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IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1429

DOMENICO CALCATERRA,
Petitioner-Appellee,

vs.

IOWA BOARD OF MEDICINE,
Respondent-Appellant.

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

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Even if the agency's interpretation of the Iowa Code §272C.6(4) is not given deference, was their interpretation of the statute in violation of Iowa Code § 17A.19(10)(c)?

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ROUTING STATEMENT

This case presents a substantial issue of first impression that has not been addressed in a published case and presents fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. For the foregoing reasons, this case should be retained. Iowa R. App. P. 6.1101(2)(c) and (d).

STATEMENT OF THE CASE

On September 26, 2018, Appellee filed a petition for a declaratory order with the Iowa Board of Medicine ("Board") pursuant to Iowa Code § 17A.9 and Iowa Admin Code 653 r. 1.9. Agency Record (A.R.) at 3-6; Confidential App. P. 5-8. The Petition requested a declaratory order from the Board regarding it interpretation of Iowa Code § 272C.6. The Petition asked the following 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 investigation information?" A.R. at 3-6; Confidential App. P. 5-8. On December 7, 2018, Appellee filed a Brief in Support of the position he wished the Board to take on his question. On December 14, 2018, the Board issued a response, refusing to issue a declaratory order on the question posed. A.R. at 75-77; Confidential App. P. 27-29.

Appellee filed a petition for judicial review on December 21, 2018. Petition for Judicial Review; App. P. 19-22. The judicial review petition raised the issues of the Board's refusal to issue a declaratory order and the merits of the underlying argument. *Id.* The District Court remanded the case and requested that the Board issue a declaratory order in response. Order Denying Respondent's Motion to Dismiss and

Remanding Back to Respondent for Further Proceedings; App. P. 19-20. On August 29, 2019, the Board issued a Declaratory Order confirming that Iowa Code § 272C.6(4)(a) does *not* prohibit the Board from publicly issuing/publishing statements of charges and issuing/publishing press releases which contain investigative information. A.R. at 82-86; Confidential App. P. 30-34. On September 27, 2019, Appellee renewed his petition for judicial review of the Board's declaratory order, citing multiple grounds under Iowa Code §17A.19(10). Amended and Substituted Petition of Judicial Review; App. P. 26-30.

On April 26, 2020, the District Court issued its Ruling on Petition for Judicial Review concluding the Board committed an error at law in its interpretation of Iowa Code §272C.6(4)(a). Ruling on Petition for Judicial Review; App. P. 68-77. On May 7, 2020, the Board filed timely motions to reconsider and stay the ruling of the District Court. Motion for Stay; Motion to Reconsider; App. P. 78-84. On November 2, 2020, the District Court issued an order denying the Board's Motion to Reconsider and finding the Board's Motion for Stay as Moot. Order 11/2/20; App. P. 81-82. Two days later, on November 4, 2020, the Board filed a Notice of Appeal. Notice of Appeal; App. 87-89.

STATEMENT OF THE FACTS

On March 13, 2013, the Board issued a Statement of Charges against the Appellee alleging, in part, that he "engaged in a pattern of disruptive behavior and/or unethical or unprofessional conduct in violation of the law and rules governing the practice of medicine." A.R. at 7-12; Confidential App. P. 9-14. The Board, upon receipt of different or additional information, filed an Amended Statement of Charges on December 30, 2013. A.R. at 13-16; Confidential App. P. 15-18. Each instance of a Statement of Charges was accompanied by a press release, summarizing the contents of the charges and following the same practice the Board, along with every other Board, had followed for decades. A.R. at 17-18; Confidential App. P. 19-20.

On April 19, 2014, having had the opportunity to consult with counsel and review its contents, the Appellee signed a settlement agreement to resolve his pending disciplinary charges with the Board. A.R. at 24-27; Confidential App. P. 23-26. A press release was issued to reflect the contents of the settlement agreement and the settlement agreement itself was posted on the Board's website. A.R. at 19; Confidential App. P. 21. Four years later, Appellee filed a petition for a declaratory order ("Petition for D.O.") with the Board regarding the

publishing of press releases and statements of charges with investigatory information. A.R. 3-6; Confidential App. P. 5-8.

