ¶¶ 22-26 and footnotes therein.)

law, but WMS felt SF0099 was government overreach that allowed the Wyoming Legislature to dictate certain medical practices and restrictions to too great of a degree. (*Id.* p. 20.) Executive Director Bush testified to this position before the Wyoming Senate Labor, Health & Social Services Committee on February 21, 2024.[4]

Immediately following Executive Director Bush's testimony, Dr. Michael Sanderson, a pediatrician from Sheridan and the President of the Wyoming Chapter of the American Academy of Pediatrics, testified similarly in opposition to SF0099, presenting largely the same position as WMS.[5]

That night, Dr. Cubin was emailed a link to the video recording of the committee hearing that had occurred earlier that day from a sender unknown to the Court. (Ex. 13 p. 21.) He then forwarded the email to Executive Director Bush and questioned whether a majority of WMS members agreed with Dr. Sanderson's comments and whether WMS should present physicians from both sides of the issue. (*Id.*) This email engendered responses from both Executive Director Bush and WMS President Dr. Kristopher Schamber, a reply from Dr. Cubin, and further debate on the topic over the next several days involving several other WMS leaders and Dr. Cubin. (*Id.* pp. 14-21.) The details of this spirited debate on WMS' position on SF0099 and certain gender-affirming care are largely immaterial to the issues raised in this lawsuit. Significant to this proceeding, after several days of back-and-forth emails, Dr. Cubin requested a statement from WMS leadership on WMS' position going forward:

What we all need to know right now is, specifically, what can we expect to see

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[4] Video recording available at https://www.youtube.com/watch?v=IztrjpvN-RI&t=2783s. Executive Director Bush testified at 33:50-35:43. Executive Director Bush presented the same position of the Wyoming Chapter of the American Academy of Pediatrics at the time; thus she testified on behalf of both organizations.

[5] Available at https://www.youtube.com/watch?v=IztrjpvN-RI&t=2783s, 35:43-45:35. In short, Dr. Sanderson repeated that gender reassignment surgeries were opposed by the American Academy of Pediatrics and were not being performed in Wyoming, but felt SF0099 imposed inappropriate limitations on medical care and the doctor-patient relationship that would negatively affect doctors' abilities to treat other medical issues.

> from WMS in regard to this bill over the next several days? Will WMS continue to publicly oppose SF 99 or will you be presenting a neutral position?

(*Id.* p. 14.) Within a couple of hours of this email, a WMS leader responded, "We will make arrangements for the board members to discuss this issue further and determine our next best steps. Further details for board members to follow." (*Id.*) Unsatisfied with the speed of a response, Dr. Cubin, later that same day, sent an email to the entire Wyoming House of Representatives that is at the center of this lawsuit. (Ex. 3.)

In that email, Dr. Cubin set forth his personal support for SF0099. (*See id.*) He also said more than that, though. Much of his email to the Wyoming House reported his disagreements with WMS leadership and with Dr. Sanderson. Relevant portions of his email include the following:

> It saddens me very much to have to report that, under their current leadership, the Wyoming Medical Society has been essentially hijacked by the far left. It seems that they have decided to prioritize politics over their stated mission of physician advocacy. In my opinion, they have adopted and embraced "woke" positions that are not congruent with the thoughts and opinions of the majority of their physician members. In essence, I have lost all confidence in their ability or desire to faithfully represent the physicians in this state.
>
> Please allow me to give you an example. WMS seems to have teamed up with the American Association of Pediatricians in opposing SF 99. Quite frankly, I refuse to believe that the majority of physicians in this very conservative state agree with this position - and we were never polled. This position was established by several very vocal, extremely liberal members of the Board. The position was then made public as though it actually represents the thoughts and beliefs of physicians in Wyoming when, in fact, that is probably not true.
>
> In their opposition to Chloe's Law, the WMS has partnered with Dr. Sanderson, a pediatrician from Sheridan, who is the President of the WyAAP. Dr. Sanderson has effectively delivered the position of his organization but he has failed to tell you that there is another pediatric professional society that has taken an opposite position, the American College of Pediatricians (ACP).
>
> ...
>
> You need to know that Dr. Sanderson (and presumably the WMS leadership)

