IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1429

DOMENICO CALCATERRA, M.D.,

Petitioner-Appellee,

vs.

IOWA BOARD OF MEDICINE,

Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY HONORABLE ROBERT HANSON, JUDGE

APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

Respectfully Submitted,

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Iowa Code § 272C.6(4)

Doe v. Iowa Bd. of Med. Examiners, 733 N.W.2d 705, 709 (Iowa 2007)

Reveiz v. Iowa Bd. of Med. Examiners, 735 N.W.2d 203 (Iowa App. 2007)

This case concerns the validity of a statute (Iowa Code § 272C.6(4)); a conflict between decisions of the Iowa Supreme Court (*Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 709 (Iowa 2007)) and the Iowa Court of Appeals (*Reveiz v. Iowa Bd. of Med. Examiners*, 735 N.W.2d 203 (Iowa App. 2007)), the latter being recognized and put into practice by the Iowa Board of Medicine and other licensing boards in the State of Iowa in violation of *Doe* and the plain language of Iowa Code § 272C.6(4); and involves a question of broad importance to all licensed

professionals in the State of Iowa. As such, the Appellee agrees this case should be retained by the Supreme Court.

STATEMENT OF THE CASE

Iowa Code § 272C.6(4)(a)

Iowa Code Chapter 17A

Iowa Code § 17A.9

Iowa Admin. Code 653 r. 1.9

Iowa Code § 272C.6(4)

Iowa Code Section 272C.6(4)(a)

This case concerns the rampant and blatant violation of law by licensing boards, and particularly the Iowa Board of Medicine (Board). in this state for (at least) three decades.

Iowa Code § 272C.6(4)(a) (and its precursor statute) has, since 1977, made all investigative information collected in the pursuit of licensee discipline confidential until and unless such information is included in a final decision by a licensing board.

Instead, licensing boards have been publishing notices and press releases which include this confidential information prior to licensees even being given the opportunity to defend themselves (as required by Iowa Code Chapter 17A). This amounts to nothing less than a *de facto* sanction without due process and the weaponizing of the administrative process.

On September 26, 2018, the Petitioner-Appellee, Domenico Calcaterra, M.D. (Dr. Calcaterra) filed his "Petition for Declaratory Order" pursuant to Iowa Code § 17A.9 and Iowa Admin. Code 653 r. 1.9 requesting the Board to answer the question: "*Does Iowa Code 272C.6(4)(a) prohibit the Board from publicly issuing/publishing statements of charges and issuing/publishing press releases which contain investigative information?*" Admin. R. p.3. Confidential App. p. 1.

On December 14, 2018, the Board issued its ruling refusing to issue a declaratory order, finding essentially that Dr. Calcaterra did not have standing to request a declaratory ruling. Admin. R. p. 75-77. Confidential App. p. 27-29.

On December 21, 2018, Dr. Calcaterra filed a "Petition for Judicial Review" of the Board's December 14, 2018, refusal to issue a declaratory order. App. p. 15.

On January 8, 2019, the Board filed its "Motion to Dismiss" the petition for judicial review in the district court arguing essentially, again, that Dr. Calcaterra did not have standing to request a declaratory order. App. p. 5.

On July 7, 2019, the district court stated that Dr. Calcaterra had standing to litigate the issues raised in his petition and remanded the matter to the Board for further proceedings. Order Denying Respondent's Motion to Dismiss and Remanding Back to Respondent for Further Proceedings. App. p. 19.

On August 29, 2019, the Board issued a declaratory ruling answering the question presented in the negative, stating that the public dissemination of statements

of charges and press releases containing confidential information did not violate the confidentiality provision of Iowa Code § 272C.6(4). Admin. R. 82-86. Confidential App. p. 30-34.

On September 27, 2019, Dr. Calcaterra filed his amended Petition for Judicial Review with the district court. App. p. 22.

On April 26, 2020, the district court found, "… the Board erred in determining that it was not prohibited by Iowa Code Section 272C.6(4)(a) from disseminating investigative information contained in statements of charges and press releases." Ruling on Petition for Judicial Review at p. 6 (April 26, 2020). App. p. 64.

On November 5, 2020, after the disposition of a motion to reconsider, the Board timely filed an appeal of the district court decision to this Court. App. p. 83.

STATEMENT OF FACTS

Iowa Code § 272C.6(4)

Iowa Code § 272C.3(k)

Iowa Code § 272C.6(4)

Iowa R. App. P. 6.110(5)

In 2010, Domenico Calcaterra, M.D. (Dr. Calcaterra) was employed as a cardiothoracic surgeon in Iowa City, Iowa.

In 2010, Dr. Calcaterra was performing a heart surgery with a resident. Seeing that the patient was in jeopardy due to a dislodged heart machine tube, Dr.

Calcaterra, acting emergently, pushed the resident to immediately recover and replace the tube. A non-medical non-participating observer in the room, watching the surgery, reported the event to Dr. Calcaterra's employer. Pursuant to Iowa Code § 272C.6(4) and Iowa R. App. P. 6.110(5) Dr. Calcaterra cannot include in this brief what was reported but it can be found at Admin. R. at p. 11. Conf. App. p. 13.

Dr. Calcaterra's employer required Dr. Calcaterra to self-report to the Iowa Physician Health Program (IPHP), a review committee formed pursuant to Iowa Code § 272C.3(k) which allows impaired (diagnosed with addiction or mental illness) physicians who may otherwise face discipline by the Iowa Board of Medicine (Board) an opportunity to rehabilitate and continue practice. After an evaluation, the IPHP determined that Dr. Calcaterra did not have the necessary diagnoses (did not suffer an impairment) to qualify for the IPHP and improperly referred Dr. Calcaterra's case to the Board.

On March 8, 2013, the Iowa Board of Medicine filed a Statement of Charges against Dr. Calcaterra claiming that Dr. Calcaterra had engaged in disruptive behavior and provided numerous alleged facts obtained during the investigation. Admin. R. at p. 7-12. Conf. App. p. 9-14. This Statement of Charges was published on the Iowa Board of Medicine website.

This Statement of Charges contained investigative information relating to licensee discipline. Pursuant to Iowa Code § 272C.6(4) and Iowa R. App. P. 6.110(5)

what was contained in the Statement of Charges cannot be included in this brief, however the Statement of Charges can be found at Admin R. p.10-12. Conf. App. p. 12-14.