ARGUMENT

I. The Board of Medicine Interpretation of Iowa Code § 272C.6 was Not Erroneous

Preservation of Error and Standard of Review

The Appellant-Board argued in briefing and at oral argument before the District Court that the Board had authority to interpret the relevant legal provision and, in the event the Board was not vested with interpreting the statute, that the Board's analysis was still reasonable and not arbitrary or capricious. Respondent's Brief at 7-20; App. P. 130-148.

"When a district court exercises its authority on judicial review, it acts in an appellate capacity to correct any errors of law by the agency." *Menegbo v. Iowa Dept. of Inspections and Appeals*, 745 N.W.2d 95 (Table), 2007 WL 4553345 (Iowa Ct. App. Dec. 28, 2007) (citing *Hill v. Fleetguard*, 705 N.W.2d 665, 671 (Iowa 2005). "When we review a district court decision on judicial review, our task is to determine if we would reach the same result as the district court in our application of section 17A.10." *Manegbo*, 2007 WL 4553345. When the case involves "interpretation of statute that affect [the Board's] work," a district court defers to the agency's expertise, unless the suggested

interpretation is clearly erroneous. *Wiebenga v. Iowa Dep't of Transp.*, 530 N.W.2d 732, 734 (Iowa 1995).

A declaratory order is considered "other action" for the purposes of this appeal. "[A]s such, we review to determine whether the board committed an error of law, or acted unreasonably, capriciously, or arbitrarily." *Doe v. Iowa Bd. Med. Exam'rs*, 733 N.W.2d 705, 707 (2007) (citing *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 831 (Iowa 2002) (citing *Sindlinger v. Iowa State. Bd. of Regents*, 503 N.W.2d 387, 390 (Iowa 1993)). "Unreasonableness is defined as 'action in the face of evidence to which there is no room for difference of opinion among reasonable minds or not based on substantial evidence.'" *Office of Consumer Advocate v. Iowa State Commerce Com'n*, 419 N.W.2d 373, 374 (Iowa 1988) (quoting *Churchill Truck Lines, Inc. v. Transp. Regulation Bd.*, 274 N.W.2d 295, 300 (Iowa 1979)). Arbitrary and capricious refers to agency action taken with no accounting for law or the facts of the case. *Office of Consumer Advocate v. Iowa State Commerce Commission, supra*, 432 N.W.2d 148, 154 (Iowa 1988).

Merits

A. The Board Cannot Comply with the Notice Requirements of Iowa Code §17A.12 Under the District Court's Interpretation.

The question presented to the Board and before this court for review is whether Iowa Code section 272C.6(4) allows the publishing of press releases and statements of charges containing some investigative information. However, because statutes are not read in a vacuum but, rather, in conjunction with one another, when Iowa Code section 272C.6(4) is read together with Iowa Code chapters 17A and 22, the Board's Declaratory Order is reasonable.

Iowa Code section 17A.12 requires a notice be issued at the commencement of a contested case and explicitly lists what must be included in that notice. The notice must include general information of the time, place, and manner of the hearing. The notice must also include the legal basis, including the statutes or rules that the agency is relying upon as well as a jurisdictional statement. Finally, the notice must include "[a] short and plain statement of the matters asserted." Iowa Code § 17A.12(2)(d). It is significant that the statute separates the rules, statute, and jurisdiction from the matters asserted. It indicates that the legislature intended it to have independent meaning that could

not be encompassed by the remainder of the requirements. Under Appellee's interpretation of Iowa Code 272C.6(4) and the District Court ruling, the Board would be in violation of Iowa Code 17A.12 as they would only be permitted to include the relevant statutory and administrative rule sections but could not include any investigative information, which are the basis for "matters asserted" and allow the Board to comply with the notice pleading standard for contested cases. The factual summary, which naturally pulls some basic investigative information from the confidential report, is the only way to comply with the standard for notices set by Iowa Code 17A.12.