> were aware of these ACP positions and yet they were ignored and suppressed when the WMS position was established. Further, I presume that you have only been provided with the WMS/AAP position and not the ACP position statements. As I have communicated to the entire WMS Board, it is not acceptable to only present one side of an issue in an effort to effect change in social policy.
>
> ...
>
> It feels very much like the leadership at WMS has inserted their opinions in hopes that the WMS membership would not notice or speak up.
>
> ...
>
> I think it is important for you to know that I have aggressively tried to address this situation with the WMS Board over the last couple days. I was given an assurance earlier today that the WMS Board will be holding an executive session of some kind to determine if they will be changing their position from opposing this bill to a neutral position. At this time, I have not been given any assurance that the WMS will be changing their position, so I feel the need to advocate on my own behalf by coming to you directly with this information. It is entirely possible that when this bill is considered in committee and on the floor that the WMS position may have been changed to neutral. Up to this point, however, they have not changed their position to neutral.

(Ex. 3 pp. 1-2.) The next morning, Dr. Sanderson sent the following email to Dr. Cubin, WMS leadership, and others who had been involved in the email debate:

> Dr. Cubin,
>
> I have read the email you have sent to Wyoming lawmakers on this issue. The [WMS] board should see it as well. Your engagement on this issue has, in my opinion, moved from cooperative conversation to an attack. You have committed libel by stating that, first, I was actively involved in forming the WMS position on this, and second, that I myself and the WMS board, cooperatively and intentionally suppressed the position of a separate organization. Neither of these are true and they were shared in an effort to discredit and defame both myself and the WMS board. I cannot speak to why the American College of Pediatrician's position was or was not represented to the WMS board - I was never involved in the forming of the position for the WMS. I did not represent the American College of Pediatrician's position because I am neither a member of the ACP nor their representative.
>
> I would recommend to the WMS board that all further communications regarding this matter move into a thread involving only the WMS board members and adjacent WMS staff. To be clear, Dr. Cubin, this would not involve me.

(ECF 20-4 p. 1.)

As noted, SF0099 was passed by both chambers of the Wyoming Legislature, and Governor Gordon signed the bill into law in March 2024. That is, the bill became law as Dr. Cubin desired. On April 22, 2024, Dr. Cubin received a phone call from the Governor's Chief of Staff, Drew Perkins, advising Dr. Cubin that his services on the Board were no longer needed and an emailed letter from the Governor would be sent to him shortly detailing the decision. In that removal letter, Governor Gordon wrote the following:

> I have been made aware of your email to the members of the House of Representatives during this last legislative session regarding SF0099 in which you strongly encouraged the members to pass this legislation and criticized the Wyoming Medical Society's opposition to the bill. I certainly appreciate your position on this issue and respect your right to impart it to the Legislature. Nonetheless, no matter what anyone's personal expressed beliefs may be, it is important that the professionals governed by the Board of Medicine have confidence that board members prosecute their responsibilities on the board in an objective and unbiased way. I believe your comments on this particular legislation 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. Medical professionals should be confident that their licensure, which is their livelihood, will be handled professionally and clinically examined on merits alone. Even the appearance of bias can be disquieting as well as erode confidence in the Board's presumed impartiality.
>
> I am certain you would understand that while you certainly are entitled to your First Amendment right to free speech, as an individual member of the Board, you would not be entitled to speak for the Board unilaterally. Nevertheless, some may not appreciate that your personal comments might not necessarily be those of the Board as a whole. It has never been my intention to inhibit your own ability to express your views unabashedly or to confuse anyone's personal opinions and beliefs with those of any of our boards. Therefore, as I have done before, when a member of a board chooses to express personal beliefs in a way that can be construed as speaking for the body, I have elected to relieve that member of the constraints board membership requires.
>
> Therefore, in this instance, sadly, I believe it is best to remove you from the Board of Medicine. I wish you all the best in your future endeavors and urge you to continue to advocate for your beliefs.