On March 14, 2013, the Iowa Board of Medicine issued a press release which included a recitation of numerous alleged facts obtained during the investigation. Admin. R. at p. 17. Conf. App. p. 19. This press release was published on the Iowa Board of Medicine website, sent to individuals who subscribe to Board of Medicine emails and to numerous news outlets across the state. Pursuant to Iowa Code § 272C.6(4) and Iowa R. App. P. 6.110(5) what was contained in the Statement of Charges cannot be included in this brief, however the press release can be found at Admin R. p. 17. Conf. App. p. 19.

On December 20, 2013, the Iowa Board of Medicine filed an Amended Statement of Charges against Dr. Calcaterra, which primarily recited the same investigative information as was in the March 8, 2013, statement. Admin. R. at p. 13-16. Conf. App. p. 15-18. This Amended Statement of Charges disseminated seven months after the first was also published on the Iowa Board of Medicine website.

On December 23, 2013, the Iowa Board of Medicine issued another press release subsequent to the Amended Statement of Charges which included a recitation of all of the numerous alleged facts obtained during the investigation which appeared

in the March 14, 2013, press release. Admin. R. at p. 18. Conf. App. p. 20. However, this press release contained amendments which cannot be reproduced here pursuant to Iowa Code § 272C.6(4) and Iowa R. App. P. 6.110(5), but can be found at Admin R. p.18. Conf. App. p.20. This press release was published on the Iowa Board of Medicine website, sent to individuals who subscribe to Board of Medicine emails and to numerous news outlets across the state.

Dr. Calcaterra entered into a settlement agreement with the Board on April 19, 2014. In that Settlement Agreement it states Dr. Calcaterra, "… filed an Answer with the Board denying the allegations made by the Board. Respondent denies any wrongdoing but voluntarily agrees to enter into this settlement to resolve the pending charges." Admin. R. at p.25. Conf. App. p. 27. Other than identifying Dr. Calcaterra, the settlement agreement contains none of the investigative information contained in the other documents at issue in this case. Admin. R. 24-27. Conf. App. p. 26-29.

On April 22, 2014, the Iowa Board of Medicine issued a press release which included a recitation of investigative information. Admin. R. p. 19. Conf. App. p. 21. This press release stated: "… a 45year old Iowa-licensed physician … entered into a Settlement Agreement with the Board on April 19, 2014. [additional citation omitted pursuant to 272C.6(4) and Iowa R. App. P. 6.110(5)].

None of these allegations formed from investigative information as included in the April 22, 2014, press release were admitted to or recited in the settlement

agreement entered into by Dr. Calcaterra on April 19, 2014. This press release was published on the Iowa Board of Medicine website and sent to individuals who subscribe to Board of Medicine emails and to numerous news outlets across the state.

After the issuance of these two Statements of Charges and all three press releases, Dr. Calcaterra has had difficulty finding employment. Employers have cited "… the existence of the numerous Statements of Charges, as well as the related press releases concerning Dr. Calcaterra," as a detriment. Admin R. at p. 21-23. Conf. App. p. 23-25.

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY INTERPRETED IOWA CODE § 272C.6(4) TO BAR THE PUBLICATION AND DISSEMINATION OF INVESTIGATIVE INFORMATION PRIOR TO A FINAL DECISION BY A LICENSING BOARD.

Iowa Code § 272C.6(4)

Iowa Code section 17A.19(10)

Renda v. Iowa Civ. Rights Commn., 784 N.W.2d 8, 10 (Iowa 2010)

Reveiz v. the Iowa Board of Medical Examiners, 735 N.W.2d 203 (Iowa App. 2007)

Doe v. Iowa Bd. of Med. Examiners, 733 N.W.2d 705, 708 (Iowa 2007)

Iowa Code § 272C

Iowa Code § 17A.19

Iowa Code § 17A.1(3)

Iowa Code Chapter 22

Iowa Code Chapter 17A

Iowa Code § 17A.12

Iowa Code Chapter § 22.2(1)

Iowa Code § 272C.6(4)(a)

Iowa Code § 22.7(60)

Iowa Code Chapter 21

Iowa Code § 22.6.(4)

Iowa Code § 22.7

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McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980)

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State v. Vander Esch, 662 N.W.2d 689 (Ia. App.2002)

Iowa Code section 272C.4(2)

Iowa Code § 17A.3

Dillon v. City of Davenport, 366 N.W. 2d 918, 922 (Iowa 1985)

Brakke v. Iowa Dept. of Nat. Resources, 897 N.W.2d 522, 534 (Iowa 2017)

Cawthorn v. Catholic Health Initiatives Iowa Corp., 743 N.W.2d 525, 528 (Iowa 2007)

Thomas v. Progressive Cas. Ins. Co., 749 N.W.2d 678, 687 (Iowa 2008)

Miller v. Bd. of Med. Examiners of State of Iowa, 609 N.W.2d 478 (Iowa 2000)

Iowa Code § 272C.6(1)

Iowa Code § 17A.4B

Iowa Code § 17A.12

Iowa R. of App. P. 6.110(5)

Iowa Code § 272C.6(1)

Preservation of Error

Dr. Calcaterra agrees that all the arguments made by the Board, namely that (1) the Board's interpretation of Iowa Code § 272C.6(4) is correct, and (2) that public policy favors the Board's interpretation were argued by the Board throughout the administrative process and at the district court level and were properly preserved for appeal. Any novel arguments by the Board are directed at the district court decision from which this appeal was made and appropriate for consideration by this Court.

Standard of Review

This Court has stated:

> Judicial review of an agency decision is controlled by the provisions of Iowa Code section 17A.19(10) (2009). [citation omitted] We will apply the standards of section 17A.19(10) to determine if we reach the same results as the district court. The district court may grant relief if the agency action has prejudiced the substantial rights of the petitioner and if the agency action meets one of the enumerated criteria contained in section 17A.19(10)(*a*) through (*n*). *Renda v. Iowa Civ. Rights Commn.*, 784 N.W.2d 8, 10 (Iowa 2010).

And that:

> Normally, the interpretation of a statute is a pure question of law over which agencies are not delegated any special powers by the General Assembly so, a court is free to, and usually does, substitute its judgment *de novo* for that of the agency and determine if the agency interpretation of the statute is correct.... But, where the General Assembly clearly delegates *discretionary* authority to an agency to interpret or elaborate a statutory term based on the agency's own special expertness, the court may not simply substitute its view as to the meaning or elaboration of the term for that of the agency but, instead, may reverse the agency interpretation or elaboration only if it is arbitrary, capricious, unreasonable, or an abuse of discretion—a deferential standard of review. *Renda v. Iowa Civ. Rights Commn.*, 784 N.W.2d 8, 11 (Iowa 2010).