The danger to the Board of reversal of their agency decisions for failure to comply with the notice requirements and thereby failing to provide adequate due process is illustrated in *Silva v. Employment Appeal Bd.*, 547 N.W.2d 232, 235 (Iowa Ct. App. 1996). In an agency action in front of the employment appeal board, the notice simply read "'Whether the claimant was discharged for misconduct.' No other rule, statute, or issue was included in the notice." *Id.* at 233. The Court determined that this notice was insufficient, not only because it lacked any reference to rules or statutes but also because it lacked any specificity to the matters asserted. "The notice shall include a reference

to the particular sections of statutes and rules implication *and* a short and plain statement of the matters asserted." *Id.* at 235. "Reference to the notice issued in this case reveals it is plainly deficient in its exclusion of any reference to the statute applicable to voluntary quitting. The notice *also fails* to include this issue in the statement of the matter asserted on appeal." *Id.* If a mere recitation of the jurisdiction and relevant rules and statutes was sufficient, the legislature would not have felt it necessary to include the language requiring a short and plain statement. *See* Iowa Code §4.4(2) ("In enacting a statute, it is presumed that. . . .[t]he entire statute is intended to be effective.").

B. The Only Appellate Review of This Exact Issue has Favored the Board's Interpretation.

This exact same issue has come before the Iowa appellate courts on one other occasion, in the *Reveiz* case, which directly and persuasively answers Appellee's question. In fact, the Board's practices related to statements of charges and press releases have been largely governed by the ruling from this case. In *Reveiz*, the licensee filed an application for a temporary and permanent restraining order, "claiming the notice of hearing and statement of charges should be considered confidential under Iowa Code section 272C.6(4)(2005)."

Reveiz v. Iowa Bd. of Med. Exam'rs, 2007 WL 1342553, at *1 (Iowa Ct. App. May 9, 2007) (unpublished). The court affirmed the district court's ruling that the notice of hearing and statement of charges were public records. They also determined that some investigatory information could be contained in the statement of charges. *Id.* at *5. As Appellee points out in his brief to the District Court, this case was decided before the Supreme Court issued its ruling in *Doe* that interpreting the word "confidential" in a statute was not within the acute knowledge of the Board and had not been clearly vested to the Board. Brief in Support of Judicial Review and Application for Attorney Fees; App. P. 90-113. However, the court in *Reveiz* went beyond simply stating that the interpretation was acceptable based only on their deference to the agency's interpretation. The Court of Appeals provided a reasoned analysis for its decision and the same analysis should be applied in this case.

Setting aside the fact that the Court in *Reveiz* "conclude[d] interpretation of the statute has clearly been vested by a provision of the law in the discretion of the Board." *Id.* at *2 (citing *Thoms v. Iowa Public Employees' Retirement Sys.*, 715 N.W.2d 7, 10-11 (Iowa 2006)), the Court still favored the interpretation of the Board. First, they

concluded that, as a governmental body, the Board's documents and records were public records subject to open record laws. *Id.* at *2. "Public records may be examined, copied, published or otherwise disseminated." *Id.* (citing Iowa Code § 22.2(1)). The Court acknowledged that some public records are made confidential by statute, specifically citing Iowa Code section 22.7, which at the time contained fifty types of confidential records but its current iteration contains well over seventy. *Id.*

The Court then analyzed this statute in conjunction with Iowa Code section 272C.6(4) and agreed, as the Board did, that during the investigation phase, "records that come within the confines of section 272C.6(4) are to be seen only by the board." *Id.* (citing *Portz v. Iowa Bd. of Med. Exam'rs*, 563 N.W.2d 592, 595 (Iowa 1997). However, nothing in the open records laws or in Iowa Code 272C.6(4) then made or now makes statements of charges, including a notice of hearing, confidential. "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*, 2007 WL 1342553, at *3 (citing Iowa Code § 22.2(1)).