(Ex. 9.) It is unclear as to when the Governor became aware of Dr. Cubin's February 28, 2024 email to the Wyoming House. At the preliminary-injunction hearing, Dr. Cubin testified he was stunned and shocked after receiving a call from the Governor's Chief of Staff and an email from the Governor. However, in Dr. Cubin's April 22, 2024 e-mail in reply to the phone call and Governor Gordon's correspondence, he wrote in part:

> It was with some sadness that I received a phone call from Drew today explaining that my services are no longer needed on the Wyoming Board of medicine. I have to say that this phone call was not totally unexpected. However, before anything is made final, I would very much like to make sure that my voice is heard and that my side of the story is told.
>
> ...
>
> In this particular case, however, there was a significant injustice and misrepresentation on behalf of the Wyoming medical Society. Specifically, the Wyoming medical Society came out with a position that did not represent the majority of the physicians in the state – without polling the physicians. They then reported to represent all of the physicians in the state.

(ECF 20-2 p. 1.) Subsequently, Dr. Cubin requested he be permitted to instead resign from the Board, which Governor Gordon allowed and which occurred in late April 2024. (Ex. 10, 11.)

Four months later, Dr. Cubin filed this lawsuit (ECF 1), and another month after that, he filed the instant motion for preliminary injunction (ECF 11). He asks the Court to order Governor Gordon to restore him to the Board while this lawsuit is pending.

DISCUSSION

Having considered the submissions from the parties (ECF 11, 12, 20) along with the evidence and testimony presented at the evidentiary hearing held on November 8, 2024 (ECF 24), the Court finds and concludes Dr. Cubin has not carried his burden of showing a likelihood of success on the merits or irreparable harm.

1. Substantial Likelihood of Success on the Merits

"It is not enough that the chance of success on the merits be better than negligible." *Nken*, 556 U.S. at 434 (quotations omitted). Dr. Cubin contends Governor Gordon unlawfully retaliated against his exercise of his First Amendment rights by removing him from the Board in response to his comments to the Wyoming House. The First Amendment rights at issue are the right to free speech and right to petition the government.

Dr. Cubin's government service on the Board and government compensation rendered him a public employee. "As applied to the states by the Fourteenth Amendment, the First Amendment prevents state and local governments from 'condition[ing] public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'" *Duda v. Elder*, 7 F.4th 899, 910 (10th Cir. 2021) (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)). "When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom," but the First Amendment continues to protect "a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417, 418 (2006). "The government employer, however, also has a 'countervailing interest in controlling the operation of its workplaces.'" *Knopf v. Williams*, 884 F.3d 939, 944 (10th Cir. 2018) (quoting *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014)). "Thus, a public employer's legitimate needs and interests may justify some limitations on the speech of employees." *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 594 (10th Cir. 1994), *overruled on other grounds by Ellis v. Univ. of Kansas Med. Ctr.*, 163 F.3d 1186, 1194-97 (10th Cir. 1998).

"The government has a substantial interest in ensuring that all of its operations are efficient and effective." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 386 (2011). When

public employees "speak out, they can express views that contravene governmental policies or impair the performance of governmental functions." *Garcetti*, 547 U.S. at 419. "The problem in any case is to arrive at 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." *Knopf*, 884 F.3d at 944 (quoting *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)). "To determine if an employer's adverse employment action against an employee is an impermissible retaliation under the First Amendment, we apply the *Garcetti/Pickering* test." *Id.* at 945. The *Garcetti/Pickering* test comprises five elements:

(1) whether the speech was made pursuant to an employee's official duties;

(2) whether the speech was on a matter of public concern;

(3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests;

(4) whether the protected speech was a motivating factor in the adverse employment action; and

(5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Id. (quoting *Trant v. Oklahoma*, 754 F.3d 1158, 1165 (10th Cir. 2014)). The *Garcetti/Pickering* test applies to Dr. Cubin's free-speech claim as well as his right-to-petition claim. *See Guarnieri*, 564 U.S. at 398 ("The framework used to govern Speech Clause claims by public employees, when applied to the Petition Clause, will protect both the interests of the government and the First Amendment right."); *Morris v. City of Colorado Springs*, 666 F.3d 654, 660-61 (10th Cir. 2012) (noting the *Garcetti/Pickering* analysis applies to both free-speech and right-to-petition claims).