Contrary to the Board assertion (Board's Brief at p. 25), neither this Court nor the district court is required to give the Board deference in this matter.

The Board relies primarily on *Reveiz v. the Iowa Board of Medical Examiners*, 735 N.W.2d 203 (Iowa App. 2007) for the proposition that the Board's interpretation of Iowa Code 272C.6(4) should be given deference. Board's Brief at pp. 21, 23, 25, 26.

Reveiz is a 2007 Court of Appeals decision which the Board itself concedes and the district court confirms is not controlling authority. Order, Motion to Reconsider footnote at p. 2 (November 2, 2020) App. p.82.; Board's Motion to Reconsider at p. 1 (May 7, 2020). App. p.74.

The Court of Appeals in *Reviez* determined that the interpretation of 272C.6(4) was clearly vested in the Iowa Board of Medicine and that therefore the

court was forced to give the Board deference. *Reveiz v. Iowa Bd. of Med. Examiners*, 735 N.W.2d 203 (Iowa App. 2007).

The Board now argues that the holding in *Reveiz* favors the Board's interpretation even without deference. Brief at p. 20. However, it is clear from the *Reveiz* case and the Board's own citation to that case that this is not so.

The Court of Appeals in *Reveiz* concluded that, "… *the Board's interpretation* of section 272C.6(4), which would allow it to use limited information obtained through the Board's investigation in the statement of charges, is not irrational, illogical, or wholly unjustifiable." *Reveiz v. Iowa Bd. of Med. Examiners*, 735 N.W.2d 203 (Iowa App. 2007). (Emphasis added).

While the Board appears to claim, regardless of the deferential standard employed by the Court of Appeals, that the *Reveiz* Court reasoned the Board is required to make investigative information public. However, even the citation to *Reveiz* quoted by the Board in its own brief states, "We turn to question of *the Board's interpretation* of 272C.6(4) and the [district] court's conclusion that paragraph ten of the statement of charges should remain confidential under the statute." Board's Brief at p. 23, citing *Reveiz*. It is clear, that the Court of Appeals was embracing the Board's interpretation of 272C.6(4) and that it colored the reasoning throughout the *Reveiz* opinion.

In 2007, one month after the Court of Appeals rendered its decision in *Reveiz*, this Supreme Court, in evaluating the exact same statutory provision – Iowa Code § 272C.6(4) – stated:

> The legislature did not give the board discretion to determine what information is, and is not, confidential. Instead, the legislature attempted to draw a line between confidential and public information in the context of licensee discipline and, in so doing, chose not to give the board discretion to do so. Therefore, we review the board's interpretation of section 272 C.6(4) for correction of errors at law pursuant to section 17A.19(10)(c) and not under the more deferential standard of section 17A.19(10)(l). *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 708 (Iowa 2007) as relied upon by the District Court, Ruling on Petition for Judicial Review at p 5 (April 26, 2020).

The conclusion of this Court in *Doe* makes sense.

The Iowa Board of Medicine is appointed to harness their medical knowledge to protect the citizens of Iowa.

Decisions about what constitutes confidential information or what procedural protections should be afforded licensees who are subject to Board sanction does not fall within that special expertise. That is a question which falls within the competence of the courts.

Nor should the Board of Medicine, which plays the role of policymaker, investigator, prosecutor, judge and jury also be responsible for interpreting the procedural rules to the disadvantage of the licensees whose careers are at the mercy of the Board's jurisdiction. The Legislature has not explicitly or implicitly given the

Board domain to interpret Iowa Code § 272C. *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 708 (Iowa 2007).

Iowa Code § 17A.19 and § 272C contain procedural safeguards to assure licensees are protected from unrelenting agency power, "… to simplify government by assuming a uniform minimum procedure … to increase the fairness of agencies in their conduct of contested case proceedings … to strike a fair balance between these purposes and the need for efficient, economic and effective government administration." Iowa Code § 17A.1(3) and (4).

By unshackling the court from viewing the protections devised by the Legislature in Iowa Code Chapter 272C through the lens of the Board of Medicine and its mission; this Court in *Doe* was able to return to licensees the fairness and balance the Legislature sought to establish when it drafted Iowa Code Chapter 272C – a balance which has been on hiatus for more than 30 years.

This is the balance this Court recognized in *Doe*.

This is the balance the district court found in the case at bar. Ruling on Petition for Judicial Review at p. 5. App. p.68.

This is the balance we are asking this Court to confirm today.

This Court owes the Board no deference.

A. NO CONFLICT EXISTS AMONG IOWA CODE CHAPTERS, 272C, 17A OR 22 TO JUSTIFY JUDICIAL INTERVENTION TO OVERCOME THE PLAIN LANGUAGE OF IOWA CODE § 272C.6(4) WHICH CLEARLY MAKES INVESTIGATIVE INFORMATION IN LICENSING BOARD MATTERS CONFIDENTIAL.

The primary legal argument made by the Board is that it is impossible for the Board to both give adequate notice of potential sanction to the licensee without sharing said notice with the public pursuant to Iowa's Open Records Law.

This is simply not true.

No conflict exists among Iowa Code Chapter 22, Iowa's Public Records Act, Iowa Code Chapter § 272C.6(4) or Iowa Code Chapter 17A, Iowa's Administrative Procedure Act, to demand this Court determine which of these statutes must give way. In fact, these three code chapters pave a clear path to maintaining the confidentiality of investigative information until or unless a licensing board includes it in a final disciplinary decision as Iowa Code Chapter § 272C.6(4) provides.

1. THE NOTICE REQUIREMENT OF IOWA CODE §17A.12 DOES NOT DEMAND SUCH NOTICE BE MADE PUBLIC AND THEREFORE DOES NOT CONFLICT WITH IOWA CODE § 272C.6(4)(a) CONFIDENTIALITY.

Iowa Code § 17A.12 requires parties receive notice of, "… a statement of legal authority and jurisdiction …," "… a reference to a particular section of the statutes involved," and a "… short and plain statement of the matters asserted …," among other requirements. App. p. 100.

What the Board argues is that a "…. short and plain statement of the matters asserted …," cannot be made without relying on investigative information. Dr. Calcaterra agrees; however, disagrees this short and plain statement must be made public.