The District Court in this case has similarly and correctly concluded that when it comes to statements of charges or notices of hearings, those should be considered open records and the Board may continue publishing them on their website. Ruling on Judicial Review at 6-7; App. 64-73. "Despite Petitioner's assertions to the contrary, the Board is not precluded from issuing press releases and statements of charges in general[.]" *Id.*

The *Reveiz* court took it step further and separately analyzed the logic and legality of including limited investigatory information in the statement of charges. *Reveiz*, 2007 WL 1342553, at *4. "We turn to the question of the Board's interpretation of section 272C.6(4) and the [district] court's conclusion that paragraph ten of the statement of charges should remain confidential under that statute." *Id.* The Board claimed then, as it does in part today that "it was required by statute to include a factual basis in the notice and statement of charges against Dr. Reveiz." *Id.*

The statute in question is Iowa Code section 17A.12(2)(d), which "requires that the notice to commence a contested case contain '[a] short and plain statement of the matters asserted.'" *Id.* (quoting Iowa Code § 17A.12(2)(d)). "In general, a notice must contain a reference to

the particular statutes implicated, and a short and plain statement of the matters asserted." *Id.* (citing *Silva*, 547 N.W.2d at 235). "A person must have a reasonable opportunity to know of the claims which affect the person." *Id.* (citing *Alfredo v. Iowa Racing & Gaming Comm'n*, 555 N.W.2d 827, 833 (Iowa 1996)). "'The petition [ ] must contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition.'" *Id.* (quoting *Rees v. City of Shanandoah*, 682 N.W.2d 77, 79 (Iowa 2004).

With the understanding that both Iowa Code 17A.12(2) and Iowa Code 17A.18(3) required some factual allegations to be included in the notice to the licensee, the Court in *Reveiz* resolved the question of whether investigatory information may be included in the public statement of charges. "In a medical license revocation proceeding, that factual information would necessarily come from the Board's investigation. Thus, not all information garnered by the Board's investigation can be kept privileged and confidential." *Id.* at 5. As stated above, the court in *Reveiz* was the only appellate court to have taken on the *exact* same issue that is before the court today. Although their analysis was whether the Board's interpretation was irrational, illogical, or wholly unjustifiable, this court's task is not so different, a

determination of whether the Board's interpretation was reasonable. Notably, the District Court in this case misapplied the provision on Iowa Code section 17A.19 is issuing its ruling. Ruling on Petition for Judicial Review at 8. The District Court cited to Iowa Code section 17A.19(10)(c), which states that reversal may be granted based upon an "erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law on the discretion of the agency." However, the language the District Court cited is actually from Iowa Code section 17A.19(10)(l), which states that reversal of agency decision may be granted based upon "an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by a provision of law in the discretion of the agency." The District Court erroneously evaluated the Board's interpretation against a harsher standard while at the same time, failing to give the Board any deference, as that standard requires.

Based on the analysis provided in *Reveiz* about the underlying logic behind such an interpretation, the Board contends that its current interpretation of the statute, allowing limited investigative information in public statement of charges, is reasonable and meets the standards of either Iowa Code section 17A.19(10)(c) or Iowa Code section

17A.19(10)(l). Although *Reveiz* is an unpublished decision from the Iowa Court of Appeals, the District Court should have considered it to be persuasive authority. *See Johnson v. Baum*, No. 09-1340, 2010 WL 2757192, at *2 (Iowa Ct. App. July 14, 2010) (unpublished) (finding no error in a district court's reliance on a relevant unpublished court of appeals decision, explaining "such cases may be cited for their persuasive value.").