For purposes of this preliminary-injunction motion, Governor Gordon disputes only the third element of the test, effectively conceding the remaining elements at this stage. (ECF 20 p. 11.) The third element of the *Garcetti/Pickering* test is a question of law to be decided by the court. *Duda*, 7 F.4th at 911 ("The first three elements concern whether the speech is protected and are 'issues of law for the court to decide.'") (quoting *Trant*, 754 F.3d at 1165). "Although the third element must weigh in favor of the plaintiff for the plaintiff to prevail on the First Amendment claim, the employer bears the [ultimate] burden on the third element." *Id.* at 912. The Court will thus focus the likelihood-of-success analysis on this disputed element.

The third element of the *Garcetti/Pickering* test asks whether the government employer's interests in promoting and ensuring efficient public service outweigh the public employee's First Amendment interests. "We have said the 'only public employer interest that outweighs the employee's free speech interest is avoiding direct disruption, *by the speech itself*, of the public employer's internal operations and employment relationships.'" *Id.* (emphasis in original) (quoting *Trant*, 754 F.3d at 1166). "Relevant considerations include 'whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.'" *Id.* (quoting *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007)).

"In analyzing the employer's interest in avoiding disruption, different standards apply depending on whether the adverse employment action occurred 'long after' or 'soon after' the employee's protected speech." *Id.* If the adverse employment action occurs "long after" the public employee's speech, then the government employer must prove the speech actually

disrupted its operations in order to outweigh the employee's First Amendment interests. *Id.* at 912-13; *Deschenie v. Bd. of Educ. of Cent. Consol. Sch. Dist. No. 22*, 473 F.3d 1271, 1280 (10th Cir. 2007) ("once a sufficient time has passed, the government employer may satisfy its burden only by showing specific evidence of actual disruption"). In contrast, when the adverse employment action is taken "soon after" the subject speech, there is no requirement that the government employer show the employee's speech caused an actual disruption to government operations and instead can rely on a reasonable prediction of disruption. *Duda*, 7 F.4th at 913; *Deschenie*, 473 F.3d at 1279 (where the adverse employment action is taken "soon after" the speech, a court will generally defer to the employer's reasonable predictions of disruption that are supported by specific evidence).

Here, Governor Gordon removed Dr. Cubin from the Board slightly less than two months after Dr. Cubin's email to the Wyoming House. The parties in this case dispute whether Governor Gordon removed Dr. Cubin from the Board "soon after" or "long after" Dr. Cubin's email to the Wyoming House.

The Tenth Circuit has not fixed a time limitation for separating "soon after" from "long after." *Duda*, 7 F.4th at 913 n.10; *see Deschenie*, 473 F.3d at 1279 ("When the adverse employment action takes place several months after the employee's speech, however, it is no longer reasonable for the government to rely on predictions of disruption which did not materialize."). The Tenth Circuit has determined, though, that six months with no actual disruption is "long after" the subject speech, and such a length of time precludes any "prediction" of disruption weighing in the government employer's favor. *Id.* (citing *Kent v. Martin*, 252 F.3d 1141, 1146 (10th Cir. 2001)). Similarly, the Tenth Circuit has said that adverse employment action taken within one month of the subject speech falls on the "soon after" side of

the line, allowing the government employer to rely on its prediction of disruption. *Deschenie*, 473 F.3d at 1280-81. But where the line actually falls between "soon after" and "long after" remains undefined.

Based on the undisputed facts in the record, and specific to this case, the Court concludes Governor Gordon's action was "soon after" Dr. Cubin's email to the Wyoming House for two reasons. First, the slightly less than two months in this case is not anywhere near the timeframes, considered by the Tenth Circuit to be clearly "long after;" it is far closer to *Deschenie's* one month (which was "soon after") than to *Kent's* six months (which was "long after"); and it is less than the "several months" referenced in *Deschenie*. Second, particular to the circumstances here, the Court considers it significant that Dr. Cubin's work on the Board was not day-to-day but rather sporadic, thus making any opportunity for his email to disrupt the Board's work rather sporadic as well. For example, Dr. Cubin's exhibits introduced at the preliminary-injunction hearing establish his receipt of three emails concerning Board business from April 8, 2024, through April 16, 2024. (Ex. 6, 7, 8.) In a more traditional employment context, the opportunity for an employee's speech to disrupt the functioning of their employment is far more frequent, and likely more immediate, than the occasional work done by the Board members. Thus, the Court considers Dr. Cubin's removal from the Board to have occurred "soon after" his subject speech.[6,7] Consequently, "we do not require a government employer to allow the disruption to