Contrary to the Board's assertion that the District Court in this case concluded "… that when it comes to statements of charges or notices of hearing, those should be considered public records and the Board may continue publishing them on their website;" *what the District Court actually concluded is that*, "… the Board is not precluded from issuing press releases and statements of charges in general, but the board cannot disseminate investigative information before they issue a final written decision in the matter." Board Brief at p. 23; Order at p. 6-7. (April 26, 2020). App. p.69-70. The District Court ***absolutely did not say*** that statements of charges or notices of hearing "… *should be considered public records*. …"

Iowa Code § 17A.12 does not refer to a statement of charges or notice to the public but specifically states, "… all *parties* shall be afforded an opportunity for hearing after reasonable notice in writing delivered either by personal service as in civil actions or by certified mail return receipt requested." (emphasis added). Certainly, the Legislature did not intend the Board to notify the public by United States Postal Service.

Iowa Code § 17A.12 does not demand, nor does it suggest that notice to a licensee be a public record. *See generally* Iowa Code § 17A.12. In fact, Iowa Code Chapter 22 provides that a document which initiates disciplinary proceedings is required to be kept confidential. Iowa Code § 22.7(60) *see* argument in §3.

2. IOWA CODE § 272C.6(4) IS A STATUTE THAT MAKES INVESTIGATIVE INFORMATION CONFIDENTIAL PURSUANT TO IOWA CODE CHAPTER 22.

The Iowa Public Records Act extends the right to examine government records to "every person," not government agencies. Iowa Code Chapter § 22.2(1). Chapter 22 requires "*In the absence of a statute making the information confidential*, the information is a public record, which may be examined, copied, published, or otherwise disseminated." *Reveiz v. Iowa Bd. of Med. Examiners*, 735 N.W.2d 203 (Iowa App. 2007). (Emphasis added).

Iowa Code § 272C.6(4) *is* a such a statute. Iowa Code § 272C.6(4) makes investigative information relating to licensee discipline confidential.

Iowa Code 272C.6(4) states, in part, "… all complaint files, investigation files, other investigation reports, and other investigative information in the possession of a licensing board or peer review committee … which relates to licensee discipline are ***privileged and confidential*** and are not subject to discovery, subpoena, or other means of legal compulsion for their release to a person other than the licensee and the boards … However, a final written decision and finding of fact

of a licensing board in a disciplinary proceeding … is a public record." Iowa Code § 272C.6(4). (Emphasis added).

The district court in the case at bar concluded, "… [t]he plain language of the statute (272C.6(4)) is clear and unambiguous. Subject to certain exceptions not relevant here, investigative information is privileged and confidential unless and until such information is disclosed in the findings of fact section of a final written decision made at the conclusion of a disciplinary proceeding." Order at p.6 (April 26, 2020) (Parenthetical added) App. p. 69.

Iowa Code § 272C.6(4) is a statute which makes investigative information confidential. Therefore, the § 272C.6(4)(a) confidentiality provided to licensees does not offend Iowa's Open Records Act.

3. IOWA CODE CHAPTER 22.7(60) SPECIFICALLY MAKES THE INFORMATION CONTAINED IN STATEMENTS OF CHARGES AND PRESS RELEASES CONFIDENTIAL.

In addition to Iowa Code § 272C.6(4), Iowa Code § 22.7(60) specifically makes statements of charges (and press releases) confidential.

Iowa Code Chapter § 22.7(60) makes confidential, "Information in a record that would permit a governmental body subject to Chapter 21 [Iowa's Open Meetings Law] to hold a closed session pursuant to section 21.5 in order to avoid public discourse of that information, until such time *as a final action* is taken …." Iowa Code § 22.6.(4).

Iowa Code Chapter 21 states, "A government body may hold a closed session … for any of the following reasons … To discuss the contents of a licensing examination or whether to initiate licensee disciplinary investigations or proceedings if the government body is a licensing or examining board." Iowa Code § 21.5

Statements of charges are entirely composed of "… information in a record …," pertaining to a licensing board's decision to "… initiate licensee disciplinary … proceedings." Iowa Code Chapter 21 allows a Board to discuss such matters in private and Iowa Code § 22.7(60) states that any information related to such a meeting, "… shall be kept confidential." Iowa Code § 22.7.

By the demand of Iowa Code Chapter 22.7 alone, statements of charges and certainly press releases, "… shall be kept confidential." Iowa Code Chapter 21.5; Iowa Code Chapter 22.7(60). Because Iowa Code Chapter 22 actually casts a wider cloak of confidentiality over information relating to licensee discipline than that in Chapter 272C, Iowa Code Chapter 22 does not conflict with Iowa Code § 272C.6(4).

4. THE STATUTORY SCHEME AMONG IOWA CODE CHAPTERS 17A, CHAPTER 22 AND 272C IS CLEAR THAT ONLY FINAL DECISIONS OF A LICENSING BOARD ARE INTENDED TO BE PUBLIC RECORDS.

While the Iowa Supreme Court has recognized that the plain language of a statute should prevail, it is only in cases of ambiguity where the court should attempt to give meaning to the language chosen by Legislature and, "… should be accorded a logical, sensible construction which gives harmonious meaning to related sections

and accomplishes the legislative purpose." *McSpadden v. Big Ben Coal Co.,* 288 N.W.2d 181, 188 (Iowa 1980). *IBP, Inc. v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001).

There is no ambiguity here.

The doctrine of "*Inclusio unius est exclusio alterius*" means that when certain items are listed in statute, there is an inference that the exclusion of other items is intentional. *State v. Vander Esch,* 662 N.W.2d 689 (Ia. App.2002). If the Legislature desired that a statement of charges or any press releases be public, neither of which are even conceived of in statute, it could have demanded as such as it did for final decisions of licensing boards in 272C and for agencies in general in 17A.

However, the Legislature chose not to make any investigative information prior to a final decision available for public consumption. This includes statements of charges and press releases, neither of which are contemplated by Iowa Code Chapters 17A, 22 or 272C.

It is clear that the Legislature intended a final decision of a licensing board to be a public document.

Iowa Code Chapter 22 demands that information related to a board's decision to initiate licensee disciplinary proceeding should remain confidential, "… to avoid public discourse of that information, until such time *as a final action* is taken …."

Iowa Code section 272C.4(2) separately requires each licensing board to specify methods by which the final decisions of the board relating to disciplinary proceedings are to be published.

Iowa Code 17A.3*, titled "Public information – adoption of rules – availability of rules and orders," states that an agency shall "Make available for public inspection and index by name and subject all ***final*** orders, decisions and opinions …." (Emphasis added).

Even 272C.6(4), warns, "However, a final written decision and findings of a licensing board in a disciplinary proceeding … is a public record."

The Legislature identifies when the public will be notified of any relevant investigative details – in a final written decision of a board. The Legislature purposely included final decisions and remains silent on statements of charges and press releases – so silent neither document is even mentioned.