C. The District Court and Appellee's Reliance on the *Doe* Case is Flawed.

Appellee successfully argued below that the Board was not clearly vested with the discretion to interpret the confidentiality provisions contained within Iowa Code section 272C.6(4), relying in the *Doe* decision from 2007. Brief in Support of Judicial Review and Application for Attorney Fees at 4-8; App. P. 90-113. However, the Board responded that regardless of whether the Board was vested with the authority to interpret this statute, the Board's interpretation and application of Iowa Code section 272C.6(4) was reasonable and not arbitrary or capricious. Respondent's Brief at 7-19; App. P. 123-145. Appellee heavily relied upon the *Doe v. Iowa Bd. of Med. Exam'rs* decision in making his case. 733 N.W.2d 705 (Iowa 2007). Of note, the *Doe* decision analyzed the language of the statute as it applied to the

entire investigative file being disclosed to another licensing agency, but did not independently analyze the statute to determine whether limited investigatory information could be included in a public statement of charges. *Doe*, 733 N.W.2d at 705-12.

Appellee argued below that *Doe*, as well as the plain language of the statute outline the exceptions that exist to the confidentiality provisions contained in Iowa Code section 272C.6(4). Brief in Support of Judicial Review and Application for Attorney Fees at 6-8; App. 90-113. However, the *Doe* case elucidates the argument that the exceptions explicitly spelled out in Iowa Code section 272C.6(4), which include allowing *entire* investigative files to be handed over to other licensing authorities as well as granting Boards the discretion to refer cases to law enforcement when they suspect a crime has been committed, only pertain to what is permitted *prior* to disciplinary charges being filed the Board. The statute is silent on what exceptions explicitly apply after the disciplinary charges have been filed other than requiring investigative material to be turned over to the licensee and prohibiting investigatory information from being used in any proceeding other than the one before the Board.

The language in *Doe* supports the Board's contentions.

> Doe argues, relying on our holding in *Physical Therapy*, that section 272C.6(4) only allows disclosure of investigative information to other states' licensing authorities after formal disciplinary proceedings have been initiated. We do not think the legislature intended such a narrow reading of this exception.
>
> The phrase "relates to licensee discipline" is used twice in section 272C.6(4)—first to describe the information that must be kept confidential ("all complaint files, investigation files, other investigation reports, and other investigative information in the possession of a licensing board … which *relates to licensee discipline* are privileged and confidential"), and second to describe the information that may be disclosed to other states' licensing authorities ("However, investigative information in the possession of a licensing board … which *relates to licensee discipline* may be disclosed to … the appropriate licensing authority in another state … in which the licensee is licensed or had applied for a license."). *Id.* In stating that "all complaint files and investigative data are confidential," we implicitly concluded that all complaint files and investigative information relate to licensee discipline regardless of whether that information leads to the filing of formal disciplinary charges.

Doe, 733 N.W.2d at 710 (emphasis in original).

Although it is true that the court in *Doe* found that Iowa Code 272C.6(4) was "not meant solely to protect the complainant, but also to protect the licensee[,]" the Court was speaking in the context of revealing unsubstantiated complaints prior to investigation and action by the Board. *Doe*, 733 N.W.2d at 711.

> We acknowledge Doe's contention that many of the complaints filed against medical licensees are

> unsubstantiated and, thus, do not result in licensee discipline. However, that does not change the basic fact that the existence of such *complaints*, while they are *pending investigation*, relate to licensee discipline and, therefore, may be disclosed to another state's licensing authority[.]

Doe, 733 N.W.2d at 711 (emphasis added).

D. The Board's Interpretation Avoids Absurd Results and is Supported by Public Policy.

The Board's interpretation of the statute, that not only are statement of charges public records, a finding the District Court supported as well, but that limited investigative information, sufficient to provide some context and detail to the issues at play in a contested case are also permitted to be in the public document, is supported by both public policy and longstanding principles already in practice. Their interpretation also prevents unfairness to the licensee and absurd results.

1. The Board's Interpretation Avoids Absurd Results.

Interpreting the statute in the overly constrictive manner in which the District Court ordered would lead to absurd results.