[6] At the preliminary-injunction hearing, Dr. Cubin relied on *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584 (10th Cir. 1994), to suggest that while the timeframe between the speech and the employment action there (about 46 days) was less than that here (about 57 days), the Tenth Circuit did not consider it to be on the "soon after" side in *Ramirez*. While the timeframe played a role in *Ramirez*, it was only concerning whether an inference of retaliatory motive could be raised to withstand summary judgment. *Id.* at 596. The timeframe was not a consideration in the Tenth Circuit's balancing the plaintiff's First Amendment rights against the government's interest in efficient operations. *Id.* at 594-95. Thus, the Court finds *Ramirez* largely inapplicable to the "soon after" versus "long after" delineation at issue here.

[7] Additionally, at the preliminary-injunction hearing, Governor Gordon highlighted the fact that it's unclear when he first learned of Dr. Cubin's email, which might suggest Governor Gordon took swift action upon learning of the

manifest before acting." *Bailey v. Indep. Sch. Dist. No. 69 of Canadian Cnty. Oklahoma*, 896 F.3d 1176, 1183 (10th Cir. 2018). "Instead, when the employer's intent in taking an adverse action is to avoid actual disruption, we will generally defer to a public employer's reasonable predictions of disruption, as long as the predictions are supported by specific evidence." *Duda*, 7 F.4th at 913 (internal citations and quotations omitted).

The real issue here is not that Dr. Cubin expressed his personal support of SF0099 to the Wyoming House. Instead, the real issue is that Dr. Cubin's comments to the Wyoming House went beyond his support for SF0099 and into his disputes with WMS and specific doctors, the same doctors who may appear before the Board to answer a complaint with their medical licenses and livelihoods in jeopardy. The Board is statutorily authorized to "[g]rant, refuse to grant, suspend, restrict, revoke, reinstate or renew licenses to practice medicine." Wyo. Stat. § 33-26-202(b)(i). The Board has the power to investigate allegations that a licensee has violated the Wyoming Medical Practice Act and to take disciplinary action against the licensee upon finding such a violation. *Id.* § 33-26-202(b)(ii).

When a Board member sits in judgment of a licensee, they of course owe the licensee a fair and impartial consideration of the matter, but they also owe the appearance of fairness and impartiality. "Due process requires that an agency provide a fair trial without the appearance of bias or prejudice." *Painter v. Abels*, 998 P.2d 931, 938 (Wyo. 2000). In an agency's action in a licensing matter, "[f]undamental considerations require not just fairness in fact but also fairness in appearance." *Dorr v. Wyo. Bd. of Certified Public Accountants*, 21 P.3d 735, 745 (Wyo.

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subject speech. In addition to being speculative, the Court finds this to be a red herring. The "soon after" versus "long after" determination is not dependent upon when the government employer learns of the speech. If an employer learned of the employee's speech long after the speech occurred and then took immediate action based on a "prediction" of disruption with no actual disruption in the interim, it's unlikely to be considered a reasonable prediction based on evidence. *Duda*, 7 F.4th at 913.

2001). "It is clearly established law that '[m]aintaining the appearance of impartiality of the judiciary is an interest of vital importance.'" *Stengle v. Office of Dispute Resolution*, 631 F. Supp. 2d 564, 575 (M.D. Pa. 2009) (quoting *Kirchgessner v. Wilentz*, 884 F. Supp. 901, 912 (D.N.J. 1995)); *see U.S. Civil Serv. Comm'n v. Nat'l Assoc. of Letter Carriers*, 413 U.S. 548, 565 (1973) ("it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent"). "[T]he maintenance of [Dr. Cubin's] impartiality, and appearance thereof, was crucial to the effective operation of" the Board, particularly because one of the primary duties of Board members is to sit as arbiters over complaints against other medical providers. *See Stengle*, 631 F. Supp. 2d at 576. Governor Gordon accurately stated in his removal letter to Dr. Cubin: "Even the appearance of bias can be disquieting as well as erode confidence in the Board's presumed impartiality." (ECF 1-2 p. 2.) The Court has little difficulty concluding that Governor Gordon has a significant interest in assuring members of the Board can perform their Board functions without perceived or actual bias or prejudice.