Contrary to the Board's argument that Iowa Code Chapters 22, 17A and 272C create an irreparable conflict that demands judicial intervention, these provisions reflect a harmonious design by the Legislature that final decisions by licensing boards will be public records but the information involved in the investigation, initiation of disciplinary proceedings (including sending notice *to the parties* pursuant to Iowa Code § 17A.12) and the preparation for a contested case hearing

will all remain confidential until and unless such investigatory information is used in the findings of a final written decision of a licensing board.

The Board among other licensing boards, have recognized this Legislative intent and have specifically petitioned the Legislature to amend Iowa Code 272C.6(4), likely in order to end run this court action which threatens to put an end to these boards' illegal and unjust *modus operandi*. Dr. Calcaterra asks this Court to take judicial notice of House Study Bill 75 which is widely available to the public at https://www.legis.iowa.gov/legislation/BillBook?ba=HSB75&ga=89. App. p.9.

Pragmatically, a licensing board may compose notice pursuant to Iowa Code 17A.12 and include all the investigative information necessary to give a licensee an adequate opportunity to prepare for hearing without worrying about publishing the allegations on its website or in a press release as Iowa Code Chapters 272C and 22 clearly prohibits such a publication or dissemination prior to a final decision.

Even if, *arguendo*, this Court finds it owes the Board deference, the congruence of these statutes designed by the Legislature cannot be ignored. *See, Dillon v. City of Davenport*, 366 N.W. 2d 918, 922 (Iowa 1985) "According to the principles of statutory construction, if two statutes conflict, courts must attempt to harmonize them in an effort to carry out the meaning and purpose of both statutes."

The harmony among the three code chapters pertinent to this case already exists. The only conflict resides within the Board itself which simply does not like

the restriction the Legislature has clearly placed on it. This Court should enforce the plain language of 272C.6(4) and leave the Board to pursue its grievances via the legislative process.

B. THE DISTRICT COURT'S RELIANCE ON *DOE V. THE IOWA BOARD OF MEDICINE* IS WHOLLY APPROPRIATE AND THE BOARD DOES NOT IDENTIFY ANY EXCEPTION OR OTHER LEGAL THEORY CONTAINED WITHIN *DOE* WHICH ALLOWS IT TO PUBLISH INFORMATION MADE CONFIDENTIAL PURSUANT TO IOWA CODE § 272C.6(4).

The Board argues for the first time that the holding in *Doe* only confirms that 272C.6(4) confidentiality only applies, "… *prior* to disciplinary charges being filed [by] the Board." Board's Brief at p. 27.

Dr. Calcaterra disagrees.

In *Doe*, a licensee had three pending investigations before the Iowa Board of Medicine. The same licensee applied for licensure in Massachusetts. The Massachusetts Board of Registration in Medicine (MBR) asked the Iowa Board for the licensee's Board file. The Iowa Board complied. The licensee objected, claiming the file was confidential investigative information pursuant to Iowa Code 272C.6(4) and that such information should not have been disclosed to the MBR. *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 707 (Iowa 2007).

The Board in *Doe* relied on an exception to § 272C.6(4) confidentiality which states specifically, "However, investigative information in the possession of a licensing board or its employees or agents which relates to licensee discipline may

be disclosed to … the appropriate licensing authority in another state ….” Iowa Code 272C.6(4)(a).

The licensee in *Doe* argued that investigative information must, “relate[] to licensee discipline,” and that since the investigations of said licensee were pending, the information did not relate to actual, final discipline and the confidentiality exception did not apply.

This Court in *Doe* found that the Legislature did not intend the exception regarding other state boards to be so narrowly construed and concluded that, “… complaints pending investigation relate to licensee discipline,” and that the Board acted appropriately in providing the requested files to the MBR. *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 712 (Iowa 2007).

Iowa Code § 272C.6(4) states, “… all complaint files, investigative files, other investigative reports, and other investigative information in the possession of a licensing board … which relates to licensee discipline are privileged and confidential ….” Iowa Code § 272C.6(4)(a).

In *Doe*, this Court reviewed the history of Iowa Code § 272C.6(4) since its predecessor statute’s enactment in 1977. The § 272C.6 confidentiality provisions were, in 1977, so restrictive that, “Taken literally, section 258A.6(4) did not allow disclosure of complaint or investigative information, even during a disciplinary

proceeding arising from that information." *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 709 (Iowa 2007).

The *Doe* Court (*Id.* at p. 709-710) then describes the amendments made by the Legislature to § 272C.6(4) during the course of five years which included the following exceptions:

> (1) However, investigative information … may be disclosed to appropriate licensing authorities within this state, … in another state, the [multistate nursing compacts] … the District of Columbia, or a territory or country in which the licensee is licensed or has applied for a license …. (2) If the investigative information … indicates a crime has been committed, … to the proper law enforcement agency. (3) However, a final written decision and finding of fact of a licensing board in a disciplinary proceeding … is a public record. Iowa Code § 272C.6(4)(a). (numerals added).

These exceptions are the only means by which a licensing board can switch confidential investigative information public.

The Board now adopts a similar argument to the licensee in *Doe* and urges somehow, that §272C.6(4) confidentiality only attaches to investigative information *prior* to the initiation of formal disciplinary proceedings, claiming Iowa Code § 272C.6(4), "… is silent on what exceptions explicitly apply after disciplinary charges have been filed …."

As *Doe* determined, § 272C.6(4) does not bifurcate the application of confidentiality that way. If a licensing board wants to disseminate investigative information to the public (as opposed to another agency), the only means to do so is

by, "… a final written decision and finding of fact of a licensing board in a disciplinary proceeding …."

While it is clear the Board considers the filing of the statement of charges to be a determination of guilt (which is problematic in and of itself), Iowa Code 272C.6(4) does not even contemplate the "formal filing of disciplinary charges." This Court in *Doe* specifically found no such temporal or contingent distinction existed. *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 712 (Iowa 2007). It was the Board that urged no such distinction existed. *Id.* This argument is a fiction. The Board cannot even argue that any of the articulated exceptions within 272C.6(4) apply to them.

This Court in *Doe* recognized:

> … section 272C.6(4) was not meant solely to protect the complainant, but also to protect the licensee. Section 272C.6(4) ensures that the general public does not have access to complaint or investigative information unless, and until, a final written decision is published and is, therefore, a public record. *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 711 (Iowa 2007).