> The doctrine of absurdity has good pedigree. Sutherland Statutory Construction, for instance, notes that ordinarily, ambiguous statutory language should be construed in a fashion that produces a reasonable result. 2A Normal J. Singer & Shambie Singer, *Statutes & Statutory Construction* §45:12, at 104-06 (7th ed. rev. 2014)

> [hereinafter Statutory Construction]. But Sutherland goes further. According to Sutherland, courts may use a "variant of the 'reasonableness' rule even absent ambiguity … when an act's plain, clear, literal meaning produces an unintended, absurd result." *Id.* at 115. Sutherland instructs that courts find it "fundamental" that departure from a literal construction is justified "when such a construction would produce an 'unreasonable' or 'absurd' or 'unworkable' or 'unjust' or 'unlikely' result clearly inconsistent with the purposes and policies of the act in question." *Id.* at 115-19 (footnotes omitted).

Brakke v. Iowa Dept. of Natural Resources, 897 N.W.2d 522, 534 (Iowa 2017). Even if Iowa Code section 272C.6(4) was evaluated in a vacuum and the literal meaning of the words indicated that no investigative information could be shared, this Court should still favor the Board's interpretation to avoid absurd results as detailed below.

The Board may choose to file charges under multiple grounds or encapsulate multiple discretions under one ground. If the District Court order is affirmed, that would mean that the extent of the Board's legal requirement would be to issue a notice of hearing with a time, place, and manner for the hearing, the legal authority and jurisdiction, the relevant statute, and the ground under the administrative code that the licensee is being disciplined under. No investigative material whatsoever could be included. But 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.

By way of example, 653 Iowa Admin. Code 23.1(2) is a ground for professional incompetency. This can include concerns of malpractice, negligence, substantial lack of knowledge, substantial deviation from standards, and deviation from standards of care for the industry. If the Board receives a complaint of wrong-site surgery, failure to maintain a pain management contract, failure to diagnose, and surgery resulting in complications not known or expected in the standard of care – the Board investigates all portions of the complaint.

If the Board eventually determines that there is sufficient evidence from the investigative report to support discipline for wrong-site surgery, this would fall under the professional incompetency ground. The licensee would not receive any notice of what portion of his practice was incompetent and the complete investigative file, which he would be entitled to and would receive once the discipline was underway, would include reports about not only the wrong-site surgery but the other portions of the complaint as well, any of which could reasonably fall under the category of professional incompetency. With no other investigative material to review (including a basic statement

to indicate that the Board believes the individual was incompetent based on a wrong-site surgery) and an inability to review closed session minutes without a court order and only in circumstances of particular need, the licensee would enter the contested case either not knowing what to defend against or being forced to prepare to defend against issues that the Board had already deemed unsubstantiated, resulting in additional attorney fees. If the licensee chose to present all his defenses, this would then lead to an unjustifiable waste of judicial economy.

2. The Board's Interpretation is Supported by Public Policy.

The Iowa Board of Medicine, like any other state agency, must comply with open record laws encompassed in statute, particularly Iowa Code chapter 22. "The purpose of the statute is 'to open the doors of government to public scrutiny—to prevent government from secreting its decision-making activities from the public, on whose behalf it is its duty to act.'" *Rathmann v. Board of Directors of Davenport Comm. School Dist.*, 580 N.W.2d 773, 777 (Iowa 1998) (quoting *Iowa Civil Rights Comm'n v. City of Des Moines*, 313 N.W.2d 491, 495 (Iowa 1981)). "There is a presumption of disclosure of records under the statute and exceptions to this rule are to be narrowly

construed." *Id.* (citing *Northeast Council on Substance Abuse, Inc. v. Iowa Dep't of Pub. Health*, 513 N.W.2d 757, 759 (Iowa 1994).

There is no specifically enumerated exception in chapter 22 which states, nor did the District Court find, that statement of charges must remain confidential from the public. "All records of a state board are public records." *Doe v. Iowa St. Bd. of Physical Therapy Exam'rs*, 320 N.W.2d 557, 559 (Iowa 1982) (relying on Iowa Code §68A.1, which has since moved to §22.1). "A citizen has access to them unless some provision of the Code 'limits such right or requires such records to be kept secret or confidential.'" *Id.* (quoting Iowa Code §68A.2, which has since moved to §22.2).