Dr. Cubin's email to the Wyoming House went beyond offering his personal position and thoughts on SF0099. He alleged "Dr. Sanderson (and presumably the WMS leadership)" "ignored and suppressed" the position of a different pediatric organization. (Ex. 3 p. 2.) These are charged allegations leveled by Dr. Cubin against specific medical providers, providers who could appear before the Board and whose careers and livelihood are affected by his work on the Board. Irrespective of the accuracy of the allegations, Dr. Sanderson and any of the WMS leadership appearing before Dr. Cubin in his role as a Board member could reasonably question whether they would receive fair consideration from him in light of Dr. Cubin's allegations to the

Wyoming House. Dr. Cubin testified that the WMS is the largest lobbying organization representing doctors in Wyoming and a significant percentage of Wyoming's doctors are members.

Beyond just Dr. Sanderson and WMS leadership, though, Dr. Cubin's email could also cause others, such as those on the "left" of the partisan divide, to also question whether Dr. Cubin would be a fair and impartial arbiter for them. Dr. Cubin's email expressed his sadness and lost confidence because WMS "has been essentially hijacked by the far left." (Ex. 3 p. 1.) A provider who falls in this "left" or "far left" camp could reasonably question whether they can get a fair examination should they have to appear before Dr. Cubin. And what of those many providers who remained silent and did not offer their opinion on WMS' position? It is reasonably possible they could fear that Dr. Cubin might take their silence as tacit agreement with the "far left" WMS position even if they personally disagreed. Employees in the Executive Branch of the Government or its agencies "are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *Nat'l Assoc. of Letter Carriers*, 413 U.S. at 564–65. Dr. Cubin's comments concerning his displeasure with WMS' position on SF0099 and WMS' "hijacking" by the "far left" draws into question his ability or willingness to execute his Board responsibilities "without bias or favoritism for or against any political party or group or the members thereof." *Id.*

To be sure, Dr. Cubin could be recused or recuse himself from particular cases or proceedings, and he recused himself from multiple cases during his time as a Board member. (Cubin Decl. ¶ 4.) However, the ability to recuse or be recused from particular proceedings does not avoid disruption of the Board's operations caused by Dr. Cubin's email comment; it in fact

would constitute such disruption. The Middle District of Pennsylvania considered the potential use of recusal motions in *Stengle*:

> From these facts, one can readily infer that Plaintiff's [speech in question] had the potential to induce recusal motions from those who came before her in her hearing officer capacity. If such a motion were to be filed, either one of two things could happen. Plaintiff could recuse herself, or she could elect to deny the motion and hear the case to its conclusion. In either instance, governmental efficiency would be adversely affected.
>
> If Plaintiff denied the motion and retained the case, the losing party could appeal the decision on due process grounds, alleging that it was denied an impartial adjudication of its rights. This would entail additional governmental resources being dedicated to the appeal, which would clog dockets and ultimately reduce governmental efficiency. On the other hand, if Plaintiff chose to grant the motion and recuse herself, the case would be transferred to another hearing officer, which would not only serve to delay resolution of the case, but also to clog the docket of the newly assigned hearing officer, thereby reducing his or her ability to efficiently dispose of his or her load. Accordingly, it is easy to see that an increased number of recusal motions would severely hamper the government's ability to efficiently and effectively resolve special education issues.

Stengle, 631 F. Supp. 2d at 577 (internal citation omitted). The same problems exist concerning Dr. Cubin's ability to recuse himself or be recused from particular Board proceedings. Increased use of recusal is not the cure to increased fears of bias and partiality resulting from Dr. Cubin's email; rather, it is a symptom of the potential governmental inefficiencies Governor Gordon appropriately intended to prevent by removing Dr. Cubin from the Board.