Thus, the District Court in the case at bar was not flawed when it concluded:

> [t]he plain language of the statute (272C.6(4)) is clear and unambiguous. Subject to certain exceptions not relevant here, investigative information is privileged and confidential unless and until such information is disclosed in the findings of fact section of a final written decision made at the conclusion of a disciplinary proceeding … ' Section 272C.6(4) ensures that the general public does not have access to complaint or investigative information unless, and until, a final written decision is published and is, therefore a public record' [citation omitted] This would preclude the Board from publishing information

> in its statements of charges and press releases that would constitute investigative information, as that term is used in section 272C.6(4)(a), prior to issuing a written final decision containing such information. Accordingly, the Board erred in determining that it was not prohibited by Iowa Code § 272C.6(4)(a) from disseminating investigative information contained in statements of charges and press releases. Ruling at p. 6. App. p.69.

C. THE DISTRICT COURT'S DECISION TO BAR INVESTIGATIVE INFORMATION FROM BEING PUBLISHED PRIOR TO A FINAL DECISION BY A LICENSING BOARD DOES NOT RESULT IN ABSURD RESULTS AND, IN FACT, ACHIEVES EXACTLY WHAT THE PLAIN LANGUAGE OF IOWA CODE § 272C.6(4) SEEKS TO ACHIEVE.

The Board argues that an absurd result will occur if it is required to maintain the confidentiality of investigative information as it will not be able to notify licensees of their alleged wrongdoings.

The Board explains it worries that "… this would be completely insufficient to the public, potential witnesses, the State, who would be tasked with supporting the Board's decision to file charges, and, most importantly the licensee." Board Brief at p. 30-31.

This Court, in considering an absurd result argument, asked of the "controversial" doctrine:

> To what extent may a court evade or ignore the literal terms of a statute to avoid a result that is not simply poor public policy, but is so unreasonable that it could not have been intended by the legislature and reflects the inherent limit of the legislative process to foresee various applications of a statute? *Brakke v. Iowa Dept. of Nat. Resources*, 897 N.W.2d 522, 534 (Iowa 2017).

In *Brakke*, (cited by the Board, Brief at p. 30) landowners challenged an emergency determination by the Department of Natural Resources (DNR) pursuant to Iowa statute that the landowners were required to maintain an electric fence on their property due to a five-year "quarantine" based on the spread of disease among whitetail deer. Deer had tested positive for the disease on the landowners' property.

The landowners challenged the decision stating the DNR did not have the statutory authority to quarantine their property. The landowners argued that in creating the statutory authority to, "… quarantine 'diseased preserve whitetail' … to prevent the spread of [disease], the legislature clearly did not intend to give the DNR unfettered authority to quarantine any land that came into contact with infected deer." *Brakke v. Iowa Dept. of Nat. Resources*, 897 N.W.2d 522, 530 (Iowa 2017).

The DNR argued that not allowing a quarantine of the property resulted in an absurd result because in not allowing the DNR to incumber the landowners' property, the Legislature unwittingly confounded its own purpose – namely, to prevent the spread of disease.

This Court in *Brakke* disagreed and concluded that "… the plain meaning of the statute, namely that quarantine applies only to 'diseased preserve whitetail' is not absurd… After reviewing the record in this case, one does not emerge thinking 'Oh my gosh, that can't be!' when considering the plain legislative language," and acknowledged that the, "The DNR seeks to release itself from the verbal chains of

the statute to achieve what it views as a better, more thorough, and more comprehensive result." *Brakke v. Iowa Dept. of Nat. Resources*, 897 N.W.2d 522, 540 (Iowa 2017).

Just like the DNR in *Brakke*, the Board in the case at bar wishes to release itself from the chains with which the Legislature has bound it because it too believes ignoring its legal duty to keep investigative material confidential somehow advances its mission. Just like in *Brakke*, however; this does not make the confidentiality requirements of Iowa Code § 272C.6(4) absurd.

The Court reviewed several scenarios in *Brakke* which might constitute absurdity, such as whether a law enforcement officer who arrested a mailman can be cited for the willful obstruction of the mail or if a prisoner who breaks out of prison on fire is guilty of escape. *Id*, at 534.

In analyzing the absurdity doctrine this Court stated:

> According to Justice Kennedy, the plain words of a statute could be avoided only if the literal interpretation would lead to "patently absurd consequences" under circumstances where 'it is quite impossible that Congress could have intended the result ... and where the alleged absurdity is so clear as to be obvious to most anyone ….' It can be utilized, in rare cases, to overcome the plain meaning of the words of a statute. The doctrine, however, must be used sparingly and only in circumstances when the court is confident the legislature did not intend the result required by literal application of the statutory terms. *Brakke v. Iowa Dept. of Nat. Resources*, 897 N.W.2d 522, 536, 540 (Iowa 2017).

The case at bar is not one in which the application of the absurdity doctrine is justified.

The alleged absurd results alleged by the Board either do not exist or said results were clearly intended by the Legislature.

The Board's "most important" concern -- that it will not be able to give notice to licensees -- is resolved by the fact that Iowa Code § 17A.12 notice is not required to be a public record. In fact, as argued above and incorporated herein, Iowa Code § 272C.6 (and other statutory provisions) demands only that a final action by a board be public.

Iowa Code §272C.4(6) specifically allows for investigative information to be released to "… the licensee and the boards, their employees and agents involved in licensee discipline …." Licensees and "the State," as agents of the Board do not have to suffer any absurd results as a result of not publishing allegations of wrongdoing on their website or in press releases. Iowa Code § 272C.4(6) provides the latitude for assistant attorneys general in their roles as prosecutors to view investigative information privately behind a closed office door.

In regard to potential witnesses, the Iowa Board of Medicine has an entire fleet of its own in-house investigators who are quite competent at fact gathering (as can be seen in the case at bar). This court has recognized that the confidentiality in 272C.6(4) is intended to protect both the complainant and the licensees. *Doe v. Iowa*

Bd. of Med. Examiners, 733 N.W.2d 705, 711 (Iowa 2007); *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 528 (Iowa 2007). Dr. Calacterra has not seen a citation to any case that states 272C.6(4) is intended to assist the Board in garnering witnesses. Nor is Chapter 22 designed to make the Board of Medicine's investigative efforts easier.

As far as the public goes, the Legislature has, across several code chapters, specifically designed a cloak of confidentiality around investigative information until it can be vetted and included in a final decision of the Board.

None of these putative "absurd" results as alleged by the Board culminate in an 'Oh my gosh, that can't be!' moment. *Brakke* at 540 (Iowa 2017). The Board has not and cannot demonstrate that the confidentiality of investigative information is not exactly the result the Legislature intended when it drafted Iowa Code § 272C.6(4). *Brakke v. Iowa Dept. of Nat. Resources*, 897 N.W.2d 522, 536, 540 (Iowa 2017).