Without a specific exception, it is presumed open to the public. But the decision from the court below would mean that Iowa Code 272C.6(4) created this exception. While the code certainly did create an exception to documents that could be provided for public inspection, there is no part of Iowa Code 272C.6 that states statements of charges and notices of hearings fall under their definition of "complaint", "investigative reports", or "investigative material." Iowa Code §272C.6(4)(2019).

Limited investigative information in the statement of charges provide valuable and necessary context to the grounds for discipline that are listed. Statements of charges can give notice to pertinent witnesses of a contested case in which they might have valuable information. They can provide the public with an understanding of the Board's functions and scope of operations, allowing more people to come forward with complaints. The public is placed on notice of charges against a licensee and can make independent but informed decisions about their own care based on that information. The context the limited investigative information provides actually works in the licensee's favor at times. For example, a charge under 653 Iowa Admin Code 23.1(36), the improper management of medical records, can be something as innocuous as failing to timely update records or as serious as the purposeful destruction or mishandling of patient records resulting in medical complications. The primary purpose of the Board of Medicine, as with other boards, is not to protect licensees from undue publicity but rather to "insure that the public health, safety, and welfare are protected." *Board of Dental Exam'rs v. Hufford*, 461 N.W.2d 194, 196 (Iowa 1990). Public policy supports the limited disclosure of investigatory information in the statement of charges.

A previous District Court case, addressing the same issue presented to this Court, reached a similar conclusion on the question of public policy and open records. In *Doe II*, the District Court was asked to rule whether "all matter involving a licensee disciplinary proceeding are strictly confidential except for the final agency disciplinary order." *Doe II v. Iowa Bd. of Med. Exam'rs*, 1996 WL 34451358. The court ruled that the Board appropriately included investigative information in statements of charges, the Board appropriately disclosed those charges to the media and the public, and that Iowa Code section 272C.6(4) "was simply not intended to protect the physician from public scrutiny as suggested by the Petitioner." *Id.* The court further stated,

> The extent of information to be included in the Complaint and Statement of Charges is left to the Board's discretion. The Board must exercise discretion to plead sufficient facts to apprise the Respondent of the claim without including unnecessary investigative material in the Complaint. The Court will not interfere in the absence of a clear abuse of discretion. The Board did not abuse its discretion in this case.

Id. The District Court continued, [a] Complaint and Statement of Charges initiated by the Iowa Board of Medical Examiners is a public record under the statute." *Id.* "It is held by the Board in its official capacity as a disciplinarian of medical licensees. Disclosure to the

public allows public scrutiny of the Board's conduct in disciplining licenses by divulging to the public physician who are alleged to have violated the law." *Id.*

Appellee's arguments below, that public statements of charges and press releases unduly harm a physician by posting unsubstantiated matters in a public forum fall short when compared to criminal complaints. Unless specifically deemed confidential for some purpose (i.e. in juvenile cases), criminal complaints are all public. Criminal records are not removed from public eye, even if the defendant is found not guilty. Criminal records are not records are not removed if the defendant enters a plea deal. Appellee argued below that the cases were different because administrative law is more lenient in allowing evidence and has a lower burden of proof. But this assertion is irrelevant to the question at hand. The question is not whether the burden to prove the case is higher at the administrative or criminal level. Nor is the question what standard of evidentiary threshold is applied in administrative hearings versus criminal cases. The question is how to the two differ at the charging stage. They do not. Both administrative boards and criminal prosecutors require a showing of probable cause prior to filing charges. Iowa Code § 804.1; 653 Iowa

Admin. Code 25.4(1). Claims that charges are completely unsubstantiated at the time of charging are false, as the Board at the very least had to believe there was probable cause for the disciplinary charge, just as in criminal cases. "However, an acquittal after a trial has no bearing on whether there was probable cause for the charge but implies only that the evidence did not meet the heavy standard necessary for conviction." *Yoch v. City of Cedar Rapids*, 353 N.W.2d 95, 101 (Iowa Ct. App. 1984) (citing *Philpot v. Lucas*, 70 N.W. 625, 626 (Iowa 1897)).