Further, the emails exchanged between Dr. Cubin and Dr. Sanderson support Governor Gordon's reasonable prediction of disruption to the Board's functions. Dr. Sanderson stated in one of his responses to Dr. Cubin's emails:

> However, as a member of the Wyoming Board of Medicine, who finds himself responsible for penalizing physicians for malpractice and unprofessional behavior, I would hope that you would find yourself just as well versed on the science and rationale behind the support of GAC [gender affirming care] for minors from the American Academy of Pediatrics, The American Medical Association, The American Academy Of Child and Adolescent Psychiatry, and the other professional societies involved, as you are in the science and limited

> professional opinion that opposes GAC for minors. If the Wyoming Legislature passes this bill, it will, by necessity, force Wyoming physicians to break the ethical standard of treating patients according to the best science available at the risk of their license. Please remember this if you find yourself sitting in judgement against Wyoming physicians who may come before your Board for being put into this position by the Wyoming Legislature.

(Ex. 13 p. 17 (emphasis in original).) Dr. Cubin replied to Dr. Sanderson's statement as follows:

> In regard to my position on the Board of Medicine… while it is true that I do sit on that Board, I want to make two things very clear. First, all of the statements and communications that I have sent to this group represent my personal beliefs and do NOT represent the positions or views of the Board of Medicine. Furthermore, these communications are solely intended to address my concerns with the WMS Board of Directors and select members of a professional organization of which I am a paid member in good standing. Second, in more general terms with regard to the Board of Medicine, it is the role of the Board of Medicine to ensure patient safety in this State through an effective licensing program and to fairly and appropriately discipline holders of medical licenses when they are found to be in violation of the Wyoming Medical Practice Act. I do not endeavor to make the rules which are to be enforced. It is much better, particularly on politically charged issues such as this, for the legislature and Governor to make the rules that are to be enforced by the Board of Medicine. If anyone has any concerns regarding the Board of Medicine I would encourage you to reach out to the Executive Director with these concerns. His name is Kevin Bohnenblust and he does a fantastic job.

(*Id.* p. 16.) Dr. Cubin's reply was perfectly appropriate, but the exchange shows that his role as a Board member was a concern for at least one of the doctors who found himself a subject of Dr. Cubin's comments, who Dr. Cubin specifically accused in his email to the Wyoming House of suppressing counterinformation. From this, Governor Gordon could reasonably predict that Dr. Cubin's membership on the Board could cause the Board's impartiality to be questioned and disrupt at least some of the Board's core functions. And the Court must "generally defer to a public employer's reasonable predictions of disruption, as long as the predictions are supported by specific evidence." *Duda*, 7 F. 4th at 913 (quoting *Deschenie v. Bd. of Educ. of Cent. Consol. Sch. Dist. No. 22*, 473 F.3d 1271, 1279 (10th Cir. 2007)). Governor Gordon's reasonable

predictions of disruption are supported by specific evidence here.

While Dr. Cubin attempts to cast his removal from the Board to be a consequence of his support of SF0099, that is in reality not what the Court perceives to be the Governor's concern. Had Dr. Cubin cabined his comments to the Wyoming House to his support of SF0099 and the reasons for that support, he'd likely still be a member of the Board. However, that is not what happened. Dr. Cubin's comments to the Wyoming House went beyond SF0099, to include his dispute with WMS leadership and Dr. Sanderson, who he alleged to have colluded to suppress opposing medical viewpoints. Even still, Dr. Cubin testified at the preliminary-injunction hearing that he continues to have significant concerns about the leadership of the WMS misrepresenting its members, noting the organization still has not taken a poll as he implored. These castigating comments, extraneous to his personal support of SF0099, reasonably raised a concern about his ability or perceived ability to fairly and impartially perform his Board duties, which could directly and indirectly affect those he identified in his email to the Wyoming House as well as other providers. In the removal letter, Governor Gordon correctly noted the importance "that the professionals governed by the Board of Medicine have confidence that the board members prosecute their responsibilities on the board in an objective and unbiased way." (Ex. 9.) Governor Gordon reasonably predicted that Dr. Cubin's extraneous comments could disrupt the duties of the Board, a prediction supported by the email exchange between Dr. Sanderson and Dr. Cubin. Consequently, Governor Gordon took corrective action, by removing Dr. Cubin from the Board, to advance Wyoming's significant interest in assuring members of the Board can perform their Board functions without perceived or actual bias or prejudice.