D. THE BOARD DOES NOT IDENTIFY ANY PUBLIC POLICY WHICH REQUIRES THIS COURT TO IGNORE THE PLAIN LANGUAGE AND LEGAL EFFECT OF IOWA CODE § 272C.6(4). IN FACT, PUBLIC POLICY AND NOTIONS OF FAIRNESS AND DUE PROCESS COMPEL THIS COURT TO ASSURE CONFIDENTIALITY PROVISIONS ARE OBSERVED BY LICENSING BOARDS.

Counsel could not find any authority which allows a Court to render inoperable a statute based on public policy grounds. This is likely because to do so

would be a violation of the separation of powers doctrine. Here, an appointed wing of the executive branch is asking the judicial branch to vitiate the plain language of a legislative enactment.

However, regarding contracts which offend public policy this Court has stated:

> [P]ublic policy" is not determined by this court's 'generalized concepts of fairness and justice' or our determination of what might be most just in a particular case. 'We must look to the Constitution, statutes, and judicial decisions of [this] state, to determine [our] public policy and that which is not prohibited by statute, condemned by judicial decision, nor contrary to the public morals contravenes no principle of public policy.' *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 687 (Iowa 2008).

In short, public policy is the byproduct of case law and statutes. It does not work the other way around as the Board contends.

The Board compares statements of charges to criminal charges stating that both require a showing of probable cause prior to the charging stage.

The simple response to this argument is that the Legislature has made investigative information in these civil notices confidential pursuant to both Iowa Code § 272C.4(6) and even more broadly in Iowa Code § 22.7(60). These statutes and the case law which have upheld the confidentiality of Iowa Code § 272C.4(6) are the "public policy" of the state. *Thomas v. Progressive Cas. Ins. Co.*, 749 N.W.2d 678, 687 (Iowa 2008). *See also*, Doe v. Iowa Bd. of Med. Examiners, 733 N.W.2d 705.

However, if the Board wishes to argue that confidentiality is somehow unfair, there are ample examples of how administrative law favors the agency as compared to its criminal counterpart and that licensees should be able to defend themselves without fear of such disclosure.

The evidentiary standard for licensee disciplinary cases is extraordinary relaxed, if present at all. Hearsay is admitted, documents do not need to be authenticated and fruit of the poisonous tree is widely devoured. Boards can consider any allegation, no matter how tenuous and all of this becomes investigatory information. When Boards make decisions regarding probable cause findings, they are often non-legal professionals who are also the fact finders and enjoy deference from the courts in sustaining a decision which can be made by a standard of proof which, in practice, is something less than a preponderance. There is no deferred judgment. There is no opportunity for expungement. A sanction by a licensing board haunts a licensee for the rest of their career.

The Board has a history of violating Iowa Code 272C.6(4) and has in the past even kept investigative information from the licensee. *See Miller v. Board of Medical Examiners* in which a licensee had to seek judicial intervention to keep licensing boards from destroying investigative files. *Miller v. Bd. of Med. Examiners of State of Iowa*, 609 N.W.2d 478 (Iowa 2000).

Even today, Licensees are not given access to investigative files until *after* a statement of charges has been filed. And this is only the case if the licensee has the wherewithal to ask for it (a procedure the Board seeks to codify in its pending request for a legislative amendment. App. p. 9.).

This means that if a licensee wants to settle a dispute and avoid the publication of investigative information in a statement of charges, said licensee does not even get a chance to see the evidence gathered against him or even the charges against him before a statement of charges - a *de facto* sanction - is disseminated to the public.[1] In short, a licensee can only guess at what investigative information might be included in a statement of charges and is often coerced into settling as a result of that threat.

It is warranted, given the great latitude that is given to licensing boards to protect the public and the shenanigans in which boards engage with that power, for the Legislature, to keep the proceedings confidential until the Board can vet the allegations, hear the licensee's explanation and defenses and discern the truth to the best of its ability under the guidance of an administrative law judge.

It is entirely possible that some of the investigative information, such as long-resolved incidents that may have occurred 10 years prior as was the case in the matter

[1] If this Court upholds the district court decision, licensees will be able to review, for the first time in decades, the investigative information gathered to prosecute them and make an informed decision about whether to settle before allegations are made public.

at bar, may be deemed irrelevant during a contested case hearing and spared from public consumption.

The clearest indication that licensees are to be treated differently than criminal defendants are that the courts are left open to the public while the Boards are allowed to decide whether to pursue discipline in secret. *See* Iowa Code § 21.5. However, the Legislature has specifically allowed a disciplinary hearing to be open to the public, "… *at the discretion of the licensee.*" Iowa Code § 272C.6(1) (Emphasis added).

The Legislature also recognizes that Iowa Code Chapter 17A is, to an extent, economic in nature. Iowa Code 17A.4B requires agencies in promulgating rules to identify economic impacts that are likely expected to result from a regulation. Licensing boards regulate professionals who often have spent decades pursuing education to work in their chosen field. There is an economic impact in stripping doctors of their licenses – perhaps one of only a few doctors in a given community. It is entirely possible (and often the case) that a complaint may have been made by a competitor.

One public accusation of drug use by a physician, one public allegation of inappropriate relationship with a patient or one public accusation of incompetence can result in the end of a physician's career. Allegations shared with the public in and of themselves are a sanction, even if later they are proven to be untrue. By that time it is often too late for such licensees to salvage their careers.

In *Reveiz*, the Board of Medicine essentially asked the Court of Appeals if it could violate the law (§272C.6(4)) just a little bit. The Court of Appeals in response allowed the use of "*limited investigative information*" only to satisfy the notice requirement of Iowa Code § 17A.12 (which, again, is not required to be a public document). *See Reveiz*, "We conclude *the Board's interpretation* of section 272C.6(4), which would allow it to use *limited information* obtained through the Board's investigation in the statement of charges, is not irrational, illogical, or wholly unjustifiable." *Reveiz v. Iowa Bd. of Med. Examiners*, 735 N.W.2d 203 (Iowa App. 2007). (Emphasis added).

In the case at bar, Dr. Calcaterra was accused of a wrongdoing. In reality, Dr. Calcaterra, a cardiothoracic surgeon, took action to save a patient's life in a mishap situation. Nevertheless, his employer forced Dr. Calcaterra to refer himself to the Iowa Physician Health Program (IPHP).

After the IPHP determined that Dr. Calcaterra did not have the requisite diagnosis to qualify for its services, the Board, in 2013, charged Dr. Calcaterra with "Disruptive Behavior" and "Unethical or Unprofessional Conduct."