E. The Board's Interpretation is Reasonable and Not a Error of Law

Perhaps the strongest argument in support of why the Iowa Board of Medicine's interpretation of Iowa Code section 272C.6(4), read in conjunction with Iowa Code chapter 22 and Iowa Code chapter 17A, is reasonable is the fact that it is one among *many* boards that has chosen to interpret the statute in this manner. Professional licensing boards, the Iowa Dental Board, the Iowa Board of Nursing, and the Iowa Board of Pharmacy all interpret and implement the statute in the same way the Board of Medicine has done. *See e.g.*, Iowa Dental Board, "Notice of Hearing and Statement of Charges" *available at* https://dentalboard.iowa.gov/sites/default/files/documents/2019/10

/cooneyt_soc_sept2019.pdf, filed on Sept. 27, 2019; Iowa Board of Pharmacy, "Board Order," *available at* https://pharmacy.iowa.gov/discipline_documents, last visited Dec. 27, 2019; *see also* Iowa Admin. Code r. 657-35.7 (Board of Pharmacy); Iowa Admin Code r. 655-20.7 (Board of Nursing); Iowa Admin Code r. 650-51.6(2)(d) (Dental Board); Iowa Admin. Code r. 645-11.6(2)(d) (Professional Licensure Division).

The practice of posting the statement of charges with limited investigative information, notices of hearing, and press releases on the Board website has been the practice for decades, not only with the Board of Medicine, but with all the professional licensing board governed by Iowa Code 272C. When the interpretation of a statute is so prevalent, wide-spread, and longstanding, it garners particular weight and deference. *See Hope Evangelical Lutheran Church v. Iowa Dep't of Revenue and Finance*, 463 N.W.2d 76, 84 (Iowa 1990). Longstanding administrative interpretations of statute are entitled to some weight in statutory construction. *Mathis v. Iowa Utilities Bd.*, 934 N.W.2d 423, 430 (Iowa 2019); *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice*, 867 N.W.2d 58, 77 (Iowa 2015); *Griffin Pipe Prods. Co. v. Bd. of Review*, 789 N.W.2d 769, 775 (Iowa 2010).

"Administrative rules have the force of law and are presumed valid." *Id.* at 84. When a Board is interpreting its own rules, a reviewing court should allow the agency "a reasonable range of informed discretion." *Dameron v. Newman Brothers, Inc.*, 339 N.W.2d 160, 162 (Iowa 1983). The Board's interpretation is reasonable.

CONCLUSION

The district court ruling should be reversed and the Iowa Board of Medicine's Declaratory Order should be adopted by this court. Otherwise, the Board will be forced to violate the requirements of Iowa Code section 17A.12. The district court's reliance on the *Doe* case and failure to rely on the *Reveiz* case are both misguided. The doctrine of absurdity and public policy both dictate that the Board's interpretation of Iowa Code section 272C.6(4) is reasonable and therefore, this court should find that the Board's interpretation was not unreasonable, capricious, arbitrary or otherwise in violation of Iowa Code section 17A.19(10)(c).

REQUEST FOR ORAL SUBMISSION

The State requests oral argument in this case.

/s/ Anagha Dixit
ANAGHA DIXIT
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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Dated: February 24, 2021

<u>/s/ Anagha Dixit</u>
ANAGHA DIXIT
Assistant Attorney General

CERTIFICATE OF FILING

I, Anagha Dixit, hereby certify that on the 24th day of February, 2021, I, or a person on my behalf, did file Appellee's Proof Brief and Request for Oral Submission with the Clerk of the Iowa Supreme Court by EDMS.

/s/ Anagha Dixit
ANAGHA DIXIT
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