In balancing Dr. Cubin's First Amendment interests in speaking and petitioning as a citizen on a matter of public concern against Wyoming's countervailing interests in the effective

and efficient management of its governmental affairs, the Court finds the balance favors the employer, and therefore Dr. Cubin's "First Amendment claim will fail even though the petition [and speech] is on a matter of public concern." *Guarnieri*, 564 U.S. at 398. As the matter currently stands at this early stage of the litigation, the Court finds "the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests" in this case. *Knopf*, 884 F.3d at 945. Consequently, the Court does not find Dr. Cubin has shown a substantial likelihood of success on the merits sufficient to warrant the entry of a preliminary injunction (let alone the requested mandatory injunction).

2. Irreparable Injury if the Injunction is Denied

Dr. Cubin's request for a preliminary injunction also fails to establish irreparable harm. "[A] showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *DTC Energy Group*, 912 F.3d at 1270. "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council*, Inc., 555 U.S. 7, 22 (2008) (emphasis in original). "To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Economic loss generally will not constitute irreparable harm because it is compensable by money damages. *Schrier*, 427 F.3d at 1267.

Dr. Cubin asserts "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.'" (ECF 12 p. 28 (alteration in original) (quoting *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)).) However, because Dr. Cubin "has failed to demonstrate the requisite

likelihood of success on his free speech and [right to petition] claims," "he is not entitled to a presumption of irreparable injury" based on his alleged loss of First Amendment freedoms. *Schrier*, 427 F.3d at 1266; *see Rocky Mountain Gun Owners v. Polis*, --- F.3d ---, 2024 WL 4677573, at *24 (10th Cir. 2024) (no irreparable injury where movant "point[ed] to no irreparable injury other than the violation of his Constitutional Second Amendment right, which we resolved against his position"). And "[t]he purpose of a preliminary injunction is not to remedy past harm but to protect plaintiffs from irreparable injury that will surely result without their issuance." *DTC Energy Group*, 912 F.3d at 1270 (quoting *Schrier*, 427 F.3d at 1267). Dr. Cubin has not established his First Amendment freedoms are currently being curtailed, and the Court does not find any reasonable threat of such during the pendency of this action. And any monetary loss can be recovered through an award of damages at the conclusion of this litigation. Dr. Cubin "has presented no evidence that his removal as [Board member] during the time it will take to litigate this case will have an irreparable effect in the sense of making it difficult or impossible for him to resume his [Board membership] or restore the status quo ante in the event he prevails." *Schrier*, 427 F.3d at 1267. Dr. Cubin has not shown that his removal from the Board is likely to cause him ongoing or future harm that can only be remedied by immediate injunctive relief.

CONCLUSION AND ORDER

Dr. Cubin was required to—but did not—show that he is substantially likely to succeed on the merits and that he will suffer irreparable injury if a preliminary injunction is not issued. While the Court finds the requested injunction to be "disfavored" and therefore require a "strong showing" on the likelihood of success, Dr. Cubin has failed to carry his burden under even the normal, non-heightened standard. A preliminary injunction cannot issue due to Dr. Cubin's

inability to establish a substantial likelihood of success on the merits or irreparable harm, and the Court need not consider the remaining preliminary-injunction factors. *See High Plains Harvest Church v. Polis*, 835 F. App'x 372, 374 (10th Cir. 2020) (denying an injunction pending appeal for lack of likelihood of success on the merits without considering remaining factors); *State v. U.S. Env't Prot. Agency*, 989 F.3d 874, 890 (10th Cir. 2021) (failure to show irreparable injury precluded a preliminary injunction without need to address remaining factors).

The Court notes the findings of fact and conclusions of law in this Order are necessarily preliminary and based on the incomplete record currently before the Court. These findings and conclusions are not binding on the parties as this matter proceeds through the later stages of litigation. *See Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981) (findings and conclusions at the preliminary-injunction stage "are not binding at trial on the merits").

IT IS THEREFORE ORDERED that Plaintiff's Motion for Preliminary Injunction (ECF 11) is **DENIED**.

DATED: November 14th, 2024.

Scott W. Skavdahl
United States District Judge