Because the investigative information is confidential pursuant to Iowa Code 272C.6(4) and Iowa R. of App. P. 6.110(5), Dr. Calcaterra cannot quote the hundreds of words and remote references which the Board considers to be "limited investigative information" in this case. Dr. Calcaterra urges this Court review the

investigative information in two statements of charges at Admin. Rec. 10-12 and 14-16. Conf. App. p.12-14 and 16-18; and the investigative information published in the three press releases at Admin. R. 17-19. Conf. App. p. 19-21. The vast majority of the information is not even relevant to the charges made and it certainly cannot be said to have been designed simply to meet the notice criteria of Iowa Code § 17A.12.[2]

Dr. Calcaterra enjoyed no hearing or opportunity to defend himself before this information was made public. This is not a finding of facts by the Board. This is sanction without due process. This is sheer hubris. This is why the Legislature has deemed investigative information confidential until the contested case process (including due process) can run its course and a final decision has been reached.

Even with a settlement agreement *which included none of this extensive investigative information*, the Board had the audacity to issue a third press release and repeated many of the allegations contained in the investigative file which by agreement were not included in the settlement agreement – an agreement in which Dr. Calcaterra denied all allegations.

[2] To be clear, Dr. Calcaterra does not believe that the Court of Appeals was legally sound when it stated the Board could use "limited investigative information." Iowa Code § 272C.6(4) does not allow *any* investigative information to be disseminated until and unless it is included in a final decision. However, from a public policy standpoint, the Board cannot even be trusted to use its discretion when the court allows it leeway. This is why it is important that these confidentiality provisions are strictly observed.

Why go to the trouble of having a contested case hearing when you only need to claim a licensee's guilt in a statement of charges? The Board did not need Dr. Calcaterra to admit his guilt. The statements of facts and accompanying press releases had already hanged him. When the damage has been done, settling often seems like a viable option to licensees and their counsel just to stop the hemorrhaging of investigative information.

Dr. Calcaterra has struggled to find employment since the issuance of these documents, with many potential employers citing this statement of charges and the accompanying press releases. Admin. R. at p. 21-23. Conf. App. p.35-37.

The Board states it is not its mission to, "protect licensees from undue publicity …." Board's Brief at p. 34. However, the mission of the Board is irrelevant to this case. The Legislature and this Court have determined that "… section 272C.6(4) was not meant solely to protect the complainant, *but also to protect the licensee.* Section 272C.6(4) ensures that the general public does not have access to complaint or investigative information unless, and until, *a final written decision is published* and is, therefore, a public record." *Doe v. Iowa Bd. of Med. Examiners*, 733 N.W.2d 705, 711 (Iowa 2007) (Empahsis added). Iowa Code § 272C.6(4) assures rights of the licensee are at least better balanced against the mission of the Board.

Even 272C.6(1) states, "Notwithstanding chapters 17A and 21 a disciplinary hearing shall be open to the public *at the discretion of the licensee.*" Not the Board. Not the complainant. Not the public. Not the witnesses or assistant attorneys general. The licensee.

The Board also claims that by widely disseminating these allegations on its website and in press releases that, "The public … can make independent but informed decisions about their own care based on that information." Board Brief at p. 34.[3]

These press releases and notices are issued by the Iowa Board of Medicine, which carries the imprimatur of government. Most citizens, trusting the prudence of regulators, assume information released by the Board has been wholly vetted by procedures fair to the doctor. Due to the Board's failure to observe the law and established processes, the decisions made by the public based on these unsubstantiated allegations are neither independent nor informed.

[3] In those cases where a physician (or any other licensee) poses an immediate danger to the public health a licensing board may demand emergency adjudicative procedures pursuant to Iowa Code 17A.18A which allows a board to restrict a licensee's practice until being offered a hearing by a board. By statutory design then, licensing boards can protect the public from immediately dangerous situations, while at the same time allowing other practitioners potentially facing sanction to operate without public disclosure until due process can be afforded and a final decision can be reached.

The Board then argues as its final volley that since all licensing boards have been violating 272C.6(4) for decades that it should be allowed to do so as well. Board's Brief at p. 37-38.

Dr. Calcaterra is not certain this is a public policy argument *per se*; but regardless, it is not compelling. In fact, Dr. Calcaterra is hopeful that all licensees will enjoy greater opportunities to defend their careers as a result of this lawsuit.

Regardless, the language of Iowa Code 272C.6(4) is clear and unambiguous. Iowa Code Chapters 17A, 22, and 272C and *Doe* are the public policy and the Board's bleating that it is being treated unfairly cannot justify the type of judicial intervention it desires.

CONCLUSION

Iowa Code § 272C.6(4) is not intended to promote the mission of Board. It is designed to protect the licensee. The district court and this Court in *Doe* recognized that the plain language of § 272C.6(4) is intended to protect the licensee from public disclosure of investigative information until and unless a Board chooses to include any such information which is relevant to discipline in a final decision. Iowa Code § 272C.6(4) is designed to strike a balance between the interests of licensees in protecting their careers from the full onslaught of government resources and a licensing board that is willing to end a licensee's career without so much as giving them a chance to defend themselves. Despite the Board's treatment of licensees,

these individuals are not criminals. Most are professionals who may have made a misstep or fallen prey to a false claim. Licensees deserve discretion until a licensing board can fully evaluate a situation.

There is no public policy or absurd result which can justify this Court ignoring the plain language of a legislative strategy designed to give a licensee a slightly fairer shake in a process in which the cards are stacked against them. The Board, in asking the Legislature to change the law, is, appealing to the appropriate authority to address its putative grievances. This Court should not malign the Legislature's intent.

Dr. Calcaterra requests this Court sustain the decision of the district court and allow the enforcement of Iowa Code § 272C.6(4) the Legislature intended.

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This final brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this final brief contains 9,026 words, excluding the parts of the page final brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This final brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because this final brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2018 in 14-point Times New Roman.

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REQUEST FOR ORAL ARGUMENT

Dr. Calcaterra believes that the Court may benefit from being able to directly address any questions that may arise out the briefs and requests an oral argument for that purpose.

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ATTORNEY COST CERTIFICATE

I hereby certify that the actual cost paid for printing the foregoing "Petitioner-Appellee's Final Brief" was $0.00.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Michael M. Sellers, attorney for Petitioner-Appellee, hereby certify that on the 23rd day of February 2021, I, or a person on my behalf, did file "Petitioner-Appellee's Final Brief" with the Clerk of the Iowa Supreme Court through EDMS.

Respectfully Submitted,

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